Ahamed Nassar vs State Of Tamil Nadu And Ors on 14 October, 1999

Equivalent citations: AIR 1999 SUPREME COURT 3897, 1999 (8) SCC 473, 1999 AIR SCW 3985, 2000 CRILR(SC&MP) 65, 2000 (2) LRI 1164, 1999 (6) SCALE 539, 1999 (8) ADSC 661, 1999 SCC(CRI) 1469, 2000 CRILR(SC MAH GUJ) 65, 1999 ADSC 8 661, 1999 (10) SRJ 347, (1999) 8 JT 252 (SC), (2000) 1 EFR 153, (1999) 4 RECCRIR 84, (2000) 40 ALLCRIC 53, (2000) MATLR 348, (1999) 1 KER LT 796, (1999) 4 CIVLJ 41, (1999) 4 ALLCRILR 605, (1999) 4 CRIMES 358, (1999) 4 CURCRIR 187, (2000) SC CR R 128, (1999) 2 DMC 699, (1999) 2 HINDULR 672, (2000) 2 CURCC 118, (2000) 1 EASTCRIC 192, (2000) 1 MADLW(CRI) 311, (1999) 4 RECCRIR 559, (2000) 1 SCJ 35, (1999) 9 SUPREME 198, (1999) 26 ALLCRIR 2366, (1999) 6 SCALE 539, (1999) 3 CHANDCRIC 132, 2000 (1) ANDHLT(CRI) 193 SC

Bench: K.T. Thomas, A.P. Misra

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           CASE NO.:
Writ Petition (crl.)  166 of 1999

PETITIONER:
AHAMED NASSAR

RESPONDENT:
STATE OF TAMIL NADU AND ORS.

DATE OF JUDGMENT: 14/10/1999

BENCH:
K.T. THOMAS & A.P. MISRA

JUDGMENT:
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JUDGMENT 1999 Supp(3) SCR 657 The Judgment of the Court was delivered by MISRA, J. The petitioner has challenged the detention order dated 28th April, 1999 under Section 3(l)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the `COFEPOSA'). The detention order was passed by Shri M.F. Farooqui, Secretary to the Government of Tamil Nadu Public (SC) Department, Chennai which reads as under :

> "ORDER - Whereas the Government of Tamil Nadu are satisfied with respect to the person known as Thiru Ahamed Nassar son of Thiru Ahamed, No. 10, Mariamman Koil Street, Pudsupattinam, Ramanathapuram District now a remand pryoner in the Central Prison, Chennai that with a view of preventing him from smuggling goods in

further, it is necessary to make the following order :

> "Now, therefore, in exercise of the powers conferred by Section 3(1) (i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974), the Governor of Tamil Nadu hereby directs that the said Thiru Ahamed Nassar, son of Thiru Ahamed, be detained and kept in custody in the Central Prison, Chennai."

