

PETITIONER:
KUBIC DARIUSZ

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT 18/01/1990

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
RAY, B.C. (J)

CITATION:
1990 AIR 605 1990 SCR (1) 98
1990 SCC (1) 568 JT 1990 (1) 38
1990 SCALE (1) 55

ACT:

Conservation of Foreign Exchange And Prevention of Smuggling Activities Act. Section 9 Detention of foreign national for smuggling activities--Communication of ground in a language understood by him--Municipal law to be interpreted in accordance with State's international legal obligations.

Constitution of India 1950: Article 22(5)--Detention Order-Detenu to be afforded opportunity to make representation--Effective knowledge of grounds of detention and the prejudicial acts, which the authorities attribute to him must be communicated to him--Non-communication of grounds violative of Article 22(5) and mandate of the Constitution.

HEADNOTE:

Mr. Kubic Dariusz a Polish national was arrested on 29.4.89 by the Customs Department on the ground that he was in possession of foreign gold weighing about 70 tolas. On 30.4.89 he was produced before the Chief Judicial Magistrate who remanded him to jail custody till 15th May 89. His bail application was rejected by the Chief Judicial Magistrate. While still in custody he was served with the impugned Detention Order dated 16.5.89 under the COFEPOSA Act along-with the grounds of detention. On 24.5.89 he was granted bail by the Calcutta High Court but the same could not be availed of because of the detention order which the petitioner challenged by preferring the Writ Petition before this Court.

The detention order is assailed on two grounds, namely that the detenu did not know English wherefore he was unable to read and be informed of the grounds of detention to enable him to defend himself and secondly that the representation submitted by him through the Superintendent of Jail to Central Advisory Board, COFEPOSA was neither considered nor acted upon or replied to at all by the detaining authority wherefore the detention order was liable to be quashed as violative of Article 22(5) of the Constitution of India. On behalf of the respondent it is contended that the detenu was

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conversant with the English language as would appear from

his replies to the questions put to him in the course of interrogation. Hence there was no question of furnishing the grounds to him in Polish language. Refuting the second contention it was stated that after hearing the detenu the Advisory Board found sufficient cause for his detention. It was also urged by the respondent that the so called representation of the detenu dated 13.6.89 was not a representation to the appropriate Govt. against the detention and could not be treated as such.

Allowing the Writ Petition and setting at liberty the detenu, this Court,

HELD: Continued detention of the detenu has been rendered illegal by non-consideration of his representation by the appropriate government according to law, resulting in violation of Article 22(5) of the Constitution of India. [114F]

Where the grounds are couched in a language which was not known to the detenu, unless the contents of the grounds were fully explained and translated to the detenu it would tantamount to not serving the grounds of detention and would thus vitiate the detention *ex facie*. It is the settled law that the detention order, the grounds of detention and the documents referred to and relied upon are to be communicated to the detenu in a language understood by him so that he can make effective representation against his detention. To ascertain whether the detenu knew the language in which the grounds were served or was reigning ignorance, it is open to Court to consider the circumstances and facts of the case. The detenu is not required to write an essay or pass any language test. A working knowledge of English enabling him to understand the grounds would be enough for making a representation. He could very well send his representation in the language known by him. [103G; 106E-H; 107A-E]

No hesitation there is in the instant case in holding that the detenu understood the English Language, had the working knowledge of it and was reigning ignorance of it. [109E]

Though the representation was addressed to the Chairman Central Advisory Board, the same was forwarded by the Jail authorities and it must be taken to have been a representation to the appropriate government which was to consider it before placing it before the Advisory Board and the same having been not done, Article 22(5) of the Constitution has to be held to have been violated. Delay in disposing of 100

the representation when inordinate and unexplained the detention would be rendered bad and the detenu must be ordered to be released forthwith. [111A-B; 110E]

Preventive detention of a foreign national who is not resident of the country involved an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of the international obligation in this regard. The universal declaration of human rights include the right to life, liberty and security of person, freedom from arbitrary arrest and detention; the right to fair trial by an independent and impartial tribunal and the right to presume to be innocent until proved guilty. [112G-H; 113A]

