Bombay High Court Meena Mahendra Vakharia vs K.L. Verma And Ors. on 6 April, 1997 Equivalent citations: (1997) 99 BOMLR 764 Author: A Savant Bench: V Savant, S Parkar JUDGMENT A.V. Savant, J. 1. Heard all the learned Counsel; Shri Karmali for the petitioner, Shri Agarwal for respondent Nos. 1 and 3 and Shri Patil for respondent Nos. 2 and 4. 2. The petitioner Smt. Meena is the wife of Mahendra C. Vakharia who is the the detenu detained under the order dated 25th November, 1994 (Ex A page 29) passed by the first respondent Shri K.L. Verma, Joint Secretary to the Government of India who is the officer specially empowered under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA). The said order was served on the detenu on 24th February, 1996 because of the fact that the detenu was absconding and steps had to be taken for issuing a proclamation for attachment of his properties in accordance with the provisions of the Code of Criminal Procedure, 1973. Under the said order, the detenu has been ordered to be detained with a view to preventing him in future from acting in any manner prejudicial to the augmentation of foreign exchange. The period of detention, viz. one year has already expired but the matter has been argued before us on account of the fact that proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of property) Act, 1976 (for short SAFEM A) are still pending. Be that as it may, the order of detention alongwith the grounds on which the detention order is based and the material in support of the said grounds was served on the detenu on 24th February, 1996. This petition was filed on 20th April, 1996 and rule was issued on 23rd April, 1996. 3. Before coming to the contentions raised on behalf of the petitioner, we will briefly deal with the factual background. The Enforcement Directorate, Bombay and Ahmedabad received information from Bank of India, Bombay at Ahmedabad revealing that on 6th November, 1992 Drafts of Rs. 9,00,000/- each, totalling to Rs. 45,00,000/- payable to M/s. P. Kanubhai and Co. purported to have been drawn by Bank of India, Kalyan Branch, Maharashtra were presented for payment by Bank of Baroda Ashram Road Branch, Ahmedabad though the clearing was not issued by them (Bank of Baroda, Kalyan Branch). Prior to this incident of 6th November, 1992, between 14th October, 1992 and 30th October, 1992, 12 drafts each of Rs. 9,00,000/- (worth Rs. 1.08 Crores) payable to the above party viz. M/s P. Kanubhai and Co. purported to be drawn by Bank of Baroda, Kalyan Branch and presented by the Bank of Baroda, Ashram Road Branch, Ahmedabad were paid. On the basis of the above information, the Asstt. Director of the Enforcement Directorate at Ahmedabad issued a directive on 20th November, 1992 acting under Section 33(2) of Foreign Exchange Regulation Act, 1973 (for short 'FERA') to the Chief Manager, Bank of Baroda, Ashram Road Branch Ahmedabad calling for all the connected documents, in respect of the remittances made to Hongkong by Shri Mukesh K. Shah, M/s P. Kanubhai and Co. M/s. Pravin Kumar Kothari and Co. and Mahendra Kumar Shah and Co. It transpired that the above mentioned 4 Companies and another company namely M/s. Himani Gems, had opened the accounts with the Bank of Baroda, Ashram Road Branch, Ahmedabad and were making remittances to Hong Kong of huge amounts worth several crores of rupees. Enquiries at the

addresses of the above mentioned companies revealed that there were no such companies in existence at the given addresses. The statement of the Manager of Syndicate Bank, Navavadaj Branch, Ahmedabad was recorded under Section 39 of FERA. It transpired that the detenu was the person operating in the name of the above mentioned companies and was operating several other accounts with Syndicate Bank, Navavadaj Branch. The accounts operated by the detenu were as under: (1) S. Jamnadas and Co., (2) Mahendra Mehta and Co., (3) M/s Prime Diamond, (4) M/s Mahendra Vakharia and Co. (C.A. 960). (5) M/s Pravin Kumar Kothari and Co., (6) M/s Kanubhai & Co. and (7) M/s Coronet Diamonds. 4. In the follow up action, the residential premises of the detenu were searched under Section 37 of the FERA. Statements of the detenu and his wife Meena Vakharia, the present petitioner, were recorded under Section 40 of the FERA from which it transpired that the detenu was showing that he. was doing business of import of diamonds in the name of five companies viz; (1) Guardian Diamond Co., (2) Guardian Gems and Jewellery, (3) Paras Diamond Co., (4) Mahipal Diamond Co., (5) Mahendra Kumar and Co. Statement of Kishore H.S. Bhat, Sr. Manager of Bank of Baroda, Ashram Road Branch was recorded under Section 40 of the FERA which confirmed the fact that it was the detenu who was operating several accounts in several names on behalf of several companies mentioned above. Statement of P.K. Venugopal who was handling the inward and outward remittances in the Bank of Baroda, Ashram Road Branch was recorded on 15th November, 1992 under Section 40 of FERA which confirmed the fact that the detenu used to operate the account for the purpose of making remittances to Hong Kong to the extent of Crores of rupees. 5. Statements of some more persons were recorded in connection with the offences of forgery falsification of accounts and fabrication of accounts for which offences punishable under I.P.C., investigation is pending. Statements were also recorded in connection with the offences punishable under the FERA. The statements of the detenu were recorded on different dates under Section 40 of the FERA. The detenu was apprehended by the C.B.I. Bombay and was released on bail by the Chief Metropolitan Magistrate, Bombay on 10th September, 1994. He was summoned under Section 40 of FERA and his statements were recorded on 12th and 13th September, 1994. It transpired from the statements of the detenu that he was formerly in the employment of the Bank of India since 1974 as a clerk and was working with the said Bank till 1979. It appears that he was working at Zaveri Bazar and Opera house branch in Bombay and he voluntarily resigned and started commission business in diamond trade since 1979. He opened several accounts in the names of several firms such as (1) M/s Guardian Diamond Co., (2) M/s Paras Diamond Corporation, (3) M/s Guardian Trading Co., (4) M/s Mahipal Diamond Co., (5) M/s Mahendra Vakharia and Co., (6) M/s Guardian Gems and jewellery. The detenu's firms had bank accounts at Ahmedabad with (1) Corporation Bank, Navrangpura Branch, (2) Syndicate Bank, Navavadaj Branch, and (3) Bank of Baroda, Ashram Road Branch. Several documents were seized from the detenu during the search of his premises. Statements of the detenu's employee Kamlesh D. Rao was also recorded. From Kamlesh's custody bogus rubber stamps and bogus stamps of customs department were

seized. Similarly, it transpired that the detenu had handed over to him several bills of entry, visiting cards, foreign currency and credit advices. 6. The detenu was confronted with 65 sets of documents in respect of the remittances made by various firms from Bank of Baroda of Ashram Road Branch, Ahmedabad to Hong Kong. The total amount of unauthorised remittances worked out to U.S. $84,64,954.62 equivalent to Indian Rs. 20,27,54,355/- on the basis of the forged and fabricated import documents during the period 1991-92 without permission of the R B.I. All the remittances has gone to the following five foreign companies, namely, (1) Brilliant Gems, 26, Bat Avenue, T.S.T. Kowloon, Hong Kong, (2) Precious Stars, same address as per No. 1, (3) Aarohi Diamonds, same address as per No. 1, (4) Diamond Ripple of U.S A. and (5) Yakito Jewellery, Hongkong. It further transpired that Brilliant Gems was the company of detenu's sister Smt. Sunit S. Shah and the money was transferred in her account and she was also having another company - New Light Gem International and Diamond Deorein. Precious Star and Aarohi Diamonds belonged to one Abdul Aziz who was settled in Hong Kong holding a white card and address of Precious Star and Aarohi Diamonds were the same as that of the detenu's sister's company Brilliant Gems. Diamond Ripple of USA was the company of the detenu's brother Deepak C. Vakharia who was settled in U.S.A. since 1991 :-Yakito Jewellery belonged to one Kamlesh Shah who is an employee of one Har Kishan of Hong Kong 7. Alongwith the grounds of detention annexure A is the list of 144 remittances totalling to U.S. $84, 64,954.62 equivalent to Indian Rs. 20,27,54,355/-. The list of documents annexed alongwith the grounds of detention sets out various documents such as basic documents and, pith and substance of primary documents and pith and substance of primary documents as also some subsidiary documents. Some documents elaborating the details while indulging in large scale havala transactions resulting in serious violations of FERA. Needless to say that some of these documents forming part of the two compilations running into 851 pages pertain to either offences under I.P.C. in respect of which investigation is pending or offences punishable under FERA in respect of which also investigation is pending. It will be evident from the later part of this Judgment that some of the documents forming part of the two compilations running into 851 pages do not constitute either the basic documents or the mated al on which the order of detention is primarily based much less the pith and substance of the primary facts. They have not been relied upon for arriving at the subjective satisfaction for making the order of detention. Nevertheless they have been referred to in the course of narration of facts either in connection with the offences under the I.P.C. or offences under the FERA or the details of the FERA violations as a result of havala transactions which is the basis of the order of detention. 8. In short, the modus operandi adopted by the detenu was to fabricate documents to show import of rough, uncut, unset, unwork, non industrial unmounted diamonds. This was done on the basis of bogus customs clearances prepared by using bogus customs seals. On the basis of such fabricated documents it was contended before the Bank Official that the exporters at Hong Kong and other places were to be paid substantial amounts for which remittances of crores of Indian rupees were made. This was