The detenu (Petitioner) arrived at Anna International Airport, Chennai on 12th March, 1999 by Indian Airlines flight from Singapore along with three pieces of baggage, viz., one card board carton marked by Sony VCD MHC-V 818, one card board carton marked Sony VCD SS-V 818 and one green colour `VENO' zipper shoulder bag and one transparent plastic duty free shop bag as hand luggage. He after completing his immigration formality collected his checked-in-baggage consisting of three pieces from conveyer belt No.2 and proceeded to Table No. 11, where he declared to the Superintendent in charge that he was in possession of one Video CD System, five cellular phone, 10 carton cigarettes and that the value of goods imported by him was Rs. 60,000. On suspicion the Custom officer intercepted the detenu as he suspected the detenu might be carrying contraband or electronic goods in huge quantities. On questioning, whether he was carrying any such contraband or electronic goods, he replied in negative. The custom officer not being satisfied took him to the air intelligence unit room along with the said baggage for detailed examination. Even in the presence of witnesses on being questioned he confirmed his name and that he owns three check-in-baggage and one hand bag. On examination of Sony Video CD MHC-V 818 carton, the officer found that it contained one Sony Video CD player model, the second carton Soni Video CD SS-V 818 contained one pair of speakers. The third green colour zipper shoulder bag "VENO" contained 1C) cartons of State Express 555 cigarette, each containing 400 sticks and on examining one carton it was found within, it contained two cartons of State Express 555 cigarettes each containing 200 cigarettes. He further opened and examined both the State Express 555 cigarette cartons and recovered six cellular phone all with transparent polythene cover wrapped in black carbon paper and secured with black cellophone tape from one carton and ten packets of State Express 555 cigarettes each containing 20 cigarettes from the other carton. Similarly he opened and examined the remaining nine State Express 555 cigarette cartons 400/20 capacity and recovered 10 packets of State Express 555 cigarette with 20 sticks in each and six cellular phones from each of the four above said nine State Express 555 cigarette cartons. The said officer then examined the balance of State Express 555 cigarette cartons of 400/20 capacity and recovered ten packets of State Express 555 cigarette with 20 sticks in each and seven cellular phones from each of the said five cartons. Thereafter the said officer cut open all the cellular phone wrapper and found 23 numbers Samsung SGH cellular phones, 31 numbers Bosch GSM 908 cellular phones and 11 numbers Nokia 6110 cellular phones. Then his hand bag was also opened which contained transparent polythene duty free shop bag containing 14 numbers AIWA HSGS 183 walkmen and his personal effects. So in all total goods in baggage found were 65 cellular phones, 14 AIWA walkmen, 10 cartons of State Express 555 cigarette and one Soni Video CD player.

The case of the respondent is that the goods brought in were in trade and they were not bona fide baggage goods and the petitioner grossly misdeclared the type and quantity of goods brought by

him. In fact he ingeniously concealed the cellular phones in cigarette cartons to evade detection by custom authorities and attempted to clear the goods without payment of appropriate custom duty. The aforesaid 65 assorted cellular phones, 14 AIWA walkmen, 10 cartons of State Express cigarette and one Soni video MHC-V CD system were seized under a mahazar for action under the Customs Act, 1962. The total value of goods seized is Rs. 7,16,200 (GIF) and Rs. 10,74,300 (market value) on the day of seixure. The further case is on the same day, on 12th March, 1999 he made voluntary statement before custom officers at Anna International Airport, Chennai that since his income was not sufficient so to earn, he took a passport with the help of his friend to import goods to Chennai and to sell them in Burma Bazar. On 7th March, 1999 he went to Singapore and from the income earned there bought some walkmen and one VCD and when he was about to leave Singapore one Seeni Mohamed met and introduced himself and gave some cigarette cartons and five cellular phones at Kualampur to be carried to India and for which in turn he was paid his air ticket. These goods were contained in a green colour VENO zipper bag. The said friend informed the detenu that on his arrival at Chennai he should carry the said green colour VENO zipper bag outside the air port where it should be handed over to the person identifying him who shall pay him Rs. 15,000. The case of the respondent as disclosed in the counter affidavit is, under Section 11(2)(u) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992, import of cellular phones and electronic goods by way of concealment and misdeclaration of its value with an attempt to evade duty, renders such goods liable for confiscation under Section 111(d), (1) and (m) of the Customs Act. The petitioner was arrested on 13th March, 1999 and produced before the Additional Chief Metropolitan Magistrate, E.O.-II, Chennai, who remanded him to judicial custody till 26th March, 1999. The aforesaid detention order was served on the detenu while he was in the Central Prison, Chennai on 28th April, 1999.

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

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

> (a) Detenu's letter dated 23rd April, 1999 addressed to the detaining authority which was given to the Jail authorities on the same day at 1745 hrs.
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> (b) The letter dated 19th April, 1999 sent by his advocate to the customs authority was also not placed before the detaining authority.

