Mariamma vs Union Of India (Uoi) And Ors. on 13 August, 1993

Equivalent citations: 1993(44)ECC197

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Bench: M. Jagannadha Rao

JUDGMENT

M. Jagannadha Rao, C.J.

1. 280 silver bricks worth Rs. 7.37 crores-odd weighing 9,332.418 Kgs. were recovered by the Customs Authorities and three persons have been detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called the "COFEPOSA Act"). In O.P. No. 4106 of 1993, the petitioner is the mother of one of the detenus, M.L. Kunjumon, while the detenus in the other two writ petitions, O.P. Nos. 5748 and 5750 of 1993 are respectively Showkath Ali and Mohammed Ali. Points arising in the three cases are common, but it will be convenient to deal with O.P. 4106 of 1993 separately in one part and the other two O.Ps. separately in the other part.

2. In O.P. No. 4106 of 1993, the detenu, Kunjumon, is the owner of the house, which was hired by the persons who brought the contraband silver from abroad and the same was loaded into trucks at his residence.

3. In this O.P. No. 4106 of 1993, the detenu, Kunjumon, has been detained under the detention order Ext. P1 dated 26.11.1992 issued by the second respondent (Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, Central Secretariat, New Delhi). When detention order was issued, the detenu, Kunjumon, was in prison, having been arrested in violation of the provisions of the Customs Act earlier, and bail having been refused. The grounds of detention, Ext. P2, was served on 30.11.1992 on the detenu. A reference was made to the Advisory Board at New Delhi on 16.12,1992. The detenu made a representation, Ext. P3, on 2.1.1993 to the second respondent stating that certain documents given to him along with the grounds of detention were illegible, and raising various other grounds. The representation was forwarded to the Advisory Board at New Delhi on 18.1.1993. The Advisory Board met on 5.2.1993. The rejection order, Ext. P4, passed by the Union of India, was received on 9.2.1993 by the detenu. An order of confirmation was passed under Section 8(f) of the COFEPOSA Act on 26.2.1993 as per Ext. P5. The present writ petition was filed by the mother of the detenu, Kunjumon, on 23.3.1993 for issue of a writ of habeas corpus.

4. In the grounds of detention, Ext. P2 served on Kunjumon, the owner of the house hired by the persons who brought the contraband silver from abroad, it is stated as follows: At about 2.30 A.M. on 14.10.1992 vehicle bearing registration No. KED 4899 arrived from Aroor side at a spot along the by-pass road of National High Way 47 (from Aroor to Edappally) and was stopped by the Customs officials. But the driver drove the vehicle towards Edappally side very fast. The officers followed the vehicle and saw the vehicle KED 4899 speeding away and taking a turn towards Away side. They fired three rounds in the air and thereafter the said vehicle came to a halt. The officers along with their witnesses approached the vehicle, and on enquiry the driver identified himself as Mohammed AH, the detenu in O.P. No. 5750 of 1993 hailing from Mannarghat in Palghat District. On examination of the vehicle, the officers found that there were fresh fish and ice bars in plastic trays and beneath that, there were heavy materials wrapped in gunny and having gunny holders kept beneath the fish trays. The vehicle was taken to the office of the customs authorities. In the meanwhile they spotted another DCM Toyota pick up van with registration No. KED 9819, and was stopped, and the driver was identified as Showkathali, the detenu in O.P. No. 5748 of 1993. On examination of that vehicle also, it was found that there were certain heavy materials wrapped in gunny with gunny holders. This vehicle was also taken to the office of the customs authorities. Thereafter the customs officers along with their witnesses and the two vehicles proceeded to the residence of Kunjumon, (detenu in this O.P. No. 4106 of 1993) at Mukkath House, Aroor Panchayath. The officers noticed a tempo parked in front of that house bearing registration No. KL-13/9540. The driver identified himself as Rajesh. The said vehicle was also spotted with certain heavy objects packed with gunny and the officers then proceeded along with the witnesses inside the residential premises of Kunjumon and saw two persons standing behind the house and on enquiry the detenu in this O.P. No. 4106 of 1993 identified himself as Kunjumon and another person identified himself as Suresh, the residents of the house. The officers then proceeded to the bank of the backwaters adjoining the compound of the house where a country boat was seen with some persons inside it. On seeing them, the persons inside the country boat jumped into the backwaters and escaped. When enquired, the detenu, Kunjumon, informed that those persons had come to handle the silver bricks and were waiting for their labour charges. He also confessed to the officers that the country boat lying there was used for bringing the silver bricks. Thereafter, the officers proceeded with the three vehicles to the office of the Directorate of Anti-Evasion, Ernakulam North. In vehicle KED 4899 they discovered 50 plastic trays containing 140 heavy objects, and a mahazar was prepared. There were totally 140 such silver bricks weighing 4642.688 Kgs. Search of the vehicle KED 9819 resulted in the recovery of 30 plastic trays and 115 gunny bags kept beneath them, and they contained 115 silver bricks weighing 3843.987 Kgs. Search of the Matador tempo van with registration No. KL-13/5940 resulted in recovery of 25 gunny bags with 25 silver bricks weighing 845.743 Kgs. In all 280 silver bricks were recovered from the three vehicles with a total weight of 9332.418 Kgs. valued at Rs. 7.37 crores-odd. They were seized under the provisions of the Customs Act for further action along with the vehicles. Mohammed Ali, the detenu in O.P. No. 5750 of 1993, gave a statement dated 14.10.1992 giving various details. He gave a further statement on 15.10.1992. In the latter statement he stated that silver bars were loaded in his lorry from the house of Kunjumon on the western side of the Vembanad Kayal, and it was loaded from the backwaters. Some people while loading silver were there along with Nishad, who is also known as Noushad, Nishad was introduced to him four months earlier. He went to Knozhikode as a broker for wood and he met Nishad at a lodge. Nishad promised to finance for the purchase of lorry by Mohammed Ali,