nothing but by way of mere adjustment which is commonly known as 'Havala' transations. Apart from the grounds of detention disclosing serious violations of FERA in the process of making as many as 144 remittances of US $84,64,954.62 corresponding to Indian rupees Rs. 20,27,54,355, the investigation is also said to be in progress as far as the offences punishable under the Indian Penal Code and FERA are concerned. However, we are not concerned with the said offence punishable either under the Indian Penal Code or the FERA. 9. In the background of the above facts Shri Karmali for the petitioner has raised five contentions. The first contention is in para 6(K) of the petition at page 19 where it is contended that the copy of the panchanama dated 20th November, 1992, to which a mere reference is made in para 11 of the grounds of detention, has not been furnished to the detenu. It is contended that the said panchanama having been incorporated by reference in para 11 of the grounds of detention, must have influenced the mind of the Detaining Authority. If so, it was incumbent upon the Detaining Authority to have furnished to the detenu the copy of the said panchanama. Counsel contends that failure to do so violates both the facets of Article 22(5) of the Constitution, namely, (i) proper communication and (ii) the right to make a representation. The second limb of the first contention is that if the panchanama dated 20th November, 1992 was not at all placed by the Sponsoring Authority before the Detaining Authority, then the conclusion drawn by the Detaining Authority is vitiated by non application of mind. At any rate, it discloses a very casual approach in issuing the order of detention affecting the liberty of the citizen. 10. The reply to this contention is to be found in para 9 of the affidavit of Shri Verma which is as under : As regards the contention of the petitioner regarding copies of panchanama dt. 20.11.1992 of P.S.I. Karani Police Station, it is submitted that under the cover of letter dated 1.12.1992, the said Police Sub-Inspector has forwarded copies of documents seized only and not the panchanama, as inadvertently typed in the grounds of detention due to sheer error. It is further submitted that whatever material that was received from the police as seen at the time of arrival of subjective satisfaction have been supplied to the detenu. Neither panchanama was relied upon but has been referred to complete sequence. Further reply to the first contention raised in para 6(K) is to be found in para 12 of the affidavit of Shri Verma which reads as under: 12. As regards the contention of the partitioner in para 6(K) regarding non-supply of panchanama dated 20.11.92, it is submitted that all the materials received vide letter dt. 1.2.92 of the P.S.I. Kararj Police Station, Ahmedabad (page Nos. 471 to 482) were placed before the detaining authority and after carefully going through the same and after arriving at the subjective satisfaction that a preventive detention was warranted in respect of the detenu a detention order was issued against him. It is, therefore, submitted that the documents by which subjective satisfaction was arrived at were supplied to the detenue and therefore, no prejudice is caused. 11. Shri Agarwal appearing for the respondents has, on the other hand, contended that by letter dated 1st December, 1992 the Police Sub Inspector of Karanj Police Station had forwarded copies of the documents that were seized but the panchanama was not forwarded by the Sponsoring Authority to the Detaining Authority. He has conceded that

there is an inadvertent mistake in typing the grounds of detention which was a sheer error. It is, however, contended that the said panchanama relates to the investigation in respect of the offence punishable under the I.P.C. and the FERA and is neither a basic document nor the material on which the order of pith and substance is based or the primary facts. It is contended that at the highest this is only one of the subsidiary details of the modus operand! adopted by the detenu and this has not influenced the subjective satisfaction arrived at by the detaining authority for issuing the order of detention. Reliance has been placed by Shri Agarwal on the averments made in the affidavit of Shri Verma, relevant portions of which we have reproduced in para 10 above. 12. The second contention raised by Shri Karmali is in ground (O) of the petition at page 24-A. It is contended that in respect of the remittances from India to any foreign country, a set of 7 documents is required to be produced before any Bank in India. The 7 documents have been enumerated in ground (O) as (i) a covering letter by the importer to his bank, requesting the bank, to debit his account equivalent for the foreign currency proposed/required to be remitted outside to the account of his overseas suppliers; (ii) 2 copies of invoices, one of them being custom attested while clearing the goods; (iii) a copy of the original Certificate of Origin of goods issued by the concerned Chambers of Commerce of the Country of overseas suppliers, (iv) Airway bill, popularly known as House Air way Bill issued by the carriers of goods i.e. the airlines which carried goods from the overseas country to India; (v) 'Bill of Entry" as attested by the customs to certify that the goods have been cleared through customs; (vi) Import License in original against which the goods are cleared by the customs; and (vii) Form "A" duly filled in by the importer required for the Bank for remitting the funds. It is contended that if the detenu had created false evidence claiming that he had imported rough diamonds from abroad for which he was obliged to make remittances abroad the bank in India, in this case the Bank at Ahmedabad, should not normally, have remitted the amounts abroad, unless the abovesaid 7 documents were placed before the Bank. It is contended that though it is alleged that as many as 144 remittances were made abroad, in respect of none of 144 remittances, a complete set of 7 documents mentioned above was placed before the Bank officials and hence it was improbable that the remittances would have been made by the bank at the behest of the detenu. Our attention was invited to a chart prepared by Shri Karmali in respect of each of the 144 remittances showing that in none of the 144 remittances all the 7 columns have been filled; meaning thereby that in no case, 7 documents was complete. In short, the contention is that if the bank at Ahmedabad did not have the set of 7 documents complete, it would not have and even ought not to have made the remittances abroad. 13. In reply to this contention, Shri Agarwal for the respondent has contended that, in the first place, each of these 144 remittances constitutes a separate breach of the provisions of FERA and could be a separate ground for passing an order of detention. Indeed, he contended that in the facts of this case, there could have been as many as 144 orders of detention based on 144 distinct grounds of remittances abroad supported by the material in respect of each of the 144 grounds. He further contended that what

the petitioner contends is an ideal situation where the bank officials ought not to have fallen a prey and the bank ought not to have agreed to remit money abroad in each of the remittances in the event of having supplied with the set of 7 documents. It is then contended that inrespect of most of the remittances the documents furnished to the bankers at Ahmedabad were complete and even assuming that in many cases they were incomplete that does not detract from the validity of the order of detention since it is not this Court to go into the question of sufficiency of the material for reaching the satisfaction for issuing an order of detention. Our attention was invited to the details of certain remittances where the majority of 7 documents were available, on the basis of which, some how, the detenu seems to have prevailed upon the bank officials at Ahmedabad to agree to make remittances and infact the remittances have been made abroad. What is further complained of by the respondents is that without having actually imported the diamonds, bogus documents including bogus customs documents were prepared with the help of bogus stamps and seals on the bills of entry and customs clearances and on the basis of such bogus documents the bank officials at Ahmedabad were led to believe that the detenu had to make payments to the exporters abroad. Assuming, therefore, that the detenu prevailed upon the bank officials at Ahmedabad to make remittances abroad on the basis of incomplete documents, Counsel for the respondents contends that this is not a ground for invalidating the order of detention. 14. In reply to the second limb of the first contention Shri Agarwal contends that in the light of Section 5A of the COFEPOSA Act, it is not open to the petitioner to contend that the entire order of detention must fall to the ground even if it transpires that in respect of some of the remittances the documents were incomplete. The detention order cannot be deemed to be invalid or inoperative merely because one or some of the grounds is or are - (i) vague, (ii) non-existent, (iii) not relevant, (iv) not connected or not proximately connected with such person or (v) invalid for any other reason whatsoever and it is not, therefore, possible to hold that the person or officer making such an order would have been satisfied as provided in Sub-section (1) of Section 3 with reference to the remaining ground or grounds and made the order of detention. Relying upon Sub-section (b) of Section 5A it is contended that even assuming that the petitioner was right in respect of some of the 144 grounds, the officer making the order of detention shall be deemed to have made the order of detention under the said Sub-section (1) of Section 3 after being satisfied as provided in that sub-section with reference to the remaining ground or grounds. 15. The third contention raised by Shri Karmali is in ground No. (L) on page 22, namely, that some of the document furnished to the detenu alongwith the ground of detention are illegible. Reply to this contention is to be found in the affidavit of Shri Verma in para 13 on page 62 which reads as under: 13. As regards the contention of the petitioner in para 6(L), it is submitted that the most legible copies were supplied to the detenu, which could be read without any difficulty. It is asserted that legible copies were supplied to the detenu. 16. The fourth contentior. raised by Shri Karmali is in ground (Q) on page 24G. It pertains to some of the documents supplied to the detenu being incomplete. Reliance is placed on the copy of state-