Next he submits, on account of delay in considering detenu's representation dated 21st May, 1999 both by the State Government and the Central Government, the detention order is liable to be set aside. For this he submits the following dates :

> (a) Representation of the detenu to the State Government is dated 21st may 1999 which was received by the Slate Government on 22nd May, 1999.

After receiving it, remarks were called for on 24th May, 1999 from the sponsoring authority which was received only on 27th May, 1999, The delay pointed out is two days for the dales 25th and 26th May, 1999.

(b) Representation dated 21st May, 1999 to the Central Government was received on 25th May, 1999 and Central Government called for comments from detaining authority only on the 1st June, 1999. Submission is, this delay could have been eliminated if the same were called through `FAX' or by `E- Mail'.

The next submission is, the subjective satisfaction recorded by the detaining authority, that there was likelihood of detenu being released on bail is not based on any factual basis, which shows non-applying of mind by the detaining authority. He submits, the bail application of the petitioner dated 1st April, 1999 was dismissed by the Addl. Chief Metropolitan Magistrate on 12th April, 1999, and no other bail petition was either pending or brought to the notice of the detaining authority when it passed the detention order on 28th April, 1999. Finally, he submits that the detaining authority failed to take note that the petitioner was arrested under Section 104 of the Customs Act for an offence under Section 135 of the same Act and the conviction for which is only seven years' imprisonment. Hence, there was no compelling reason to detain the detenu under the COFEPOSA. The first submission for the detenu is that there was delay in considering the representation of the detenu by the State Government. It arises out of the following facts. Detenu's representation dated 21st May, 1999 was received by the State on 22nd May, 1999, remarks was called from the sponsoring authority on 24th May. 1999 which was received back on 27th May, 1999. The delay is said to be for these two days, namely 25th and 26th May, 1999. The alleged delay of two days, viz.. 25th and 26th May, 1999 which is the time taken by the sponsoring authority to send its comment. Though both the authorities were in the same city it cannot be held that this delay is attributable for the delay in disposal of detenu's representation. In a given case, even few days delay may be fatal while in another set of circumstances a longer delay may still be held to be for valid reasons. Expeditious disposal of any representation only means which could be expeditiously disposed of by the concerned authority but should not be with any unexplained delay or delay through carelessness. This would depend on the facts and circumstances of each case. In Mst. L.M.S. Ummu Saleema v. Shri B.B. Gujarat and another, [1981] 3 SCC 317 (para 7), the Court held that the explanation of each day delay is not a magical formula. It only means it should be done with utmost expedition :

> "The time imperative can never be absolute or obsessive. The occasional observation made by the Supreme Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu." (Para 7) In K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and Others & State of Karnataka and others, [1991] 1 SCC 476, the court held :
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> "The words `as soon as may be occurring in Clause (5) of Article 22 reflects the concern of the framers that the representation should be expeditiously considered

> and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circustances of each case. There is no period prescribed cither under the Constitution or under the concerned detention law within which the representation should he dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation."