and gave Rs. 50,000/- and thereafter this lorry was purchased. Showkathali, the detenu in O.P. No. 5748 of 1993 gave a statement on 14.10.1992 stating that KED 9819 was parked in front of Kunjumon's house, near Aroor Police Station. Thereafter he returned to his lodge. By 11 P.M. he reached the place where he left the vehicle and found that nothing was loaded in the vehicle, and he waited on the road side. At about 3.30 A.M. Nishad informed Showkathali that the vehicle had been loaded and that he should take the vehicle and proceed to Calicut. Plastic trays containing ice and fish were seen in the vehicle. He drove the vehicle along the National Highway and got into the bye-pass and thereafter the vehicle was stopped. Rajesh also gave a statement on 14.10.1992. All these persons were arrested on 15.10.1992 under Section 104 of the Customs Act and were produced before the Addl. Chief Judicial Magistrate, Ernakulam, who remanded all of them to judicial custody till 29.10.1992. The remand was further extended upto 7.12.1992. On 15.10.1992, the residence of Kunjumon was searched. Two canoes and Yamaha Engine valued at Rs. 43,000/- used for transporting the smuggled silver bricks from fishing trawler "Simla" to the shore were seized on 15.10.1992 under a mahazar under the provisions of the Customs Act, 1962. The fishing trawler "Simla" valued at Rs. 20 lakhs used to smuggle in contraband silver under seizure was seized under a mahazar on 15.10.1992 which was found abandoned in a boat jetty situated adjacent to a firm named "Island Sea Food" at Marukkumpadar in Ernakulam District. Thereafter one white Maruthi car bearing Reg. No. KRN 1904 which was abandoned by its owner and which eluded seizure on 14.10.1992 was located at Columbus road at Palluvathy on 15.10.1992, and on opening the vehicle, which was locked, photostat copies of registration certificate, visiting cards of Haji M. Abdulla Abdu Rahiman, cash bill issued to Abdulla Haji of Kolayal, disc for tax receipt, railway ticket, bits of paper with writing 26231 Gijo in it, medicine prescription, hotel receipt of Seven Stars Periyar Hotel, a Welcome card of Hotel Abad Plaza, Safari Suit, a redish brown coloured wooden box containing one sextant with its booklet and nautical Almanac, and Nautical table were recovered. It was noticed that sextant was one used by ocean going vessels. One Augustine, M.A. , gave a statement on 16.10.1992 to the customs authorities that he has a yacht with a capacity load of one and a half tonnes ice and he has 8 HP Yamaha engine, and that on 12.10.1992 his brother's son, Kunjumon, approached him and took his yacht and Yamaha engine for transporting fish, and that a few days earlier, Kunjumon had approached him and offered Rs. 100/- as hire for a day, and that in the forenoon, of 12.10.1992 Kunjumon had come and taken away yacht and Yamaha engine. He further stated that he had come to know on 14.10.1992 that some smuggled goods were landed at Aroor and his yacht was used for landing. The detenu, Kunjumon, and others filed bail application before the Addl. Chief Judicial Magistrate, Ernakulam on 16.10.1992 denying their involvement in the whole transaction, and the bail application was rejected on 29.10.1992. Various other statements were obtained from a large number of persons, as detailed in the grounds of detention. It was then stated in paragraph 41 of the grounds of detention that the detaining authority had considered the retractions contained in Kunjumon's bail application, application on appeal before the Hon'ble High Court of Kerala, and also that K. Showkathali, K. Mohammed Ali, K.P. Rajesh and K.P. Abdul Majeed. It was also stated that the detaining authority had carefully considered the retraction letter addressed to Collector of Central Excise and Customs, Cochin by Kunjumon, K.P. Rajesh and K.P. Abdul Majeed, Vis-a-vis the records, and found the retractions to be merely an after thought and therefore rejected the same. Then after referring to the silver recovered under the provisions of Sections 2(e) and 2(39) of the COFEPOSA Act, it was stated in paragraph 43 of the grounds of detention that the detaining authority was satisfied that Kunjumon was engaged in abetting and smuggling of goods, and that the