When an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the States' international obligations. [113A-B]

The fundamental rights guaranteed under our Constitution are in conforming line with those in the Declaration and the Covenant on Civil and Political Rights and the Covenant, Economic, Social and Cultural Rights to which India has become a party by ratifying them. Crimen Trahit personam. The crime carries the person. Smuggling may not be regarded as such a crime. [113C-D]

There may, therefore, be cases where while a citizen and resident of the country deserves preventive detention apart from criminal prosecution, in the case of a foreign national not resident of the country he may not be justifiably subjected to preventive detention in the event of which no international legal assistance is possible unlike in cases of criminal prosecution and punishment. [114D-E]

Harikisan v. The State of Maharashtra, [1962] 2 Suppl. SCR 918; Razia Umar Bakshi v. Union of India, [1980] 3 SCR 1398; Nainmal Partap Mal Shah v. Union of India, [1980] 4 SCC 427; Surjeet Singh v. Union of India, [1981] 2 SCC 359; Lallubhai Jogibhai Patel v. Union of India & Ors., [1981] 2 SCC 427; Hadibandhu Das v. District Magistrate, [1969] 1 SCR 227; [brahim Ahmad Batti v. State of Gujarat, [1983] 1 SCR 540; Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Ors., [1985] 3 SCR 697; Smt. Shalini Soni v. Union of India, [1981] 1 SCR 962; John Martin v. State of West

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Bengal, [1975] 3 SCR 211; Chandroo Kundan v. Union of India, AIR 1980 SC 1123; Pabitra N. Rana v. Union of India, [1980] 2 SCR 869; Saleh Mohammed v. Union of India, [1980] 4 SCC 428; Kamla Kanyalal Khushalani v. State of Maharashtra, [1981] 1 SCC 748; Rattan Singh v. State of Punjab & Ors., [1981] 4 SCC 481; Kirit Kumar Chaman Lal Kundaliya v. Union of India & Ors., [1981] 2 SCC 426; Santosh Anand's case, [1981] 2 SCC 420; B. Sundar Rao & Ors. v. State of Orissa, [1972] 3 SCC 11; Vimalchand Jawantraj Jain v. Shri Pradhan & Ors., [1979] 4 SCC 401; Jolly George Verghese v. The Bank of Cochin, AIR 1980 SC 470 and Rex v. Halliday, [1917] AC 268, referred to.

JUDGMENT:

ORIGINAL JURISDICTION: Writ petition (Criminal) No 359 of 1989.

(Under Article 32 of the Constitution of India).

Dr. Shankar Ghosh, Ashok Ganguli, Md. Nizamuddin and Ms. Mridula Ray, for the Petitioner.

V.C. Mahajan, A. Subba Rao and P. Parmeshwaran for the Respondents.

The Judgment of the Court was delivered by

K.N. SAIKIA, J. Mr. Kubic Dariusz, a Polish national, holding a Polish passport arriving Calcutta by air from Singapore via Bangkok was arrested on 29.4.1989 under section 104 of the Customs Act, by the officers of the Customs Department attached to Calcutta Airport, on the ground that he was carrying in his possession foreign gold weighing about 70 tolas. On 30.4.1989, he was produced before the Chief Judicial Magistrate, Barasat who remanded him to jail custody till 15th May, 1989. He was interrogated by Intelligence officer when he made, corrected and signed his statements in English. His application for bail was rejected by the Chief Judicial Magistrate. While still in custody, he was served with the impugned detention order dated 16.5.1989 passed under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, herein-

after referred to as 'the COFEPOSA Act along with the grounds of detention. On 24.5. 1989 he was granted bail by the Calcutta High Court but the same could not be availed of because of the detention order which is now being challenged in this petition.