ment of Bhupendra M. Vakharia recorded on 12.11.1992. Gujarathi version is to be found at pages 452 to 455 whereas English version is to be found at page 456 to 458 of the compilation of documents furnished alongwith the grounds. While the English version is complete, the Gujarathi version furnished to the detenu is incomplete in the concluding portion. Reply to this contention is to be found at page 68 of the affidavit of Shri Verma. The detaining authority has denied that it did not care to observe the constitutional imperatives in supplying the documents to the detenu. It is contended that the statement of Bhupendra Vakharia was only perused while arriving at the subjective satisfaction and whatever documents were relied upon had influenced the mind of the detaining authority were supplied to the detenu as per the constitutional requirement and no prejudice was caused to the detenu. 17. The last contention of Shri Karmali is regarding the newly inserted ground (P) at page 24-D namely that one vital and material document was not placed before the Advisory Board viz- of the circular dated 27.2.1996 issued by the Reserve Bank of India (for short R.B.I.) Ex.D to the petition dealing with the precaution for handling the import documents was not placed before the Advisory Board. Had it been placed before the Advisory Board, it would have come to the conclusion that there was no sufficient cause for passing the order of detention. The reply to this contention is to be found at page 67 to the effect that the circular issued by the R.B.I on 27.2.1996 was an attempt to prevent mal-practices in import by divising certain safeguards/duties to be discharged by the senior bank officials while handling the import documents on the basis of the imports alleged to have been made by the customers. This circular was issued on 27th February, 1996 whereas the order of uetention, has been issued on 25th November, 1994 and has been served on 24th February, 1996. It is, therefore denied that this document ought to have been placed before the Advisory Board which met on 12th April, 1996. 18. In support of their rival contentions, learned Counsel before us have invited our attention to a large number of decisions both of the Hon'ble Supreme Court as also of this Court including several unreported decisions. However, we do not wish to burden this Judgment with each and every decision that was cited before us. We would confine ourselves to dealing with the ratio of the leading decisions which have a direct bearing on the contentions raised before us. 19. Coming to the first contention regarding the failure on the part of the detaining authority to furnish a copy of the Panchanama dated 20th November 1992 to the detenu alongwith the grounds of detention there is no dispute before us that a copy of the said panchanama to which a reference has been made in Para 11 of the grounds of detention, has not been furnished to the detenu. It would be necessary to reproduce Para 11 of the grounds of detention, which reads as under: 11. The Asstt. Director, Enforcement Directorate, Ahmedabad, vide his letter dt. 24.11.92 addressed to Police Inspector, Karanj Police Station, Ahmedabad called for details in respect of search and seizure in respect of ICR No. 381/92 (Kamlesh Devendra Prasad Rao) and the PSI, Karanj Police Station vide his letter dt. 1.12.92 while intimating the details had also submitted copies of panchanama dt. 20.11.92, some telax messages regarding remittance made through banks impressions of rubber stamps seized from him. The said

Kamlesh Devendra Prasad Rao stated at time of seizure of said items, before the Police officials and witnesses that he was serving with Mahendrabhai C. Vakharia (i.e. you) for the past one and half year and on 6,11.92 the said Mahendrabhai (i.e. you) handed over 4 bags which he kept in his house at Sola from the said 4 bags belonging to you, documents such as, Bills of Entry, Visiting Cards, foreign currency, Credit Advices, your cancelled passport No.B-258107, 28 rubber stamps of Customs of Bombay and Khandala, JCCI & E. Madras were seized as detailed in the panchanama. It was also informed by PSI, Karanj Police Station that Shri. Kamlesh Devendra Prasad Rao had been arrestet and was in police custody and said Shri Kamlesh Devendra Prasad Rao was to be produced before the Metropolitan Magistrate, Court No. 5, Ahmedabad on 2.12.92. Based on said information an application dt. 2.12.92 was moved by the Enforcement Directorate, in the Court of A.C.M.M., Ahmedabad inter alia, praying for Court's permission to interrogate the said persons while in judicial custody. The Hon'ble Court granted the permission vide order dt. 2.12.92." (It may be mentioned here that in the grounds of detention two consecutive paras have been given the same No. 11 What we have reproduced is the first of such Para No. 11) 20. As stated in Para 10 above, while replying this contention, the respondents have admitted that there is an error in typing the grounds of detention in as much there was no need to make a reference to the said panchanama in para 11 and indeed the copy of the said panchanama has not been furnished to the detenu. However, the question which we have been called upon to consider is whether it is necessary for the detaining authority to furnish to the detenu each and every document, howsoever insignificant and inconsequential it may be and to which a mere reference is made in the grounds of detention and which can, therefore, be said to have been incorporated by reference in the grounds of detention. In other words, if it transpires that a particular document is neither a basic document nor does it contain the pith and substance of primary facts but is only a subsidiary detail of the grounds of detention or is the elaboration of the modus operandi adopted by the detenu, is it still necessary for the detaining authority to furnish such a document to the detenu? 21. In Vakil Singh v. State of Jammu and Kashmir and Anr. the detention was made on the ground of espionage and the basic facts, as distinguished from the factual details, were incorporated in the material communicated to the detenu. The detenu was told the name of the notorious agent and courier through whom he was supplying the information about the Indian Army and was further informed about the places in Pakistan which he was visiting. It was held that nothing more was required to be intimated to enable him to make an effecting representation. In Para 29 of the Judgment, at page 2341 of the Report, the Apex Court explained the word "grounds", meaning thereby the material on which the order of detention was primarily based and emphasised that the grounds must contain the pith said substance of primary facts, but not subsidiary facts or evidential details. It, would be convenient to quote the relevant portion of Para 29 as under:- Grounds' within the contemplation of Section 8(1) of the Act means 'materials' on which the order of detention is primarily based. Apart from conclusions of facts 'grounds' have a factual constituent, also. They must contain the pith and

substance of primary facts but not subsidiary facts or evidential details. This requirement as to the communication of all essential constituents of the grounds was complied with in the present case. The basic facts, as distinguished from factual details, were incorporated in the material communicated to the detenu. He was told the name of the notorious PAK agent and courier (Mian Reham resident of Jumbian) through whom he was supplying the information about the Indian Army. He was informed about the places in Pakistan which he was visiting. He was further told that in lieu of the supply of this information he had been receiving money from Pakistan. Nothing more was required to be intimated to enable him to make an effective representation. The facts which were not disclosed were not basic facts, and their non-disclosure did not affect the petitioner's right of making a representation. 22. In Khudiram Das v. The State of West Bengal and Ors. the Apex Court has considered the question in the light of the mandate of Article 22(5) of the Consitution and in Para 5 of the Judgment at pages 553/554 of the report, it has been observed that if all the grounds which weighed with the detaining authority are not communicated to the detenu, it may constitute a breach of both the facets of Article 22(5) of the Constitution of India viz. proper communication and the right to make a representation. In Para 6 of the Judgment, the Apex Court has reiterated its earlier view in Golam alias Golam Mallick v. The State of West Bengal Writ Petition No. 2700 of 1974, decided on 12th September 1974 to the effect that "the basic facts and material particulars, therefore, which are foundation of the order of detention will also be covered b-y"grounds" within the contemplation of Article 22(5) and Section 8 and are required to be communicated to the detenu unless the disclosure is considered by the authority to be against the public interest". It has then been concluded in para 6 at page 555 of the Report as under:- It is therefore clear that 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. That is the plain requirement of the first safeguard in Article 22(5). In Para 17 of the Judgment, the Court considered the requirement of disclosure of other particulars within the meaning of Sub-section (3) of Section 3 of the Maintenance of Internal Security Act, 1971. In Para 18 of the judgment in Khudiram Das's case, the Court clarified its earlier decision in Nardhan Saha's case and it was observed at pages 562 and 563 of the Report as under:- There can be no doubt that when the Court made these observations, what it had in mind was the materials which constituted" the grounds of detention and not "other particulars", for the making of the order of detention would be based on the former and not on the latter and so also its approval by the State Government. What the Court meant to say in making these observations was that all the materials on which the order of detention is made or approved, that is, the materials constituting the grounds of detention, must be communicated to the detenu and not that "other particulars" communicated to the State Government under Section 3, Sub-section (3) which do not form the basis of the making of the order of detention or its approval should be disclosed to the detenu. After having made the above observations, the Apex Court concluded in Para 19, at page 563 as under:- Now in the present case, as already