detaining authority was aware that Kunjumon was in judicial custody, and that the possibility of Kunjumon getting enlarged on bail could not be ruled out. Keeping in view the detenu's role in the case, the detaining authority was satisfied that in the event of enlargement on bail, unless prevented, Kunjumon would continue to involve himself in the prejudicial activities in future. Therefore, notwithstanding the action that may be taken against Kunjumon under the provisions of the Customs Act, 1962, during the course of adjudication and prosecution proceedings, the detaining authority was satisfied that it was necessary to detain Kunjumon under the COFEPOSA Act, 1974 with a view to preventing him from abetting the smuggling of goods in future. It is further stated in paragraph 44 of the grounds of detention that the above subjective satisfaction has been arrived at by considering the documents mentioned in the annexed list and copies of the same were enclosed with their transaction in Malayalam wherever necessary. It is further stated in paragraph 45 that the detaining authority considered it to be against public interest to disclose the source of information. In paragraph 46 it was further stated as follows:

> You have a right to make representation to the Central Government, Detaining Authority and Advisory Board. If you wish to make a representation against your detention to the Central Government (Secretary to the Government of India, Ministry of Finance, Department of Revenue)/Detaining Authority, you may do so by addressing it to the Secretary/Joint Secretary (COFEPOSA), Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th floor, 'B' Wing, Janpath Bhavan, New Delhi 110 001 and forward the same through the Supdt. of the prison wherein you are detained. If you desire to make any representation to the Advisory Board, you may address it to the Chairman, Central Advisory Board (COFEPOSA), High Court of Delhi, Shershah Road, New Delhi and forward the same through the Supdt. of the Prison, wherein you are detained. You are further informed that you shall be heard by the Advisory Board in due course, if the Board considers it essential to do so, or if you so desire.

5. Learned Counsel for the petitioner in O.P. No. 4106 of 1993, Sri. M.K. Sukumaran Nayar, initially contended that a reading of paragraphs 41 and 42 of the grounds of detention, Ext. P2. dated 30.11.1991 (sic), would show that the detaining authority mechanically came to the conclusion of detaining Sri. Kunjumon, the owner of the premises at which the silver bars were loaded into the vehicles. According to htm, Mr. Kunjumon had merely agreed to give the premises on rent for Rs. 1,500/- per month and that Kunjumon knew nothing about the silver bars or their loading or unloading. The observation in paragraph 43 of the grounds of detention that he abetted the smuggling is also unfounded as there is no material in that behalf. Therefore, there is no question of smuggling within the meaning of Section 2(e) of the Act.

6. We are unable to agree with learned Counsel. The statement given by the detenu has to be read with paragraph 6 of the grounds of detention as well as other paragraphs wherever reference is made to Kunjumon. Further the entire transaction of bringing the silver by the vessel "Simla", making arrangements for its unloading through boat at the place of Kunjumon and subsequently loading them in various vehicles have to be treated as an integral whole and paragraphs 41 and 42 cannot be read in an isolated manner. The material upon which the detaining authority relied upon,