Within this sphere of legal premise we do not find that there was any callousness or undue delay caused by the State Government in disposing of detenu's representation. So far consideration of the detenu representation by the Central Government the relevant facts are, that the detenu sent his representation on 21sl May, 1999 from Chennai which was received in Delhi on 25th May, 1999 and on the same day comments were called from the sponsoring authority at Chennai. Reply was sent by the sponsoring authority on 28th May, 1999 which was received in Delhi on 31st May, 1999. The same was placed before the Deputy Secretary, Central Government on 1st June, 1999 who called for the comment of the detaining authority. This comment was sent by the detaining authority on the 10th June, 1999 which was received by the Central government on 14th June, 1999. On 15th June, 1999 it was submitted to the Special Secretary and on the same day it was rejected and information was sent to the detenu also on the same day. The detenu on these facts presses that there is delay in considering his representation. The first is between 25th May, 1999 and 28th May, 1999 and then two days delay in receipt of the same by the Central Government which is on 31st May, 1999. Next the delay is of nine days between 1st June and 10th June. On the 1st June, 1999, the Central Government (Deputy Secretary. COFEPOSA) called for the comment from the detaining authority and on 10th June, 1999 reply was sent by the State Government. Similarly three days delay is said to be when the same was received by the Central Government on 14th June, 1999. In considering this delay it has to be kept in mind this is the communication period as the two authorities are placed at long distance in two different cities, one is in New Delhi and the other is in Chennai. The delay is defended to be on account of delay by the postal authorities in communicating the letters. The submission is, when liberty of an individual is affected, faster mode of communication should have been adopted, if necessary, il should have been sent by Air or through a special messenger by flight. This in our considered opinion is too far fetched to be accepted. The liberty of an individual under Constitution is very sacrosanct and there is constitutional obligation cast on the concerned authorities but this liberty should not be so stretched to such unreasonable extent to force communications to be sent through special messenger by air. We have to keep In mind that mode of communication for the statutory authorities has to be in the mode prescribed which has to be reasonable. It has been stated and we have also found from the file placed before us that the mode of these communications were through speed post. This could not be construed as callous, slack or casual disposition of his representation. For the respondent it was stated from the records that the communication between the Central Government at New Delhi and sponsoring authority and detaining authority at Chennai was through speed post. The stated delay was on account of vagaries of the postal department. It is not attributable to the States. Hence on the facts and circumstances of this case, it is not possible to hold, there was any delay in the disposal of detenue's representation by the Central Government. In our considered opinion there was no delay in consideration of detenu's representation both by the State and the Central Government.

Reliance has been placed on behalf of the detenu in Venmathi Selvam (Mrs.) v. State of T.N. and Anr., [1998] 5 SCC 510. In this case the Court held :

> "Though the delay is not long, it has remained unexplained. Though the delay by itself is not fatal, the delay which remains unexplained becomes unreasonable. In spite of this well settled legal position the State Government has failed to explain satisfactorily that it had dealt with the representation of the detenu as promptly as possible."

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

In Rajammal v. State of T.N. and Anr, [1999] 1 SCC 417, the Court held :

> "The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned." In this ease, the Court held that though there is explanation for delay till 9th February, 1998 but no explanation had been given for the delay which occurred thereafter that is to say till 14th February, 1998. These decisions render no help to the detenu. The present case is not such a case. The delay attributed was caused in postal communications. So such a short. delay may not have much bearing. What is relevant is, there should be reasonable explanation for such delay. How the authorities has dealt with the matter? If it was casual, neglect, keeping relevant papers immobile without any reasonable cause are attributable to assess delay. But delay on account of vagaries of or on account of inefficiency of postal or communicating agencies cannot in normal circumstances be taken as inexcusable delay either by the sponsoring or detaining authority or the concerned State authorities in disposal of detenu's representation.
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> Mr. R. Mohan learned counsel for the detenu submitted that material and vital documents which have bearing on this subjective satisfaction of the detaining authority were not placed before him. Reference was made to the detenu's letter dated 23rd April, 1999, addressed to the detaining authority, delivered to the jail authorities on the same day at 1745 hrs., and letter dated 19th April, 1999 of his advocate, addressed to the sponsoring authority. Both these letters were not placed before the detaining authority. These letters refer, apart from detenu's retraction from his earlier confession dated 12.3.1999, the information which detenu gave to the custom officers that he was in possession of non-prohibited and dutiable goods for which he is ready to pay its duty. Respondent's reply with reference to letter dated 23rd April, 1999 is that this letter was given to the jail authority late in the evening on

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

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

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

About sending the letter to the detaining authority it was submitted that the Secretariat to which the letter was sent, was situated at a short distance and hence it should have been sent through a special messenger. Reply is that the same was dispatched through speed post which is the prescribed and acknowledged mode for sending such letters. It is true in a given circumstance, where urgency is spelt out an officer may opt for such a recourse, but where dispatch is through a prescribed mode, which is more expeditious than normal mode, it cannot be attributed that the authorities were cither callous or careless or causal in its dealing.