pointed out above, the material from the' history-sheet, which was not disclosed to the petitioner did not form part of the grounds of detention on which the order of detention was made by the District Magistrate and approved by the State Government but merely constituted "other particulars" communicated by the District Magistrate to the State Government under Section 3. Sub-section (3). There was, therefore, no obligation on the District Magistrate or the State Government to disclose this material to the petitioner and the non-disclosure of it to the petitioner did not have the effect of invalidating the approval of the State Government to the order of detention. Finally, the Court dismissed the Writ Petition and discharged the Rule. 23. In Mehrunissa v. The State of Maharashtra it was contended before the Apex Court that there was failure on the part of the detaining authority to supply to the detenu material documents referred to in the grounds of detention. Reliance was placed on the decisions of the Apex Court in Icchu Devi v. Union of India and Smt Shalini Soni v. Union of India . No counter affidavit was filed by the State Government in the Apex Court in Mehrunissa's case and it was contended on behalf of the State that copies of the documents were not supplied to the detenu since he was already aware of the contents of the documents. This contention was rejected by the Court observing that the detenu was entitled to be supplied with the copies of all the material documents instead of having to rely upon his memory in regard to the contents of the document. The ratio of this decision has no application to the facts of the case before us. 24. In Thakur Mulchandani v. Assistant Secretary to the Government of Maharashtra and Ors. the contention before the Court was that the most important document which was the sheet-anchor of the allegations made against the detenus had not been supplied to them. The contention that was advanced by the State Government was that although the document containing the accounts was seized from the possession of one of the detenus, it was not necessary to supply copies of the same to the detenus because in the statement which the detenu had made before the Customs authority, details of the articles smuggled were already mentioned. This argument was rejected by the Court inasmuch a copy of the document which was material and which was said to be the sheet-anchor or of the allegations made against the detenu was not furnished to them. The ratio of this decision also cannot advance the case of the petitioner before us. 25. We must now refer to the decision of the Apex Court in Mst.LM.S. Umnu Saleema v. B.B. Gujral and Anr. . The Apex Court was considering a similar contention regarding the alleged failure to supply certain information regarding the alleged failure to supply certain information regarding the trunk-calls made and petrol bills in respect of the petrol put in the Jeep used for smuggling between certain dates. The order of detention was made on 31st October 1980 under Section 3(1) of the COFEPOSA Act. It was contended before the Apex Court that the detaining authority was under an obligation to supply each and every document to which even a reference was made in the grounds of detention irrespective of whether the said document was or not relied upon in the order of detention. It was contended by Shri Jethmalani that the mere fact that the documents were mentioned in the grounds establishes the fact that the documents were relied

upon in making the order of detention. This contention has been dealt with in the light of the earlier Judgments of the Apex Court in (i) Khudiram Das v. The State of West Bengal . (ii) Icchu Devi v. Union of India and(iii) Smt. Shalini Soni v. Union of India . In Para 5 of the Judgment at page 1193 of the Report the court held that failure to furnish copies of documents to which a reference is made in the grounds of detention is not an infringement of Article 22(5), fatal to the order of detention. It is only failure to furnish copies of such of the documents, as were relied upon by the detaining authority, making it difficult to the detenu under Article 22(5). The Court held that it was unnecessary to furnish copies of the documents to which a casual or passing references may be made in the course of the narration of facts and which was not relied upon by the detaining authority in making the order of detention. In Ummu Saleema's case, the Apex Court held that the trunk call bills and the petrol bills did not form part of the documents which was relied upon, but they fell in the category documents to which a casual or passing reference was made while passing the order of detention. These observations are to be found in Para 5 of the Judgment at pages 1193/1994 of the Report. They clearly support the respondents' contention. 26. In Ibrahim Ahmed Batti v. State of Gujarat the Court observed that all documents, statements and other materials incorporated in the grounds which have influenced the mind of the detaining authority in arriving at subjective satisfaction must be furnished to the detenu alongwith the grounds of detention and that all such material must be furnished-to him in the script or language which he understands and failure to do so would amount to breach of duty cast upon the detaining authority under Article 22(5) of the Constitution. In Ibrahim Ahmad Batti's case, Urdu translation of the documents in English was not furnished to the detenu the detenu pleaded. It was in this context that the Apex Court came to the conclusion that the documents on which reliance was placed in the grounds of detention ought to be communicated to the detenu in the script or language which he understands and failure to do so would be violative of his right under Article 22(5) of the Constitution. In the facts of the case before us, we do not think that the ratio of the decision in Ibrahim Ahmad Batti 's case can support the contention of the petitioner. 27. In Smt. Jayadevi Shantilal Jain, being Supreme Court Criminal Appeal No. 115 of 1986, decided on 5th February 1986, it was found that all the requisite material which ought to have been considered by the confirming authority before confirming the order of detention was not placed before the confirming authority. It was, therefore, held that the consequent confirmation was vitiated. In view of this admitted position, the Apex Court struck down the order of detention. In our view, the ratio of the decision in Smt. Jayadevi Shantilal Jain's case has no application to the facts of the present case. 28. In Prakash Chandra Mehtav. Commissioner and Secretary, Government of Kerala and Ors. the Apex Court again considered the question in the light of the grievance that though reliance was placed on the confessions alleged to have been made by the detenu, the retraction of the confessions made under Section 108 of the Customs Act had not been taken into consideration by the detaining authority. This contention has been referred in Para 55 of the Judgment at page 695 of the Report. Dealing

with the contention, the Apex Court observed that the concept of "grounds" has to receive an interpretation which will keep in tune with the contemporary notions of realities of the society and the purpose of the Act in question in the light of the concepts of liberty and fundamental freedom under Articles 19(1), 21 and 22 of the Constitution. At the end of Page 73 at page 699 of the Report the Apex Court observed as under:- While the expression "grounds" for that matter includes not only conclusions of fact but also all the "basic facts" on which those conclusions were founded, they are different from subsidiary facts or further particulars of the basic facts. The Court further held in Para 74 of the Judgment that the satisfaction recorded by the detaining authority was drawn from several factors and even if the confessions were to be completely ignored, then inference can still be drawn from other independent objective facts mentioned in the case. The Court, therefore, concluded that the order of detention cannot be challenged merely on the ground of rejection of the inferences drawn from the confessions, because the statements of retraction were not taken into account. While saying so, the Court reiterated in Para 74 that the Court was not concerned with the sufficiency of the grounds and the court was only concerned with the question whether there were relevant materials on which a reasonable belief or conviction could have been entertained by the detaining authority on the grounds mentioned in Section 3(1) of the said Act. In our view, the ratio of the decision in Prakash Chandra Mehta's case clearly supports the respondent's contention that it is not each and every document and each and every material, to which a reference is made in the grounds of detention which must be furnished to the detenu. 29. In State of UP. v. Kamal Kishore Saini the Court held that all vital material was not placed before the detaining authority in enabling him to reach his subjective satisfaction. It was held that the application made by the co-accused, as well as the statement made in the bail application filed on behalf of the detenu alleging that they had been falsely implicated in the same case and the Police Report thereon were not produced before the detaining authority before passing the order of detention. In reply to this contention, it was contended that even if these material documents were not placed before the detaining authority, the detaining authority would not have changed the subjective satisfaction reported in the order of detention. This contention was rejected by the High Court and also on appeal by the Apex Court. It was held in Para 7 of the Judgment at page 211 of the Report that it is incumbent to place all vital material before the detaining authority to enable him to come to a subjective satisfaction as to the passing of the order of detention as mandatorily required under the National Security Act, 1980. In our view, the ratio of this decision can have no application to the facts of the present case. 30. Similarly, in Ayya alias Ayub v. State of UP. and Anr. question arose in the light of the omission on the part of the detaining authority to consider the relevant material while passing the order of detention under the National Security Act, 1980. It was held in Para 13 of the Judgment at page 370 of the Report that there would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant, though not binding, has not been considered at all. If a piece of evidence, which might reasonably affect the decision whether

or not to pass order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, would vitiate the detention. It was in the light of these facts that the order of detention was set aside. We do not think that the ratio of the that decision in Ayya's case can support the contention of the petitioner. 31. In M. Ahameddkutty v. Union of India and Anr. the question that arose for consideration was about non-supply of the bail application and the order granting bail. In Para 19 of the Judgment, at page 151 of the Report, the Apex Court held that the detenu has a right to be furnished with the grounds of detention alongwith the documents relied upon in the grounds of detention. It was further held in Para 20 that it is immaterial that the detenu was aware of the contents of the document not furnished to him and if there was infirmity in furnishing the material documents on which reliance was placed, the question of demanding the document was wholly irrelevant. It was then held in Para 25 of the Judgment, at page 153 of the Report, that non-consideration of the bail order was, in the facts of that case, tantamount to non-application of mind. In the light of this, it was concluded in Para 27 of the Judgment that, in the facts of that case the bail application and the bail order were vital material for consideration and if those were not considered, the satisfaction of the detaining authority itself would be impaired. In the result, it was held that there was a violation of the right of the detenu under Article 22(5) of the Constitution of India. In our view, the ratio of this decision cannot advance the case of the petitioner before us. 32. In Haridas Amarchand Shah of Bombay v. K.L. Verma and Ors. the detenu was detained under the COFEPOSA Act The documents revealing facts leading to the arrest of the detenu and the order of conditional grant of bail was placed before the detaining authority. However, the order of variation in the condition of bail on the application made by the detenu was not placed before the detaining authority. The order of variation of the condition of bail had no relation with the activities carried on by the detenu. It was held that the order of detention was not vitiated for failure to place the application of the detenu for varying the order of bail and the order of the Magistrate Varying the condition of the bail. 33. In Madan Lai Anand v. Union of India and Ors. the order of detention was passed under Section 3 of the COFEPOSA Act. Grievance was made about failure to supply copies of document viz. Revision Application, of which a mention was made in the order of detention. The detaining authority had placed reliance on the copies of three Civil Misc. Applications filed in the said Revision Application No. 3694 of 1985. Copies of the three Civil Misc. Applications were furnished to the detenu, but the copy of the Revision application was not furnished to the detenu. In Para 23 of the Judgment, at page 181 of the Report, the Apex Court referred to its earlier decision in Vakil Singh v. State of Jammu and Kashmir (supra) to the following effect:- Grounds' within the contemplation of Section 8(1) means materials on which the order of detention is primarily based. Apart from the conclusions of facts grounds have a factual constituent, also. They must contain the pith and substance of primary facts but not subsidiary facts or evidential details. We have already referred to Vakil Singh's case (Supra) in Para 21 above. It was then held in Para 26 of the Judgment, at page 182 of the