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The detention order was passed with a view to preventing the detenu from smuggling goods; and it stated that the detaining authority, namely, the Additional Secretary to the Government of India in the department of Revenue, Ministry of Finance, was satisfied that the detenu was likely to smuggle goods into and through Calcutta Airport which was an area highly vulnerable to smuggling as defined in Explanation 1 to section 9(1) of the COFEPOSA Act. In the grounds of detention it was stated, inter alia, that arriving at Calcutta by Thai Airways the detenu opted for the green Channel meant for the passengers not having any dutiable and/or prohibited goods for customs clearance and proceeded towards the exit gate; that he declared that he did not have any gold with him, but on search 7 gold bars weighing 70 tolas valued approximately at Rs.2,71,728 deftly concealed between the inner soles of the left and right sports shoes in specially made cavities were recovered; that in his voluntary statement before the customs officer he admitted the recovery; that he had been able to learn English as he was with some English people during the period of 2nd Kedardham Expedition or Kedarnath Dham Expedition in the year 1987 and he was also learning English when he was in France in the year 1985; that scrutiny of his passport revealed that he visited Delhi on 6.2.1989 & 21.2. 1989, Trichi on 22.4.1989 and Calcutta on 29.4.1989; that he admitted to have been in India in 1986, 1987 & 1988; and that on chemical tests the sample was found to be containing 99.9% of gold.

Shankar Ghosh, the learned counsel for the petitioner assails the detention order primarily on two grounds, namely, that the detenu knew only the Polish language and did not know English wherefore he was unable to read and be informed of the grounds of detention given in English and he was not given the grounds of detention in a language understood by him so as to enable him to defend himself; and that the representation submitted by him was not considered, acted upon or replied to at all by the detaining authority wherefore the detention order was liable to be quashed as violative of Article 22(5) of the Constitution of India.

Mr. V.C. Mahajan, the learned counsel for the respondents emphatically refutes the first ground submitting that the detenu was conversant with the English language as would appear from the answers to the questions put to him in course of interrogation by the Intelligence authorities and this was clearly stated in the grounds of detention, and consequently, there arose no question of his being furnished with the grounds of detention in Polish and not in English

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language. Refuting the second submission Mr. Mahajan submits that the so called representation dated 13.6.1989 addressed to the Chairman, Central Advisory Board, COFEPOSA through the Superintendent, Central Jail, Dum Dum, Calcutta was duly sent to and received by the Chairman and the detenu appeared before the Advisory Board which, after hearing the detenu, found sufficient cause for his detention and there was, therefore, no question of the representation being separately dealt with by the Central Government. Besides, Mr. Mahajan submits, had the detaining authority accepted the statement that the detenu did not know English, they would have

been in a trap. Counsel would also submit that the so called representation dated 13.6.1989 was not a representation to the appropriate Government against the detention and could not be treated as such.

Taking up the first submission, we find that Article 22(5) of the C of India provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, 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. It is settled law that the communication of the grounds which is required by the earlier part of the clause is for the purpose of enabling the detenu to make a representation, the right to which is guaranteed by the latter part of the clause. A communication in this context, must, therefore, mean imparting to the detenu sufficient and effective knowledge of the facts and circumstances on which the order of detention is passed, that is, of the prejudicial acts which the authorities attribute to him. Such a communication would be there when it is made in a language understood by the detenu, as was held in *Harikisan v. The State of Maharashtra*, [1962] 2 Suppl. SCR 918. In *Razia Umar Bakshi v. Union of India*, [1980] 3 SCR 1398, Fazal Ali, J. held that the service of the grounds of detention on the detenu was a very precious constitutional right and where the grounds were couched in a language which was not known to the detenu, unless the contents of the grounds were fully explained and translated to the detenu, it would tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex-facie.