as set out in paragraph 6 of the grounds of detention, shows that earlier Kunjumon along with certain labourers went in a boat on 13.10.1992 to the vessel "Simla" earlier and later came back with the labourers. Subsequently, on 13.10.1992, "Simla" came within a furlong of his house and the same workman and other workman took the boat belonging to his uncle, Sebastian, and went to the vessel and brought the boxes and these were loaded at the premises in the entire night. He asked Lijan what the boxes contained, and was told that they contained silver bars. Kunjumon therefore knew that silver bars were brought from a vessel by using his uncles's boat and were brought to his house and were loaded into the vehicles. The statement of Kunjumon. would disclose that throughout the entire operations, Kunjumon was present at the site along with the workmen from 9 P.M. till 3 A.M. If he was merely a landlord who had rented the premises and had nothing to do with the bringing in of the silver bars from the vessel "Simla" to his house and if he had nothing to do with the loading of the same into the vehicles, there was no reason as to why he should have earlier gone with workmen to inspect the vessel "Simla" and then came back and later sent the workmen along with a boat of his uncle to bring the silver and then be present throughout the period when the silver was loaded into the vehicles till about 3 A.M. in the morning, throughout the night. These and other circumstances weighed with the detaining authority in coming to the conclusion that Kunjumon was actively involved and abetted the smuggling. It cannot be said that there is no material to support subjective satisfaction, nor can it be said that the detaining authority did not apply its mind.

7. The next submission was that some of the documents furnished along with the grounds of detention were not legible, as pointed out in Ext. P3 representation dated 2.1.1993. We have seen the documents and we are unable to agree that these documents are not legible. Further, the detenu had the benefit of the other corroborative material in which the details of these documents are clearly set out in Malayalam such as mahazars, etc., and, therefore, there is no difficulty in understanding the contents of the particular set of documents which are claimed to be illegible. This contention is rejected.

8. The more important question argued by Sri. M.N. Sukumaran Nayar in O.P. No. 4106 of 1993 (and by Sri. B. Kumar in the connected O.Ps., O.P. Nos.5748 and 5750 of 1993) is in regard to the interpretation of Section 11 of the Act. In the ensuing discussion, we are using the words "detaining authority" while describing the officer to whom powers under Section 3(1) are delegated for purposes of detention.

9. It is contended by both counsel that on the facts of this case the detenu in this case (as well as the detenus in O.Ps. 5748 and 5750 of 1993) had sent representations to the detaining authority and that instead of the said authority disposing of the same, he sent the representation to the Central Government, and the Central Government rejected the representations subsequently. It is contended that under Article 22(5) of the Constitution of India, there is a constitutional duty imposed not only on the Central Government (or the State Government, as the case may be) but also on the detaining authority to consider the representations independently. In fact, if the detaining authority does not dispose of the representations independently and passes the same on to the Central Government, as in this case, and then the Central Government rejects the same, the valuable right of the detenu to submit an independent representation to the Central Government is lost. This is the contention of learned Counsel Sri. M.N. Sukumaran Nayar and also Sri. B. Kumar. It is said

that under Section 21 of the General Clauses Act (which is referred to in Section 11 of the COFEPOSA Act) the detaining authority has a constitutional duty to himself consider the representation and he cannot pass it on to the Central Government. Strong reliance in this behalf is placed on the decision of the Supreme Court in Amir Shad Khan v. L. Hmingliana, , as well as on the decisions in Santosh Anand v. Union of India, , Ibrahim Bacha Bafan v. State of Gujarat, , and Pushpa v. Union of India, . Reference is also made to the recent decision of the Supreme Court in Naval Shankar Ishwarlal Dave and Anr. v. State of Gujarat and Ors. .

10. On the other hand, it is contended by learned Addl. Central Government Standing Counsel, Sri. George Poonthottam, Sri. T.K. Venugopalan and Sri. Ajay Kumar that the decision of the Supreme Court in State of Maharashtra v. SushilaMafatlal Shah. is a direct case on the point rendered by a Bench consisting of two learned Judges and it was there held that the decisions in Santosh Anand's case, and Pushpa's case, were per incuriuni. The other arguments are also refuted.

11. We shall refer to the provisions of Article 22(5) of the Constitution of India, and Sections 3 and 11 of the COFEPOSA Act and finally to the provisions of Section 21 of the General Clauses Act, 1897 in the context of the three Judge judgment in Amir Shad Khan's case, , and the two Judge judgment in Sushila Mafatlal Shah's case, .

12. Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, then "the authority making the order" shall, as soon as may be, communicate to such person, the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. The article while imposing a constitutional obligation on the "authority" to afford an opportunity of making a representation does not, as pointed out by the Supreme Court in several cases, specify to whom the representation is to be made by the detenu.