Report that the detenu was not prejudiced on account of non-supply of certain documents to him. In Para 28 of the Judgment, at page 182 of the Report, the Court reiterated its earlier view in Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala (supra). In Para 29 of the Judgment, the Court held that in view of Section 5-A of the COFEPOSA Act, even if one ground was inadmissible, the order of detention could still be sustained on the remaining grounds. In our view, the ratio of this decision in Madal Lai Anand's case clearly demonstrates what documents is referred to as the basic document or pith and substance of primary facts on which the grounds of detention have been formulated. Such documents are different from the subsidiary fact or mere evidentiary details as set out by the Apex Court in Vakil Singh v. State of Jammu and Kashmir AIR 1974 S.G. 2337 at pg. 2341 (supra in Para 20 above) 34. In the facts of the case before us, a perusal of the grounds of detention would clearly show that reference to panchanama dated 20.11.1992 is merely a casual or passing reference. It is neither a basic document nor a material on which the order of detention is primarily based, nor is the pith and substance of primary facts on which the order of detention is primarily based, nor is it the pith and substance of primary facts on which the grounds of detention has been formulated. Indeed, in our view, it is more in the nature of a subsidiary fact in the pending investigation in the offences punishable under the Indian Penal Code and the Foreign Exchange Regulations Act. In the view that we have taken in regard to the nature of this document viz. panchanama dated 20th November, 1992, there is no substance even in the second limb of the first contention raised by Mr. Karmali. This conclusion of ours is independent of the provisions of Section 5A of the COFEPOSA 35. It is no doubt true that in K. Satyanarayan Subudhi v. Union of India and Ors. while dealing with the order of detention under COFEPOSA Act, the Apex Court held that there was only one ground of detention and non-placement or retraction of confessional statement and non-consideration of same while arriving at a subjective satisfaction in the making of the order of detention making the order of detention invalid. After making these observations in Para 3 of the Judgment, at page 1376 of the Report, in Para 4 of the Judgment the Apex Court observed that the ratio of the decisions in Prakash Chandra Mehta's case (supra) and Madan Lai Anand's case (supra) was not applicable to the facts of the case before it and the Court also considered another aspect of the matter that the detenu was under detention for over 8 months and the order of detention was for a period of one year. In the light of the two facts mentioned in Paras 3 and 4 of the Judgment, the Court came to the conclusion that the detenu was entitled to be released, Paras 3 and 4 of the Judgment in case of K. Satyanarayan Subudhi reads as under:- 3 We have considered the same very minutely and carefully and it appears to us that in fact there were not two grounds hut only one ground and the non-placement of the retraction of the confessional statement by the detenu he fore the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and in our considered opinion makes the order of detention invalid. 4. In these circumstances we do not think that the decisions of this

Court in Prakash Chandra Mehta v. Commr. and Secy, Govt. of Kerala well as Madan Lai Anand v. Union of India are applicable to the instant case. We have also considered another aspect of the matter i.e the detenu is under detention for over eight months and the order of detention is for a period of one year. Considering this aspect mentioned hereinbefore we think it just and proper to quash the order of detention and direct for the release of the detenu appellant forthwith provided he is not wanted by any other order. The appeal is thus allowed and the order of detention is quashed. Appeal allowed. 36. In our view, in the light of the ratio of the Apex Court decision in (1) Vakil Singh v. State of Jammu and Kashmir and Anr. ; (2) Khudiram Das v. The State of West Bengal and Ors. ; (3) Mst. L.M.S. Ummu Saleema v. B.B. Gujral and Anr. ; (4) Prakash Chandra Mehta v. Commissioner and Secretary, Govt of Kerala and Ors. A.I.R. 1986, Supreme Court 887; (5) Haridas Amarchand Shah of Bombay v. K.L. Verma and Ors. ; (6) Madan Lai Anand v. Union of India and Ors. ; the ratio of the decision in K. Satyanarayan Subudhi's ease (supra) can have no application whatsoever to the facts of the present case. 37. We may also refer to two more decisions on the point. In Kamamnnisa v. Union of India and Anr. AIR 1991 SC 164 question arose as to whether the failure on the part of the detaining authority to furnish copies of the declaration made by the detenu before the customs authority and copies of the search warrant mentioned in the grounds of detention has violated the detenus' right to make a representation against the order of detention. The argument has been considered in Para 14, at page 1648 of the Report where the Apex Court has observed as under. The High Court while dealing with this contention came to the conclusion that the declarations made by the. detenus at the airport were neither relied on nor referred to in the grounds of detention. As regards the search authorisations, it may be pointed out that although there is a mention of the premises searched in the grounds of detention, the incriminating material found has neither been used nor made the basis for formulating the grounds of detention. Mere reference to these searches by way of completing the narration cannot entitle the detenus to claim copies of the search authorisations. This decision supports the case of the, respondents. 38. Recently, in Veeramani v. State of Tamil Nadu 1995 Cr. LJ 2644 1994 SCC (Cri minal) 482 the question that arose before the Apex Court was whether the copies of the statement under Section 161 Cr.P.C. which was simply placed before the detaining authority and which was looked into to verify the contents of the F.I.R., could be said to be the real material forming the basis of the grounds of detention. On considering some of the earlier Judgments, it was held in Para 9 of the Judgment, at page 2649 of the Report that the real question was as to whether these statements under Section 161 Cr.P.C. were just placed before the detaining authority for arriving at the satisfaction and whether they constitute part of the grounds of detention. It was held that non-supply of the statement under Section 161, which was simply placed before the detaining authority and which was looked into to verify the contents of the F.I.R. cannot be held to be the real material forming the basis of the grounds of detention and no prejudice would be caused to the detenu and as a matter of fact while making the representation the detenu did not ask for

any such document. In our view, the ratio of the decision in Veeramani 's case also supports the contention of the respondents. 39. In conclusion, we must hold that as far as the first contention is concerned, there is mere reference to the panchanama dated 20th November, 1992 in Para 11 of the Grounds of Detention. In the light of the above legal position, we are of the view that in the facts of the case before us, the panchanama dated 20.11.1992, to which a mere reference is made in Para 11 of the Grounds of Detention does not constitute a basic document on which the order of detention is primarily based, much less is it the pith and substance of the primary facts on which the grounds of detention have been formulated. The detention is on account of 144 remittances of foreign exchange in violation of the provisions of the FERA. The earlier paragraphs of the grounds of detention refer more to the investigation into the crimes punishable under the Indian Penal Code and the FERA for which investigation is still in progress. The details of the actual FERA violations which are the basis and the grounds for the order of detention are set out in Para 12 onwards. The 65 sets of documents constituting the 144 violations, with which the detenu was confronted during the course of his statement recorded on 13th September, 1994 appear in Para 13 [xx(iv)] of the grounds of detenu at page 39 of the Petition. 144 remittances of foreign exchange of US $ 84,64,64,854.62 equivalent to Indian Rs. 22,27,54,355/- were unauthorisedly made on the basis of forged and fabricated documents showing import of diamonds during 1991 -92 without the permission of the Reserve Bank of India. The said remittances had gone to 5 companies -(1) Brilliant Gems 26, Bat Avenue, T.S.T. Kowloon, Hongkong; (2) Precious Stars; (3) Aarohi Diamonds; (4) Diamond Ripple of USA, (5) Yakito Jewellery Hongkong. This is to be found in Para 13 [xx(viii)] of the grounds at pages 40/41 of the Petition. As stated earlier, Brilliant Gems of Hongkong is a Company belonging to the detenu's sister - Smt. Sunit S. Shah and the monies were transferred in her account and she was also having other Companies New Light Gen. International and Diamond Deoriean. Precious Star belonged to one Abdul Aziz, who was settled in Hongkong holding white card, but the address of Precious Star was the same as that of Brilliant Gems, which belonged to the sister of the detenu. Aarohi Diamonds also belonged to Abdul Aziz, but the address of Aarohi Diamonds was the same as that of Brilliant Games, belonging to the sister of the petitioner. M/s. Diamond Ripple of USA is the Company belonging to brother of detenu Deepak C. Vakharia who is now settled in USA since 1991 M/s. Yakito Jewellery belongs to one Shri Kamlesh Shah who is an employee of Mr. Har Kishan of Hongkong. After setting out all these details in the grounds of detention, including the two further FERA violations, as a, result of disclosures made by Vinod Solanki in the statement recorded on 26th March, 1994 under Section 40 of the FERA the detaining authority has recorded his satisfaction in Para 23 of the grounds of detention in the following words: 23. In view of the foregoing, I have no hesitation in arriving at the conclusion that you have been engaged in illegal transactions as described above in violation of provision of Foreign Exchange Regulation Act, 1973. I am also satisfied that these unauthorised transactions indulged in by you have affected the foreign exchange resources of the country adversely. Even though adjudication and prosecution