In *Nainmal Partap Mal Shah v. Union of India*, [1980] 4 SCC 427: AIR 1980 SC 2129 the detenu stated that he did not know the English language and, therefore, could not understand the grounds of detention, nor he was given a copy of the grounds duly translated in
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vernacular language. In the counter affidavit the detaining authority suggested that as the detenu had signed a number of documents in English, it must be presumed that he was fully conversant with English. Rejecting the contention it was held by this Court that merely because he may have signed some documents, it could not be presumed, in absence of cogent material, that he had working knowledge of English and under those circumstances there had been clear violation of the constitutional provisions of Article 22(5) so as to vitiate the order of detention. Thus what was considered necessary was a working knowledge of English or full explanation or translation. In *Surjeet Singh v. Union of India*, [1981] 2 SCC 359: AIR 1981 SC 1153, the petitioner, being served the detention order and the grounds in English, contended that English was not a language which he understood and that this factor rendered it necessary for the grounds of detention to be served on him in Hindi which was his mother tongue and that the same having not been done, there was in law no communication of such grounds to him; and it was held that under those facts and circumstances it had not been shown that the petitioner had the opportunity which the law contemplated in his favour of making an effective representation against his detention, which was, therefore, illegal and liable to be set aside.

Where it is stated that the detaining authority explained the grounds of detention to the detenu, Court insists on adequate proof in the absence of any translation being furnished. Thus in *Lallubhai Jogibhai Patel v. Union*

of India & Ors., [1981] 2 SCC 427, the detenu did not know English but the grounds of detention were drawn up in English and the detaining authority in affidavit stated that the Police Inspector while serving the grounds of detention fully explained the grounds in Gujarati to the detenu. Admittedly, no translation of the grounds of detention into Gujarati was given to the detenu. It was held that there was no sufficient compliance with the mandate of Article 22(5) of the Constitution which required that the grounds of detention must be communicated to the detenu. "Communicate" is a strong word. It requires that sufficient knowledge of the basic facts constituting the grounds should be imparted effectively and fully to the detenu in writing in a language which he understands, so as to enable him to make a purposeful and effective representation. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. This follows from the decisions in *Harikisan v. State of Maharashtra*, (supra) and *Hadibandhu Das v. District Magistrate*, [1969] 1 SCR AIR 1969 SC 43.

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Mr. Ghosh relies on the decision in *Ibrahim Ahmad Batti v. State of Gujarat*, [1983] 1 SCR 540, wherein the detenu under the COFEPOSA Act was a Pakistani national to whom the detention order and the grounds of detention were served in English and he contended that as he did not know English and the grounds of detention and the document relied on were not furnished in Urdu within the statutory period the detention was bad. Urdu translation of all the documents and statements referred to in the grounds for reaching the subjective satisfaction had not been supplied to the detenu in time and translations of quite a few of such documents and statements had not been supplied at all. The petitioner's mother tongue seemed to be Urdu and a little knowledge of English figured. It was evident that the petitioner knew English figures, understood English words written in capital letters and was also conversant with talking in Hindi and Gujarati and therefore it was argued for the detaining authority that the non-supply of Urdu translation of the documents could not be said to have caused prejudice to the petitioner in the matter of making representation against his detention. This Court held that the Explanation was hardly satisfactory and could not condone the non-supply of Urdu translation of those documents. In that case with the assistance of counsel of either side the Court had gone through many of those documents and statements and for the Court it was not possible to say that most of them were statements of accused containing figures in English with English words written in capital letters. A large number of documents were in Hindi and Gujarati and were material documents which had obviously influenced the mind of the detaining authority in arriving at the subjective satisfaction and those were all in a script or language not understood by the detenu and, therefore, it was held that the non-supply of Urdu translation of those documents had clearly prejudiced the petitioner's right against his detention and hence the safeguards contained in Article 22(5) was clearly violated.

In the instant case the basis of the statement that the detenu did not know English is his representation dated 13.6.1989, that is, nearly one month after his detention. An English rendering of the representation is found at page 75 of the Writ Petition which is attested to have fully corresponded to its original in Polish language. It is signed by the detenu and is addressed to the Chairman, Central Adviso-

ry Board (COFEPOSA), High Court of Delhi, through the Superintendent, Central Jail, Dum Dum, Calcutta. It reads:

"Ref: Govt. of India, Finance Department and Revenue Department Order No. F No. 673/322/89-CUS-VIII dated 16.05.1989

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Sub: Representation against my detention under COFEPOSA
Respected Chairman,

1. I am a Polish national.

2. I do not know any other language except Polish language.

3. I cannot speak, write and read English language and do not know small English letters.

4. I know how to write my name in Block letters.

5. I have received all the documents concerning the above mentioned case in English language and for the fact that I do not know that language the documents were so complicated for me to understand.