13. COFEPOSA Act, which is a law made by Parliament in respect of preventive detention permits in Section 3, the State and Central Governments to pass orders relating to preventive detention. In addition, Section 3 permits the State or the Central Government, as the case may be, to specifically empower an officer who is not to be below a particular rank, to issue an order of preventive detention. While providing a right of representation under Section 11 before the State or the Central Government, in case of orders passed by the respective officers of the State or the Central Government, it is also provided that even in the case of detention by a State Government, or by its officer, the detenu can represent to the Central Government seeking revocation of the order of detention. There is also a reference to Section 21 of the General Clauses Act, 1897, in the opening part of Section 11. Section 11 provides as follows:

> Section 11. Revocation of detention orders:-- (1) Without prejudice to the provisions of S.21 of the General Clauses Act, 1897 (10 of 1897), a detention order may, at any time, be revoked or modified:
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> (a) notwithstanding that the order has been made by an officer of the State Government, by that State Government or by the Central Government;

> (b) notwithstanding that the order has been made by an officer of the Central Government or by a State Government, by the Central Government.
>
> (2) The revocation of a detention order shall not bar the making of another detention order under Section 3 against the same person.

The power of the State Government and Central Government under Section 11 of the COFEPOSA Act to revoke orders of detention has been held to be in addition to the power under Section 21 of the General Clauses Act, 1897: Kavitha v. State of Maharashtra, . The power under Section 11 is also treated as a supervisory power: Sabir Ahmed v. Union of India, . The controversy centres round the effect of the opening part of Section 11 which refers to Section 21 of the General Clauses Act, 1897.

14. The question is as to whether there is any distinction between the power "exercisable" under Section 21 of the General Clauses Act, 1897, and the power that is to be exercised under Section 11. Under Section 21 of the General Clauses Act, 1897, it is provided as follows:

> Section 21. Power to issue, to include power to add, amend, vary or rescind, notifications, orders, rules or bye-laws:-- Where, by any Central Act, or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.
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> (emphasis supplied) Now, therefore under Section 21, if an order is issued by the State Government under Section 3 in relation to preventive detention, it can be rescinded by the State Government and likewise, if the order is issued by the Central Government, then it can also be rescinded by the Central Government. Similarly, if the detention order is issued by an officer of the State Government, he can rescind it under Section 21 and likewise, if the detention order is issued by an officer of the Central Government, he can rescind it under Section 21.

15. The next question is whether, when the detention order is issued by an officer of the State Government or of the Central Government, as the case may be, the officer is obligated to consider the representation of the detenu under Section 11. While the petitioner's counsel would contend that he is bound to, the Central Government's counsel contends that he is not. The question here is not whether the officer could exercise his powers under Section 21 of the General Clauses Act, 1897, if he minded to do so, but whether he is obligated to do so because of Section 11 of the COFEPOSA Act. The difference is that if he is not obligated to consider the representation, and he does not consider it the detention is not vitiated, while if he is obligated by Section 11, the detention will be illegal in the same manner when the State or Central Government does not discharge their obligation. In our view, this aspect has been explicitly resolved by the Supreme Court in favour of the Central Government and against the petitioner by the recent judgment of the Supreme Court in Amir ShadKhan's case, rendered by Ahmadi, J. to the following effect:

> Therefore, where an officer of the State Government or the Central Government has passed any detention order and on receipt of a representation he is convinced that the detention order needs to be revoked, he can do so by virtue of Section 21 of the General Clauses Act since Section 11 of the Act does not entitle him to do so.
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> If we may say so, with great respect to contentions raised by the learned Senior Counsel Sri. M.N. Sukumaran Nayar, and also of Sri. B. Kumar, they have unfortunately not noticed this important passage in Amir Shad Khan's''case itself, which decision is, in fact, the sheet-anchor of their argument for contending that the officer of the Government is bound to consider the detenu's representation under Section 11 of the COFEPOSA Act. In our view, this decision, far from supporting their contention, runs explicitly counter to it and says he is not obligated under Section 11, for he is, in fact, not entitled to resort to Section 11. The said passage dispels all doubts and does not, in our view, give any room for the contention that the officer of the Central Government who passed the order is obligated to exercise powers under Section 11.