proceeding under the Foreign Exchange Regulation Act, 1973, are likely to be initiated against you, I am satisfied that in view of the facts stated hereinabove, you are likely to continue your prejudicial activities in future, it is, therefore, necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with a view to preventing you in future from acting in any manner prejudicial to the augmentation of a country's foreign exchange resources. 40. It is true that in Para 24 of the Grounds of Detention the detaining authority has mentioned as under:- 24. While passing the detention order under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, I have relied upon the documents mentioned in the enclosed list. It is relevant to note that in the enclosed list of "relied upon documents", which is at Exhibit "C" to the Petition, at pages 53-55, there is no mention of the panchanma dated 20th November, 1992. Much capital was sought to be made out of the recital in Para 24 of the grounds of detention reproduced above to contend that the detaining authority has "relied upon" the panchanama dated 20.11.1992 while formulating the grounds of detention. In our view, the wording of Para 24 itself negatives such a contention, in as much as the list of "relied upon documents" does not make any reference to the panchanama dated 20.11.1992. The list contains as many as 38 items running into 851 pages. But there is no reference to the panchanama dated 20.11.1992. 41. We may now make a brief reference to a few decisions of this Court where a similar view has been taken in Uday T. Valla v. Mahendra Prasad, Joint Secretary to the. Govt. of India and Ors. 1992 Cri. LJ 2460. The order of detention under the COFEPOSA Act was passed on several grounds. The confessions of the detenu and his retraction was placed before the detaining authority, but the retraction of the statement made by a third party (not a coaccused) was not placed before the detaining authority. On a consideration of several Apex Court Judgments, including the decisions in Prakash Chandra Mehta's case, Madan Lai Anand's case and K. Subudhi's case, to some of which we have made a reference above, this Court held that the order of detention was not vitiated merely on account of failure to furnish a copy of the statement of retraction made by a third party and it was held that the order of detention was sustainable on other grounds even if the statement of the third party was ignored or obliterated. 42. Similar view was adopted by this Court in Rajesh R Kushalani and Anr. v. Mahendra Prasad, Jt. Secretary Govt. of India and Ors. 1992 (3) BCR 272 : 1992(2) Mali LR 257. In Rajesh Kushalani's case several contentions were raised such as that the statement of a Thrid party was considered for implicating the detenu, but the retraction was not considered. The Third party was not mentioned. Another contention was that some of the copies furnished to the detenu were not legible. The documents which were not legible did not constitute a basic fact but was only evidence of a basic fact and the contents of the document were communicated in another document. This Court took the view that the order of detention was not vitiated. 43. In Smt. Sharif a Abuhaker Zariwala v. The Union of India and Ors. 1996 II LJ 205 (Criminal Writ Petition No. 703 of 2995, decided on 10/11th July 1996 this Court held that it is only the non-placement and non-consideration of material which is vital for record-

ing subjective satisfaction, which vitiates the order of detention and, therefore, an inquiry has necessarily to be held by the Court as to whether the material which has been withheld or not placed or not considered is vital from the point of view of recording the satisfaction. On a consideration of several Apex Court decisions, this Court came to the conclusion that if a statement which was not placed before the detaining authority was a very minor part of the total material placed material for reaching the satisfaction that it was necessary to detain the detenu, this would not vitiate the order of detention. These observations are to be found in Para 19 of the Judgment, at page 221 of the Report. 44. Again in Smt. Anjum Abdulla Muthalib v. The State of Maharashtra, through the Secretary to the Government of Maharashtra, Home Department (Special) and Ors. 1996(4) BCR 582 (Criminal Writ Petition No. 542 of 1995, decided on 7/11 06-1996) similar question arose in relation to an order of detention under PITNDPS Act, 1988. On a consideration of several decisions of the Apex Court, this Court took the view that if the illegible portion did not constitute the basic fact while formulating the ground of detention it would not vitiate ground of detention. 45. Recently, we have ourselves considered some of the Apex Court decisions(to which a reference is made above) in Criminal Writ Petition No. 1118 of 1995, decided on 13th February, 1997. That was a case where in connection with order of detention passed under Section 3(1) of the PITNDPS Act, 1988 on the basis of the incident of 19th February, 1995 when a bag of heroin was recovered in a room from Taj Intercontinental Hotel, Bombay a copy of the statement of one John, to which reference was made in Para 17 of the grounds of detention, was not placed before the detaining authority, nor was copy furnished to the detenu. The second violation of which a complaint was made before us was that in respect of the same incident of 19th February, 1995 the record maintained by "Suvidha Communication Centre Bombay" in respect of telephone calls made to several overseas telephone numbers in U.K., Dubai, Pakistan and Mauritius to which a reference was made in para 17 of the grounds of detention was not placed before the detaining authority nor was the copy thereof furnished to the detenu. It was contended that both these omissions violated both the facets of Article 22(5) of the Constitution of India. On a consideration of number of decisions of the Apex Court, we have come to the conclusion that the two documents viz., the statement of John and the record maintained by Suvidha Communication Centre were such to which a causal reference was made in Para 17 of the grounds of detention and that having perused the entire grounds of detention, it could be said that no reliance had been placed by the detaining authority on the above mentioned two documents. It was further held that the said two documents amounted to mere subsidiary facts to which a casual reference was made while formulating the grounds of detention and hence, the grievance of Article 22(5) being breached was rejected by us. In the light of the above, there is no merit in the first contention of Shri Karmali. 45.A. In the view that we have taken, the second limb of the first contention that if the panchanama dated 20th November, 1992 was not at all placed by the sponsoring authority, before the detaining authority, the conclusion drawn by the detaining authority was vitiated by non-application of

mind does not survive. Since we have held above that the said panchanama refers to the investigation into the offences punishable under the Indian Penal Code and FERA and, at the most, may constitute a very minor part of the subsidiary material relating to the 144 remittances on which the order of detention is based it is not possible for us to accept Shri Kamlesh's contention that the order of detention discloses a very casual approach in passing the order of detention merely because the copy of the panchanama dated 20.11.1992 was not placed by the sponsoring authority before the detaining authority. Once it is held that the grounds of detention under Section 3 of the COFEPOS A Act in the present case are based on as many as 144 distinct violations of FERA, each one of which could be a separate ground of detention, in our view, the mere failure to place the copy of the panchanama dated 20.11.1992 before the detaining authority, to which a casual reference is made in Para 11 of the order of detention, does not disclose any casual approach on the part of the detaining authority in passing the order of detention. As indicated by us above, there is enough material in the grounds of detention showing as many as 144 violations of FERA, excluding the two additional illegal remittances as disclosed in the statement of Vinod Solanki. The details of each of these 144 remittances are set out in annexure 'A' annexed to the grounds of detention. The list of document relied upon contains as many as 38 items, running into 851 pages. In this view of the matter, the criticism that the order of detention has been passed in a very casual manner does not impress us. Hence, we also reject this limb of the first contention of Shri. Karmali. - 46. Coming to the second contention of Shri Karmali, it is in ground (o) of the Petition at page 24-A. The argument is that if one is required to make a remittance abroad, one has to comply with several steps under the Customs Act, the FERA and the R.B.I. Act. As many as 7 steps were indicated in the chart submitted before us and it was contended that in respect of each of the 144 remittances made abroad, unless a complete set of 7 documents was furnished to the Bank authorities at Ahmedabad, they could not have and, indeed, ought not to have made any remittance abroad. The reply to this contention is to be found in the additional affidavit made by Shri K.L. Verma on 22nd August, 1996 and as contended by Shri Agrawal before us, what the petitioner's counsel assumes is an ideal situation where honest bank officials are approached by an honest importer and both of them are willing to comply with the statutory obligations cast on each of them. If, however, the detenu had prepared several bogus documents showing imports of rough diamonds from abroad, for which he was supposed to make remittance to the exporters abroad and the Bank officials were willing to oblige the detenu for obvious reason it is difficult to accept the contention that no remittance could have been made by them though in fact as many as 144 remittance have been made. In an ideal situation no remittance ought to have been made because in none of these 144 remittance's all the 7 columns in the chart are filled. As indicated earlier, before making remittance abroad, one has to produce (i) covering letter by the importer to his Bank requesting the Bank to debit his account equivalent to foreign currency; (ii) two copies of invoices, one of them being customs attested; (iii) copy of the original certificate of origin of goods issued by the concerned