So far stand of the respondent with reference to the advocate's letter dated 19th April, 1999 it cannot be held to be a justifiable stand. These technical objections must be

> shun where a detenu is being dealt under the preventive detention law. A man is to be detained in the prison based on subjective satisfaction of the detaining authority. Every conceivable material which is relevant and vital which may have bearing on the issue should be placed before the detaining authority. Sponsoring authority should not keep it back, based on his interpretation that it would not be of any help to a prospective detenu. Decision is not to be made by the sponsoring authority. The law on this subject is well settled, a detention order vitiates if any relevant document is not placed before the detaining authority which reasonably could affect his decision.
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> In Ashadevi wife of Copal Ghermal Mehta (Detenu) v. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Anr., [1979] 1 SCC 222, the Court held :
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> "If material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the detaining authority, it would vitiate its subjective satisfaction rendering the detention order illegal."

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

In Ayya alias Ayub v. State of U.P. and Anr., [1989] 1 SCC 374, the Court held :

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

In Sita Ram Somani v. State of Rajasthan & Ors., [1986] 2 SCC 86, the court held :

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

The aforesaid two letters, viz., dated 23rd April, and 19th April, contains factual assertions not only retraction of his earlier alleged confession but other matters. So far the retraction of confession by

the detenu, we accept the stand of the respondent that the same was also recorded in the bail application dated 1st April, 1999 of the detenu which was placed and considered by the detaining authority. But in these letters the stand of the detenu, was that the seized goods are not prohibited goods which passed through the red channel, for which the detenu offered to pay the duty but instead, the officer concerned without listening proceeded to arrest him. It is true, the respondent case is that the detenu brought these goods in trade which were not bona fide baggage and were misdeclared both the type and quantity of goods were found concealed (65 cellular phones in 10 cigarette cartons of State Express 555) to evade detection and payment of custom duty. But this stand is on merits. It is not necessary in these proceedings to go into its merits and demerits.

The question is not whether the second part of the contents of those letters was relevant or not but whether they were placed before the detaining authority for his consideration. There could be no two opinions on it. It contains the very stand of the detenu of whatever worth. What else would be relevant if not this? It may be that the detaining authority might have come to the same conclusion as the sponsoring authority but its contents are relevant which could not be withheld by the sponsoring authority. The letter dated 19th April, 1999 it reached the sponsoring authority and reached well within time for it being placed before the detaining authority. There is obligation cast on the sponsoring authority to place it before the detaining authority, which has not been done. Even the letter dated 23rd April, 1999 which reached the Secretary concerned at 3.00 P.M. on 26th April, 1999 which was much before the formal detention order dated 28th April, 1999. The Secretary concerned was obliged to place the same before the detaining authority. Respondent authority was not right in not placing it as it contains not only what is already referred to in the hail application dated 1st April, 1999 hut something more.

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

In the case of Mohd. Shakeel Wahid Ahmed v. State of Maharashtra and Ors., [1983] 2 SCC 392, also detention was challenged as relevant material came into existence after signing of the detention order but before issuance of formal order. The advisory board opined in the case of another detenu Shamsi that there was no sufficient cause for Shamsi's detention but this material was not placed before the detaining authority. The defence taken by the State was that the detention order is dated 8th October, 1981 while advisory board's opinion is dated 19th October, 1981. The constitution bench of this Court rejected this contention and held :

> "The explanation offered by Shri Capoor as to why the opinion of the Advisory Board in Shamsi's case was not placed before him is that the report of the Advisory Board in Shamsi's case which is dated October 19, 1981, was not in existence when he `formulated and ordered to issue the detention order against the petitioner' in this case. We see quite some difficulty in accepting this explanation. In the first place, the fact that it was on October 8, 1981 that Shri Capoor had directed the detention of the petitioner is a matter of no consequence. The order of detention was issued, that is to

> say passed, on November 7, 1981 and we must have regard to the state of circumstances which were in existence on that date. Shri Capoor seems to suggest that the Advisory Board's opinion dated October 19, 1981 came into existence after he had made up his mind to pass an order of detention against the petitioner on October 8, 1981 and, therefore, he could not take, or need not have taken, that opinion into account. The infirmity of this explanation is that the order of detention was passed against the petitioner on November 7, 1981 and the Advisory Board's opinion in Shamsi's case was available to the State Government nearly three weeks before that date."