16. Ahmadi, J. has made the abovesaid significant declaration of law as to the powers of the officer of the Central Government or State Government. We may also add an additional reason for the abovesaid view expressed by Ahmadi, J. In our opinion, while Sub-clauses (a) and (b) of Section 11 impose an obligation upon the Central or State Government to dispose of a representation of the detenu, Section 21 of the General Clauses Act, 1897, deals merely with a "power", pure and simple, which is not coupled with any duty. In fact, the officer who passed the order of detention under Section 3, could, on his own, rescind the order of detention even before any representation is received by him, if he is satisfied that the original order of detention passed by him is liable to be rescinded. While dealing with mandamus, the distinction between "powers", pure and simple, and "powers coupled with duties" has been noticed. It has been stated in Foulke's, Administrative Law, 7th Edition, 1990, pp 171,368, that mandamus enforces "duties" and not "powers" but in some cases, a power may be coupled with a duty so that the donee of the power "would be obliged" to exercise it: Julius v. Lord Bishop of Oxford, (1880) 5 A.C. 214. Section 21 powers of the officer are not coupled with an obligation for the exercise of the power and therefore the non-exercise of power by the officer cannot lead to the detention becoming illegal.

17. However, reliance is placed by the petitioner's counsel on the observations of Ahmadi, J. in Amir Shad Khan's case, to the effect that His Lordship stated that there are "three" authorities who can deal with the detenu's representation. But, in our view, the said passage (at p. 1988), if read as a whole says that "three" authorities "can" exercise powers to revoke the order of detention, but does not say that all the three are "obligated" to exercise the power of revocation. So far as the officer of the Central or State Government is concerned, it is clearly stated that his powers are confined to Section 21 of the General Clauses. Act, 1897, and not to Section 11 of the COFEPOSA Act. The passage, in the judgment dealing with the "three" authorities only says that they "can" revoke but does not say that they are all three obligated to consider the representation. It says:

> Thus, on a conjoint reading of Section 21 of the General Clauses Act and Section 11 of the Act, it becomes clear that the power of revocation can be exercised by three authorities (emphasis supplied) Then after referring to Sections 8(f), 22 and 11, it is stated that "the statutory provisions, when read in the context of Article 22, make it clear that they are intended to satisfy the constitutional requirements and provide for enforcement of the right conferred on the detenu to represent at against his detention order". This sentence, in our view, has to be read with the earlier passage to the effect that the officer of the Central or State Government derives his powers only under Section 21 of the General Clauses Act, and not under Section 11 of the COPEPOSA Act.

18. The opinion expressed by Ahmedi, J. in Amir Shad Khan's case, which is a three Judge judgment is, in our view, not in confict with the view of the Bench of two learned Judges of the Supreme Court in State of Maharashtra v. Sushila Mafatlal Shah, , and there is no question of any conflict between these two judgments. In the last mentioned case, the point, in fact, directly arose as to whether the officer of the state Government should have himself disposed of the representation, and ought not to have sent up the same to the Government. The Supreme Court clearly held, on a consideration of the statutory provisions, as well as the earlier cases that, the officer has no power to dispose of the representation under Section 11 and that he could validly send up the same to the Government. That could obviously mean that the non-exercise of the power "exercisable" under Section 21 of the General Clause Act, 1897, did not vitiate the detention. It is also clear from the said judgment that the power under the saving clause in the opening part of Section 11(1), which saves the powers of the Officer under Section 21, is not elevated to the status of a supervisory power as in sub-clauses (a) and (b) of Section 11(1). The Supreme Court referred to Kavitha v. State of Maharashtra, and Masuma v. State of Maharashtra, . The Supreme Court also held that the decisions in Santosh Anand v. Union of India. and Pushpa v. Union of India taking a contrary view are decisions per incuriam and need not be followed. Their Lordships also distinguished Ibrahim Bachu Bafan v. State of Gujarat, as a decision restricted to Section 11(2) and as not an authority for purposes of Section 11(1). Therefore reliance for the petitioner on these three cases last mentioned is impermissible.

19. Some arguments are advanced that Section 11(1) of the COFEPOSA Act or rather Clauses (a) and (b) of Section 11(1) are not enacted for purposes of Article 22(5) and that even without Section 11, the detenu could rely upon Article 22(5) to enforce his fundamental right against the State or Central Government. We are of the view that in view of the majority judgment of Ahmadi, J. in Amir Shad Khan's case, such an argument based on the minority judgment therein, is not permissible. According to the view of the majority, Section 11 is intended to implement the provisions of Article 22(5). We have already explained that even while holding so and referring to "three authorities", Ahmadi, J. clearly held that so far as the officer is concerned, he can exercise his powers only under Section 21 of the General Clauses Act, 1897 and not under Section 11 of the COFEPOSA Act. If Section 11 is out of the purview of the officer, the obligation arising under Section 11 to consider the detenu's representation is not cast on the officer, though it is cast on the State and Central Governments.