6. In view of the above facts, I kindly request your goodself to provide me with the order of detention together with the grounds of detention in my language (Polish language) so that I can effectively present my defence."

While it is the settled law that the detention order, the grounds of detention and the documents referred to and relied on are to be communicated to the detenu in a language understood by him so that he could make effective representation against his detention, the question arises as to whether the courts have necessarily to accept what is stated by the detenu or it is permissible for the Court to consider the facts and circumstances of the case so as to have a reasonable view as to the detenu's knowledge of the language in which the grounds of detention were served, particularly in a case where the detenu is a foreign national. If the detenu's statement is to be accepted as correct under all circumstances it would be incumbent on the part of the detaining authority in each such case to furnish the grounds of detention in the mother tongue of the detenu which may involve some delay or difficulty under peculiar circumstances of a case. On the other hand if it is permissible to ascertain whether the statement of the detenu in this regard was correct or not it would involve a subjective determination. It would, of course, always be safer course in such cases to furnish translations in the detenu's own language. We are of the view

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that it would be open for the Court to consider the facts and the circumstances of a case to reasonably ascertain whether the detenu is reigning ignorance of the language or he has such working knowledge as to understand the grounds of detention and the contents of the documents furnished.

In the instant case we find that when the detention order and the grounds of detention were served the detenu received them and acknowledged the receipt thereof, as it appears from the records, putting his signature in English. He did not complain that the grounds of detention were not understood by him. On the other hand in the very grounds of detention it was stated that in course of interrogation he answered the questions in English including the questions as to how he happened to learn English. The gist of his answers in this regard was also given in the grounds of detention. We have perused the statements and find that those contained number of informations peculiar to the detenu himself which could not have been communicated by him to the interrogators unless he knew the English language. We also find that in several places he corrected the statements putting appropri-

ate English words and signing the corrections. While the detention order was passed on 16-5-1989 his representation was admittedly dated only 13-6-1989. In the meantime bail petitions were moved on his behalf before the Chief Judicial Magistrate and the High Court. There is nothing to show that he did not give instructions to his counsel. After all, the detenu is not required to write an essay or pass any language test. A working knowledge of English enabling him to understand the grounds would be enough for making a representation. He could very well send his representation in the language known by him.

In *Parkash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Ors.*, [1985] 3 SCR 697, Venilal D. Mehta, his daughter Miss Pragna Mehta and son Bharat Mehta were detained under the COFEPOSA Act by an order dated 19th June, 1984 and the detention order was challenged in this Court under Article 32 of the Constitution of India. They were alleged to have been in possession of 60 gold biscuits of foreign origin. After their arrest the father and his daughter were taken to the Central Excise and Customs Department, Cochin where statements on their behalf were written in English by the daughter. The father Venilal D. Mehta put his signature in English as Balvant Shah but the daughter told the officers concerned that the correct name of her father was Venilal Mehta. In the writ petition it was the case of the father that he could not understand, read, speak or write English but could only sign his name in English. He was served

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with the grounds of detention in English language on 20th June, 1984. A Hindi translation of the grounds of detention was served on 30th June, 1984. On 27th May, 1984 the father made a representation in Gujarati to the detaining authority praying that he was unable to read and write either in English or Hindi or 'Malayalam and the grounds of detention may be given to him duly translated in Gujarati. In Court it was contended that the order and grounds should have been communicated to the detenu in the language or languages they understood and Venilal Mehta understood nothing except Gujarati. He did not understand English or Hindi or Malayalam. The Hindi translation was admittedly furnished beyond a period of 5 days and no exceptional circumstances were stated to exist. Following *Harikisan v. State of Maharashtra* (supra) and considering the definite case of Venilal Mehta, this Court observed that the facts revealed that the detenu Venilal Mehta was constantly in the company of his daughter as well as son and both of them knew English very well. The father signed a document in Gujarati which was written in English and which was his mercy petition in which he completely accepted the guilt of the involvement in smuggling. That document contained a statement--"I myself am surprised to understand what prompted me to involve in such activity as dealing in Imported Gold." On those facts and circumstances this Court observed:

"There is no rule of law that common sense should be put in cold storage while considering Constitutional provisions safeguards against misuse of powers by authorities though these Constitutional provisions should be strictly construed. Bearing in mind this salutary principle and having regard to the conduct of the detenu Venilal Mehta especially in the mercy petition and other communications, the version of the detenu Venilal in feigning lack of any knowledge of English must be judged in the proper perspective. He was, however, in any event given by 30th June, 1984 the Hindi translation of the grounds of which he claimed ignorance.

The gist of the annexures which were given in Malayalam language had been stated in the grounds. That he does not know anything except Gujarati is merely the ipse dixit of Venilal Mehta and is not the last word and the Court is not denuded of its powers to examine the truth. He goes to the extent that he signed the mercy petition not knowing the contents, not understanding the same merely because his wife sent it though he was sixty years old and he was in business and he was writing at a

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time when he was under arrest, his room had been searched, gold biscuits had been recovered from him. Court is not the place where one can sell all tales. The detaining authority came to the conclusion that he knew both Hindi and English. It had been stated so in the affidavit filed on behalf of the respondent. We are of the opinion that the detenu Venilal Mehta was merely reigning ignorance of English."

After referring to the decisions in Hadibandhu Das v. District Magistrate, Cuttack & Anr. (supra), Nainmal Partap Mal Shah v. Union of India & Ors. (supra), and Ibrahim v. State of Gujarat & Ors. (supra) this Court in Prakash Chandra Mehta (supra) rejected the contention that the grounds of detention were not communicated to Venilal Mehta in a language understood by him.

Considering the facts and circumstances of the instant case and in view of the fact that no objection regarding non-communication of the grounds in a language understood by the detenu was made within the statutory period for furnishing the grounds and the fact that the representation was beyond the statutory period, almost a month after the grounds were served, along with the detenu's statements as to how he learnt English, we have no hesitation in holding that the detenu understood the English language, had working knowledge of it and was reigning ignorance of it, and there was no violation of Article 22(5) of the Constitution on the ground of non-communication of the grounds of detention in a language understood by him. The first submission of the detenu has, therefore, to be rejected.

Coming to the second submission, in the representation dated 13.6. 1989 the detenu clearly requested that he be provided with the order of detention together with the grounds of detention in his language (Polish language) so that he could effectively present his defence. He called it a "representation" against his detention under COFEPOSA Act. Admittedly, this representation was not disposed of by the appropriate Government and, indeed, has not been disposed of or acted upon till today. Mr. Mahajan submits that it having been addressed to the Chairman, Central Advisory Board it need not have been dealt with by the Central Government and it could not be regarded as representation at all and the Government smarted out of the trap by not admitting that the detenu did not know English. We are not inclined to accept this submission. Admittedly the representation was sent through the Superintendent, Central Jail, Dum Dum,

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Calcutta. There was no scope to hold that what has been stated to be 'representation' was not representation at all inasmuch as it only requested for translated copies of the grounds of detention and the annexed documents in Polish language. Supply of translated copies would have surely not affected the detention order ipso facto. In Smt. Shalini Soni v. Union of India, AIR 1981 SC 431: 1981(1) SCR 962, it has been held that under Article 22(5) no proforma for representation has been prescribed and a request for release of the detenu, therefore, has to be deemed a representation;

so also a request to supply copies of documents etc. Opportunity to make a representation comprehends a request for supply of translated copies. Therefore, the detenu's 'representation' asking for copies of documents must be held to have amounted to a representation and it was mandatory on the part of the appropriate Government to consider and act upon it at the earliest opportunity and failure to do so would be fatal to the detention order. There has been a catena of decisions of this Court that the representation of the detenu must be considered by the appropriate Government and Article 22(5) does not say which is the authority to whom representation shall be made or which authority shall consider it. But it is indisputable that the representation may be made by the detenu to the appropriate Government and it is the appropriate Government that has to consider the representation as was reiterated in *John Martin v. State of West Bengal*, AIR 1975 SC 775:1975 (3) SCR 211.