The above was a case where detention order was signed on 8th October hut formal order was only signed on 7th November, 1981. The relevant material, viz., opinion of the Advisory Board came into existence on 19lh October, 1991. i.e., between the aforesaid two dates. Non-placement of the opinion, which came into existence after signing of detention order before the detaining authority was held to vitiate the detention. Thus issuance of the formal order is held to be relevant date upto which, if any, relevant material comes in possession of the concerned authority has to be placed before the detaining authority. In the present case, we find the letter of detenu dated 23rd April, 1999 was received on 26lh April, 1999, i.e., before issuance of formal detention order dated 28th April, 1999. It was incumbent for the Secretary concerned to have placed it before the detaining authority. So we conclude, non-placement of those two letters which were relevant, vitiates the impugned detention order.

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

In interpreting any provision of Preventive detention law, its prcamble and its objectives have to be kept in mind. The Preamble of COFEPOSA is :

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

The object and reasons of this Act is also incorporated therein;

> "Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State;
>
> And whereas having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude and clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith;"

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

In order to achieve this objective, in the national interest an obligation is cast on the State even to curtail the most sacred of the human rights, viz., his personal liberty. The source of power to curtail this, flows from Article 22 of the Constitution of India within the limitation as provided therein. Every right in our Constitution within its widest amplitude is clipped with reasonable restrictions. Right under Article 15 not to be discriminated on grounds of religion, race, caste, sex, etc., is clipped through its sub-clauses (3) and (4) while making provisions for women, children, socially and educationally backward classes, Scheduled castes and Schedule Tribes respectively. Article 16 creates right for equality of opportunity in the matter of public employment which is curtailed through its sub-clauses (3), (4), (4A) and (5) by enabling the Parliament to make law confining to a class or classes for employment to an office even prior to such employment, permitting reservation in favour of backward class, Scheduled castes and Scheduled tribes or in the cases of religious denominational institution. Each of the most solemn rights of any citizens is cloaked with reasonable restrictions under various sub-clauses of Article 19. The protection of life and personal liberty enshrined in Article 21 itself contains the restriction which can be curtailed through the procedure established by law, which of course has to be reasonable fair and just. Article 22 confers power to deprive of the very sacrosanct individual right of liberty under very restricted conditions. Sub-clauses (1) and (2) confers right to arrest within the limitations prescribed therein. Sub-clause (3) even erases this residual protective right under sub-clauses (2) and (3) by conferring right on the authority to detain a man without trial under the preventive detention law. This drastic clipping of right is for a national purpose and for the security of the State.

Similarly, Article 301, Chapter XII of the Constitution confers right to trade, commerce and intercourse freely through out the territory of India but succeeding Articles, viz., Articles 302, 303 and 304 slice that absolute freedom in various grades and degrees. Each of such checks and clippings in the absolute right of an individual is made within the sphere of certain reasonableness to give preference, when in conflict with the collective right of and for the gain of the society. Man is

a social animal who dedicates his works to enrich the social coffer for enriching social development. On one hand individual rights are well recognised but when it makes dent on society, affecting public right it gives way. This is the pattern of our Constitution. So far as individual rights are concerned they are recognised and fully protected but such right is curtailed when it tramples on community right or right of public at large. It is severely curtailed when it tramples with considerable magnitude for self gain, deleteriously effecting the national interest by dealing such person sternly through preventive detention without trial, for a specified period within the limitation provided therein. So in any organised society there can be no right in absolute term.