20. The view which we have taken is in consonance with the view taken by a Division Bench of the Bombay High Court in H.G. Jain v. State of Maharashtra, 1993 Crl LJ 1209 (Bom.), subject to the difference that while the Bench held that observations of Ahmadi, J. in Amir Shad Khan's case, if they run counter to the direct case in Sushila Mafallal Shah's case, the said observations can be ignored as obiter, we have held that there is really no conflict between the two judgments of the Supreme Court. Our view is also in consonance with the view of the Delhi High Court in Mohd. Saleem v. Union of India and in Vijaya Kumar v. Union of India, 1988 Crl LJ. 1198 (Delhi) and Subash Chandran v. Union of India, 1990 Crl LJ (NOC) 54 (Delhi), and with the decisions of the Madras High Court in K. Natarajan v. State of T.N. , 1991 Crl LJ 756 (Mad) and of the Andhra Pradesh High Court in Nutan J. Patel v. S.V. Prasad, 1993 Crl LJ 989 (AP). We respectfully dissent from the decision of the majority of the Gujarat High Court in Kalidas v. Police Commissioner, , and we agree with the minority view. We also disagree with the view of the Madras High Court in W.P. No.8073 of 1991 dated 10.12.1991 [reported as M. Arumugam v. Joint Secretary to Government of India and Another in [1992] 40 ECC 206 (Mad)]. So far as the decisions of the Supreme Court in Santosh Anand's case, and in Pushpa's case, , are concerned, they have already been held to be per incuriam in Sushila Mafatlal Shah's case, . So far as Ibrahim Bachu Bafan's case, AIR 1985 SC 1983 is concerned, it dealt with Section 11(2) and not Section 11(1).

21. So far as the decision of the Supreme Court in Naval Shankar Ishwarlal Dave v. State of Gujarat, is concerned, that is a case under the National Security Act and there the order of the Officer has to be approved by the Government within 12 days. In view of Article 22(5), the Supreme Court held that the detenu must have a remedy within 12 days to submit a representation and, therefore, held that the Officer under that Act has a duty to dispose of the representation. That decision cannot apply to COFEPOSA because here there is no provision for approval of the Officer's order directing detention. The detenu can straightaway represent to the State or Central Government as provided in Section 11 of the Act.

22. We shall next deal with the submission of Sri. B. Kumar in OPs. 5748 and 5750 of 1993 (adopted by Sri. M.N. Sukumaran Nayar in OP 4106 of 1993). These two writ petitions relate to the driver-owners of two of the vehicles which carried the silver. They are Mr. Showkath Ali and Mohd. Ali. They are brothers. They gave various statements on 14.10.1992, 15.10.1992 and 10.11.1992. The grounds of detention refer to statements of these two drivers, driver of another vehicle, statements of vendors and vendors of the vehicles purchased by these drivers, statements of Hotel reception employees in Abaci Plasa, Periyar Hotel etc. and various others. The grounds reveal that these two persons purchased the two vehicles respectively with the finances and help provided by one Haji N. Abdulla Abdul Rahman and K.V. Ismail. As these persons stayed in hotels in different names, the photos of Haji N. Abdulla given by his brother and of Ismail, given by his wife were first got identified by these two persons, signing on the back of the photos A and C, and on that basis the hotel people identified the said persons who stayed there as Haji N. Abdulla and K.V. Ismail. The search in an abandoned Maruthi car gave out various documents pertaining to them and were, in fact, the basis for getting at these facts and identifying their real names and identify. (Of course, Haji, M. Abdulla and Ismail could not be arrested). On the basis of the facts so set out in the grounds, Sri. B. Kumar urged various points before us.