Chambers of Commerce of the country of overseas suppliers; iv) Airway Bill, popularly known as House Air Way Bill issued by the Carriers of goods; v) Bill of Entry attested by the customs to certify that the goods have been cleared through customs; vi) Import Licence in original against which the goods are cleared by the customs; vii) Form 'A' duly filled in by the importer, required for the Bank for remitting the funds. 47. Shri Verma has rightly stated that the procedure for complying with these 7 sets of documents is applicable in case of genuine imports and as stated ahove in the case of an honest importer approaching an honest Bank official. Obviously, it can have no application where a person like the detenu, who claims to have made imports on the basis of fraudulent and fabricated documents, without having actually imported rough diamonds, approaches a willing and obliging Bank official for remittances to bogus companies abroad in the names of his sister and brother. We have been taken through the chart to show that in most of the 144 remittances, all the 7 columns cannot be said to have been duly filled in before the Bank agreed to make a remittance. Assuming for the sake of arguments that this is so, we are at a loss to understate as to how this would vitiate the order of detention. If the 144 remittances are the basis of the grounds of detention and assuming that each of the 144 violations is a case of incomplete documentation in the sense that in no case all the 7 columns indicated by the detenu's counsel are duly filled in, if the detaining authority thought that these materiris were sufficient for recording the satisfaction required under Section 3 of the Act, it is not for us to say that the Bank official ought not to have made the remittances without having verified that each of the remittances was supported by the complete set of all the document and that all the 7 columns of each of the remittance were duly filled in. In our view, the agrument is fallacious and on consideration of the material before us, we are not prepared to examine the sufficiency or otherwise of the documents in support of each of the 144 remittances viz- the question as to whether Bank officials ought to have made the remittances. It is one thing to consider as to whether the Bank official ought to have made the remittance in the absence of all the documents being produced before him; it is quite a different thing for the detaining authority to be satisfied that in spite of failure on the part of the detenu to comply with all the formalities, he persuaded, indeed, prevailed upon the Bank officials to make the 144 remittances as enumerated in the grounds of detention. Thus, without undertaking the exercise or going into the details of each of the 144 remittances, we have no hesitation in rejecting the second contention raised by Shri Karrnali. 48. In this behalf, Shri Agrawal for the respondents has also invited our attention to the provisions of the amended Section 5A of the COFEPOSA Act. Said Section 5A reads as under:- 5-A. Grounds of detention severable where a person has been detained in pursuance of an order of detention under Sub-section (1) of Section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly - (a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are- (i) vague, (ii) non-existent; (iii) not relevant, (iv) not connected or not proximately connected with such person, or (v) invalid for

any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in Sub-section (1) of Section 3 with reference to the ground or grounds and made the order of detention; (b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said Sub-section (1) after being satisfied as provided in that Sub-section with reference to the remaining ground or grounds. Dealing with Section 5A, we must refer to the decision of the Constitution Bench of the Apex Court in Attorney General for India etc. etc v. Amratlal Prajivandas and Ors. etc. . In the said decision rendered by the 9 learned Judges, the Apex Court has upheld the validity of Section 5A of the COFEPOSA Act. The discussion in paragraphs 44 to 49 of the Judgment at pages 2206 to 2208 of the report clearly shows that the enactment of the said provision viz. Section 5A of the COFEPOSA Act does not infringe upon any facet of Article 22(5) of the constitution. In summary in Para 55 of the Judgment, Point No. 6 reads as under which is at page 2210- (6) Section 5-A of COFEPOSA is not invalid or void. It is not violative of Clause (5) of Article 22; 49. Even before the Constitution Bench upheld the validity of Section 5A of the said Act, the Apex Court had an occasion to consider the effect of Section 5A of the COFEPOSA Act in State of Gujarat v. Chamanlal Manjibhai Soni . It was observed in Para 2 of the Judgment in Chamanlal's case that several High Courts had taken the view that where several grounds are mentioned in the order of detention and one of them is found to be vague or irrelevant, then the entire order was vitiated because it would not be predicted to what extent the subjective satisfaction of the authority was influenced by a vague or irrelevant ground. If the Parliament enacted Section 5A of the COFEPOSA Act in order to make it clear that even if one of the grounds was irrelevant but the other grounds were clear and specific, it would not vitiate the order of detention. 6th March 97 50. The view was expressed by Apex Court in Suraj Pal Sahu v. State of Maharashtra and Ors. which was a case under National Security Act, 1980. Relevant observations are to be found in paras 19 to 23 of the Judgment at pages 2148 of the report and the obvious conclusion was that even existence of one ground was sufficient to sustain the detention order. 51. Again in Yogendra Murari v. State of U.P. and Shafiq Ahmed v. District Magistrate, Meerat and Ors. AIR. 1990 SC 220 : 1990 Cr LJ 573 : (1989) 3 JT 659) the Apex Court held that even if more than one ground was stated in the ground of detention, the fact that one of the ground was bad did not vitiate the order of detention. In view of the above, we do not find any substance in the second contention raised by Shri Karmali. We have already indicated above while considering the effect of the amendment inserting Section 5A in the COFEPOSA Act that where there are number of grounds of detention covering various activities of the detenu spreading the period or perirods, each activity is a separate ground by itself and if one ground is irrelevant, vague or unspecific, it will not vitiate the order of detention. 52. Coming to the third contention of Shri Karmali, it is to be found in the ground "L" namely that some of the documents furnished to the detenu alongwith the grounds of detention are illegible. In reply, it is contended that most of the documents supplied were

legible and could be read without any difficulty. A grievance was made that page 6 of the material supplied to the detenu was not legible. Before coming to the details of some of the documents which were said to be illegible in part, it must be borne in mind that if some insignificant part of the documents referred to in the grounds of detention is illegible it would not vitiate the entire order of detention in the light of our conclusions on the first two contentions. The illegibility of the document must be qua the relevant portion [of a document which is the basis of the order if not the pith and substance of the primary facts]. The question arose before this Court in Rajesh R. Kushalani and Anr. v. Shri Mahendra Prasad, Jt. Secretary, Govt. of India and Ors. in Criminal Writ Petition No. 1412 of 1991 and 1448 of 1991 decided on 20th April, 1992 and reported at 1992(3) Bora. C.R. 272(supra). One of the main challenges to the order of detention made under Section 3 of the COFEPOSA was that copies of certain documents were not legible. While repelling the said challenge, it was observed in para 9 of the Judgment at page 275 of the report that illegibility of the said documents had not materially affected the right of the detenu to make a representation. The description about the document was conveyed to the detenu in other documents and if all the documents were read together, it was clear that the meaning was sufficiently conveyed. Secondly, it was observed that the document was a subsidiary fact in the nature of evidence and it was mentioned to substantiate and support the main basic fact about the transaction in which the detenu had participated. 53. In the light of the above legal position it is always necessary to find out whether a document in respect of which the complaint of partial illegibility has been made constitutes a primary or basic document on which reliance has been placed for formulating the grounds of detention or whether the document is more of a evidentiary detail or corroborative document to substantiate the subsidiary facts. It is also relevant to bear in mind as to whether reading other documents alongwith the disputed document which is illegible in part, conveys the full meaning of the document in question so as to enable the detenu to make a proper representation. In the light of the above approach let us consider the documents in respect of which grievance was made on the ground of illegibility to contend that this affected both the facets of Article 22(5). of the Constitution. 54. The first document is to be found at page 6 of the material supplied namely the compilation of 851 pages. It is a printed form for opening the bank account at the Bank of Baroda Ashram Road Branch, Ahmedabad. What is complained of is that the rubber stamp mentioning as to who will operate the account was not properly legible. Assuming that to be so, we do not think in the light of the legal position mentioned above, that this has violated the detenu's right under Article 22(5) of the constitution. In our view, this is not a basic document much less is it a primary basic document. This is only an evidentiary details of the modus operandi resorted by the detenu by opening the account in the name of a fictitious firm which account was always operated by him to facilitate abroad in different names. It was then contended that certain portion on the cheque was illegible. The illegible portion is alleged to be a part of the computerised number which, our experience shows, is some times not fully legible. In the present case, the document at page 18 of the