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

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

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

Learned counsel for the detenu relies on Dharmendra Suganchand Chelawat through his sister Km. Archana Chelawat & Suganchand Kan-naiyyalal Chelawat through his daughter Km. Archana Chelawat v. Union of India & Ors., [1990] 1 SCC 746, in this case the Court held :

> "In the present case there was no material in the grounds of detention showing that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from

> custody on that day. On the other hand the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the Narcotic Drugs and Psychotropic Substances Act, 1985. It cannot, therefore, be said that there was a reasonable prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention was passed on October 11, 1988"

In the above, it was a case under Narcotic Drugs and Psychotropic Substances Act, 1985, therefore, it cannot be said that there was a reasonable prospect of the appellant being released on bail.

In Binod Singh v. District Magistrate, Dhanbad, Bihar and Ors., [1986] 4 SCC 416, the detenu was in detention when order of detention under Section 3(2) National Security Act, 1980 was served on him. There were criminal cases against him and in one of them the offence was Section 303 of the IPC. When the order of detention was passed the petitioner had not surrendered but when it was served petitioner had already surrendered. In this background subjective satisfaction of the order of detention was challenged as there was no likelihood of the detenu being released on bail. This Court held :

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

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

In Rivadeneyta Ricardo Agustin v. Government of the National Capital Territory of Delhi and Ors., [1994] 1 Supp. SCC 597, reliance is placed on the following passage which approved the case of Kamarunnissa v. Union of India, [1991] 1 SCC 128 held :-

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

The above decision is strongly relied by learned counsel for the detenu as detention therein was also under Section 3 of the COFEPOSA pertaining to an offence under Section 135 of the Customs Act. It was held that the State could not bring to the notice any material indicating that release of the petitioner was imminent or there was a likelihood of his being released. In that case the bail

application was finally dismissed on June 9, 1992 and hence there was no scope for presuming a likelihood of his being released on bail. Further significantly proposal for the detention was sent on May 22, 1992 but the authority concerned passed the order only on August 18, 1992, after several months without appraising of the facts prevailing in the middle of the August 1992. The above decision is, therefore, distinguishable on facts. The Court in the above case records :

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

We have already observed in the matter of testing satisfaction of any detaining authority, it has to be tested on the facts and circumstances of each case. Examining the facts in the present case, we find in para 7 of the counter affidavit filed on behalf of respondent No.l (State) by Mr. S. Retnaswamy, Deputy Secretary to Government, Public Department, Government of Tamil Nadu, Chennai-9 it is stated :

> "....It is further submitted that the detaining authority has considered the bail application of the detenu dated 1.4.1999 and arrived at the subjective satisfaction that there is likelihood of the release of the detenu on bail and hence it cannot be staled that there is non-application of mind on the part of the detaining authority." So before the detaining authority, there existed not only order dated 12.4.1999 rejecting his bail application but the contents of the bail application dated 1.4.1999. The averment made therein are relevant material on which subjective satisfaction could legitimately be drawn either way. Thus in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction based on the contents of the bail application keeping in mind the circumstance that there is likelihood of detenu being released on bail. Merely because no bail ap-plication was then pending is no premise to hold that there was no likelihood of his being released on bail. The words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case, if it is moved in future, is decided. The word "likely" shows it can be either way. So without taking any such risk if on the facts and circumstances of each case, the type of crime to be dealt with under the criminal law, including contents of the bail application, each separately or all this compositely, all would constitute to be relevant material for arriving at any conclusion. The contents of bail application would vary from one case to the other, coupled with the different set of circumstances in each case, it may be legitimately possible in a given case for a detaining authority to draw an inference that there is likelihood of detenu being released on bail. The detention order records :-

> "The Administrator of the National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail application in the Court(s) after June 9, 1992 but nothing prevents you from moving bail applications and possibility of your

> release on bail cannot be ruled out in the near future. Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released."

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

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

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