23. The first contention is that pages 354, 359, 372 and 612 of the papers supplied with the grounds are not legible (see also representation of the detenu to the government). We are unable to accept this submission. We have ourselves looked into them and we do not accept that they are illegible. Further, and in fact, the corroborative documents, such as statements or mahazars, too, confirm the contents of these documents in very clear terms. The contention again is that translation of pages 280 to 291, 337, 503 to 512, 521 to 526, 547 are in English and that Malayalam translations are not given. They were given on 25.2.1993 while confirmation order was passed on 26.2.1993. Several decisions are relied upon in this connection. It is argued that they should have been given along with the grounds and at any rate, at least after the representation, earlier enough than one day before the order of confirmation. We have examined the records carefully including these very documents. In fact, the case was argued, if we go by the hours of argument, for more than three full days. We found that while translation of these few documents was furnished later, the bulk of the papers furnished (in English and Malayalam) run nearly to 630 pages. These few documents whose translations were not supplied initially were the centre of some argument and the Additional Standing Counsel for the Central Government took us, document by document, -- one is a hotel-card, others are small-chit, a railway ticket, bills issued by hotels, card of Haji Abdulla, car registration certificate and so on. We ultimately found that in respect of each of these documents in English (which were not translated), their description was already there in Malayalam in the various mahazars of seizure of these documents or in the statements of the hotel reception employees, etc. We do not want to burden this judgment with all these details but suffice to say that we are fully satisfied that the detenu had the contents of these English documents fully conveyed to him in the mahazars of seizure of these documents or in the statements of witnesses -- all of which were supplied to the detenus in Malayalam. There is, therefore, no basis for saying that, on that account, the detenus could not submit an effective representation.

24. Yet another argument of Sri. B. Kumar was that the detenus' representations were not placed before the Advisory Board. We have looked into the Advisory Board record of these detenus and find that the Board at Delhi had the English translation of the Malayalam representation sent on behalf of the detenus, before them.

25. It was also contended that seven lines in the grounds of detention are added in the Malayalam copy of the detention order and these lines were not there in the English version of the grounds. While factually, this is true, we find that this defect relates to the extract of the contents of the statement of Mohd. Ali dated 26.10.92. We find that page 368 of the documents file, as furnished to the detenus, consists of the actual full text of the above statement of the said detenu and, therefore, the whole text of that statement was there in both Malayalam and English both before the detaining authority and before the Advisory Board. In fact, the submission is limited to saying that the above mistake would show that the detaining authority did not apply its mind and that somebody else prepared the English/Malayalam version of the grounds. For reasons given above, there is no substance in this submission.

26. It is then argued that the C.C. of the bail order rejecting bail was delivered by the Economic Offences Court,Ernakulam only on 24.11.1992 and this could not have been placed before the detaining authority by 26.11.1992. There is no substance in this because the records show it was

faxed to Delhi. Nor can it be said that the detaining authority did not know about this rejection of bail before the detention orders were passed. It was also argued that the detaining authority did not first arrive at all these grounds in its mind before it actually prepared the order of detention. We find no material to accept the said contention.

27. It is also argued that the detenus were deprived of their right of engaging a lawyer or having a friend before the Advisory Board. In this behalf, we have the telex dated 19.1.1993 issued from Delhi to the Superintendent of the Jail at Trivandrum and others directing them to inform the detenus that they can engage a lawyer or a friend before the Advisory Board. It is also stated that officers of the Government would be attending the Board along with records. After this, Kunjumon (detenu in OP 4106 of 1993) took his friend, who was present, and that person, in fact, helped the Board in the translation of Malayalam to English or vice versa when the other two detenus were interviewed by the Board. This fact is admitted. It is, therefore, clear that the Jail authorities have informed the detenus, may be, orally about the contents of the telex and if the detenus in OPs 5748 and 5750 of 1993 did not avail of this opportunity, they cannot be now allowed to complain. It is argued that the detenus do not know that the Board will 'hear' the officers and, therefore, only when the Board actually hears the officers, a right will suddenly spring up and the Board has a duty to once again request the detenus to get their lawyer or friend. We may say that once the detenus have been informed earlier orally at the instance of the Board that they can have their advocate or friend and in case two out of the three detenus did not take their advocate or friend to the Board's meeting (while Kunjumon did take his friend), these two detenus cannot complain that the Board did not give them a second opportunity. We have so held in a detailed Judgment, -- where the entire case law has been reviewed in Sabina v. State of Kerala (O.P. (HC) No. 1983 of 1993 dated 2.7.1993). This principle is based on the time limitations of the Board under Article 22 of the Constitution and under the COFEPOSA Act.

28. The case involves smuggling of 280 silver bars worth Rs. 7.37 Crores and we have heard arguments for more than three full days in all, -- every conceivable point was argued -- and we find no substance in the contentions.

For all the aforesaid reasons, all the three Writ Petitions are dismissed.