compilation of material is the cheque drawn by the detenu as a proprietor of Mahendrakumar Shah and Co. payable to "yourself. The cheque is drawn on 2nd October, 1992 for a sum of Rs. 5,66,426/-. All these details are clearly legible and no grievance was made in respect thereof What was contended was that some digits in the computerised number in the lower portion of the cheque were not clearly legible, For the reasons stated above, we must reject this contention. Similar is the case inrespect of the cheque dated 21st October, 1992 at page 19, drawn by the detenu for Rs. 20,88,841/-; page 20 being cheque dated 21st October, 1992 drawn by detenu for Rs. 7,04,008/-; page 21, cheque dated 30th October, 1992 drawn by the detenu for Rs. 20,88,851/- and finally page 22 being cheque dated 30th October, 1992 drawn by the detenu for Rs. 23,49,909/- We are of the view that the details of the cheques drawn by the detenu payable to"yourself, date thereof and amount is clearly legible. Some digits of the computerised number at the lower portion of the cheque not being clearly legible does not infringe the right of the detenu under Article 22(5) of the Constitution of India in the facts and circumstances of the case. 55. A grievance was then made in respect of some of the copies of pay-in-slips which are at pages 24 to 26, 28 to 33,35 to 39,42 to 48 and 50 to 53 of compilation of documents material supplied to the detenu. The grievance is that the rubber stamp which the Bank puts does not clearly disclose the date of receipt of the said pay-in slip by the bank. Though this is not unusual, we do not think that illegibility of the date of the pay-in slip, in any manner affects the satisfaction recorded in the order of detention. Again these are not the basic facts. These are subsidiary details of evidence suggesting modus operandi adopted by the detenu. They are merely referred to for elaborating the various steps taken by the detenu while making the 144 remittances abroad the name mentioned in the pay-in slip, the date, the amount and other details of the notes, their denominations and number is clearly legible. What was complained was that when the bank staff puts its rubber stamp on the copy supplied to the detenu, the impression of the rubber stamp, in of or as the date of receipt is concerned, is not clearly legible. For the reasons aforesaid, we reject the contention that this constitutes a breach of the provision of Article 22(5) of the Constitution. 56. Then a grievance was made of the documents at page 100 which is a bill of entry. As stated earlier, the detenu has produced the bogus bills of entries showing import of rough, uncut, unset, unworked, non-industrial, unmounted diamonds. The bill of entry bears the stamp of customs department which again is a bogus stamp not a genuine stamp. While the number of bill of entry and its date at page 100 has been clearly mentioned as 1.60-6121-1825/8.2.91, the grievance is that in the lower portion, the amount is not clearly mentioned. The amount mentioned is Rs. 18,42,208/- Again in respect of the document at page 218 of the compilation of documents, the number of bill of entry on the right column is mentioned as 260/7121 -1835/19.2.92. However, in the left hand portion of the said bill of entry, the xerox copy of which has been furnished to the detenu, a part of the number of bill of entry has not been reflected and the first four digits 260-7 are blank as a result of some folding of the paper or again some torn portion as it appears from the xerox copy. However, the other details of the rough diamonds

uncut, unset, unmorted, unmounted etc. worth Rs. 18,02,320/- are clearly legible. Thus, in respect of none of these documents a grievance can be made about the breach to comply with the provisions of Article 22(5) of the Constitution of India. Accordingly, we reject the third contention raised by Shri Karmali. 57. The fourth contention raised is in ground Q at page 24-G. It pertains to a document supplied to the detenu being incomplete, viz. copy of the statement of Bhupendra Vakharia recorded on 12th November, 1992. While the Gujarathi version is to be found at pages 452 to 455 of the compilation of documents, the English version is to be found at pages 456 to 458. It appears that the entire Gujarathi version has been translated into English which is at pages 456 to 458. We have gone through both the versions and it appears to us that the best portion of the translated version in English, is complete though the corresponding portion in Gujarathi is missing. A perusal of the last portion namely pages 458 in English shows that it is not relating to any basic fact but refers to some of the minor details of the modus operandi adopted by the detenu while operating the bank accounts. It refers to one Salim, employee of the detenu, going to the banks and other places for operating the accounts on behalf of the detenu. We do not think that this portion constitutes basic fact or primary basic fact on which the grounds of detention have been formulated. Even assuming that while the translation is complete, the original document was incomplete we are of the view that failure to furnish part of Gujarati version of the statement of Bhupendra Vakharia recorded on 12.11.1992 does not violate the detenu's right under Article 22(5) of the Constitution. 58. The last contention raised by Shri Karmali is the newly inserted ground (p) at page 24-D. This relates to the circular dated 27.2.1996 issued by R.B.I. relating to the precautions for handling the import documents, not being placed before the Advisory Board-when the Advisory Board met on 12.4.1996 and considered the representation of the detenu. In reply, it is contended that the order of detention has been issued on 25th November, 1994 and was served on the detenu on 24th February, 1996. The circular dated 27th February, 1996 issued by R.B.I., has been produced before us at Ex.D to the petition at page 55A. It was issued by the Chief General Manager of R.B.I. Exchange Control Department Central Office, Mumbai and is addressed to all the authorised dealers in foreign exchange. The attention of various dealers in foreign exchange has been invited to certain paras of the Exchange Control Manual 1993 as to the due care to be exercised by them while handling the import document on collection basis on behalf of the importer customers with reference to their line of business financial standing, frequency of import etc. to establish genuineness of the import. It was observed that despite precautionary instructions fraud in this type of import transactions was on the increase. This had happened because authorised dealers had not only failed to observe the instruction in letter and spirit but had also not observed the banking practice of "knowing the customer" while handling the import transactions. The manner in which the detenu has prevailed upon the bank officials to make the 144 remittances abroad, leaves no doubt in our mind that the concern expressed by the Chief General Manager of R.B.I. was justified. We do not think that this subsequent development not being placed before the Advisory Board

when it considered the representation on 12th April, 1996, has in any manner vitiated the detention or continued detention of the detenu. 59. We may now sum up our conclusions indicated above. (1) If a document is a basic document or a document which contains the pith and substances of primary facts which are the basis of the grounds of detention, such a document must be communicated to the detenu in order to comply with the constitutional obligation under Article 22(5) of the Constitution of India. This, however, does not mean that it is necessary for the detaining authority to furnish to the detenu each and every document, howsoever insignificant or inconsequential it may be, and to which a mere reference is made in the grounds of detention and which can, therefore, be said to have been incorporated by reference in the grounds of detention. (2) In other words, if it transpires that a particular document is neither a basic document nor does it contain pith and substance of primary facts but is only a subsidiary details of the grounds of detention, or is an elaboration of the modus operandi adopted by the detenu, in our view, it is unnecessary for the detaining authority to furnish such a document to the detenu. If the fact which are not disclosed are not the basic facts, their non disclosure does not affect the detenu's rights under Article 22(5) of the Constitution of India; (3) It would, therefore, follow that all the basic facts on which the detaining authority has based its conclusions in making the order of detention must be communicated to the detenu so as to comply with the plain requirement of the first safeguard of Article 22(5) of the Constitution but this does mean that "other particulars" apart from the material constituting the grounds of detention which "other particulars" do not form the basis of the making of the order of detention should also be disclosed to the detenu. (4) The documents or facts to which a mere casual or passing reference is made in the grounds of detention but which do not constitute the basic material for recording the satisfaction in the grounds of detention need not be communicated to the detenu. (5) As held by the Constitution Bench of the Apex Court in Attorney General for India v. Amritlal Pranjivanlal Section 5A of the COFEPOSA is not invalid or void. It is not violative of Clause (5) of Article 22 of the Constitution, of India. Even assuming that one or some of the grounds is or are (i) vague, (ii) non-existent, (iii) not relevant, (iv) not of connected with or not proximately connected with the detenu or (v) invalid for any other reason whatsoever, the order of detention cannot be deemed to be invalid or inoperative merely on this ground and the order of detention shall be deemed to have been made after being satisfied as provided in Sub-section (1) of Section 3 of the COFEPOSA with regard to the remaining ground or grounds. (6) It is necessary for the Court to find out whether the document in respect of which a complaint of partial illegibility has been made constitutes a primary or basic document on which reliance has been placed for for mulating the grounds of detention or whether the document is more of a evidentiary detail or a corroborative subsidiary fact. (7) In the light of the conclusions indicated above, it would follow that if some of the documents furnished to the detenu alongwith the grounds of detention are partly 11 legible qua some insignificant part of the document which has not affected the right of the detenu to make a representation, this would, not be a breach of the constitutional mandate of

Article 22(5) of the Constitution of India. (8) Similarly if a document is incomplete qua a portion which does not constitute the basis or primary fact on which the grounds of detention have been formulated this by itself would not vitate the order of detention, if it can be ascertained from the other documents furnished to the detenu as to what those insignificant or subsidiary contents were qua which document is incomplete. 60. Rule is discharged.