It is settled law that delay in disposing the representation when inordinate and unexplained the detention would be bad and the detenu must be ordered to be released forthwith. *Chandroot Kundan v. Union of India*, AIR 1980 SC 1123; *Pabitra N. Rana v. Union of India*, AIR 1980 SC 798: (1980) (2) SCR 869, *Saleh Mohammed v. Union of India*, AIR 1981 SC 111: (1980) 4 SCC 428; *Kamla Kanyalal Khusahalani v. State of Maharashtra*, [1981] 1 SCC 748 are some of the decisions settling this proposition of law.

In *Rattan Singh v. State of Punjab & Ors.*, [1981] 4 SCC 481, it was held that section 11(1) of the COFEPOSA Act confers upon the Central Government the power of revocation of an order of detention made by the State Government or its officer. That power, in order to be real and effective, must imply the right in a detenu to make a representation to the Central Government against the order of detention. The failure of the Jail Superintendent to either forward the representation to the Government concerned or to have forwarded the same to the State Government with a request for their onward transmission to the Central Government in that case was held to have

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deprived the detenu of his valuable right to have his detention revoked by the Government. The continued detention of the detenu was, therefore, held illegal and the detenu was set free. In the instant case though the representation was addressed to the Chairman, Central Advisory Board the same was forwarded by the Jail authorities and it must be taken to have been a representation to the appropriate Government which was to consider it before placing it before the Advisory Board and the same having not been done Article 22(5) has to be held to have, been violated.

In *Kirit Kumar Chaman Lal Kundaliya v. Union of India & Ors.*, [1981] 2 SCC 426, a case under the COFEPOSA Act, where the order of detention was made by the Home Minister and the representation made by the detenu had been rejected not by the Home Minister but by the Secretary, this Court held that the representation had been rejected by an authority which had no jurisdiction at all to consider or pass any order on the representation of the detenu and that, therefore, rendered a continued detention of the petitioner void, following *Santosh Anand's case* (1981) 2 SCC 420, where it was held that the representation was not rejected by the detaining authority and as such the constitutional safeguards under Article 22(5) could not be said to have been strictly observed or complied with. In *B. Sundar Rao & Ors. v. State of Orissa*, [1972] 3 SCC 11, where the detention was under the Orissa Preventive Detention Act, 1970 and sections 7 & 11

thereof conferred the right on the detenu to make representation and have it considered by appropriate authority it was held that such consideration was independent of any action of Advisory Board as there was necessity of Government to form opinion and judgment before sending the case to the Advisory Board.

In Vimalchand Jawantraj Jain v. Shri Pradhan & Ors., [1979] 4 SCC 401, it was held by this Court that under Article 22(5) independent of the reference to the Advisory Board, the detaining authority must consider the representation at the earliest and come to its own conclusion before confirming the detention order and consideration and rejection of the representation subsequent to report of the Advisory Board would not cure the defect. It was clearly held that it is no answer for the detaining authority to say that the representation of the detenu was sent by it to the Advisory Board and the Advisory Board had considered the representation and then made a report in favour of detention. Even if the Advisory Board had made a report upholding the detention the appropriate Government is not bound by such opinion and it may still, on considering the representation of the

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detenu and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenu; as in that case there was nothing to show that the Government considered the representation before making the order confirming the detention. The Constitutional obligation under Article 22(5) was not complied with. In the instant case there was no consideration before and even after the Advisory Board considered the case of the detenu. It can not therefore, be said that the representation was disposed of in accordance with law.

Mr. Ghosh faintly submits on merits of the case that a single instance of possessing 70 tolas of gold in gold bars was not enough to genuinely satisfy the detaining authorities to resort to preventive detention of the petitioner who is a Polish national and not resident in India. It is true that the detention order was passed with a view to preventing the detenu from repeating smuggling activities. That the detenu in the particular act indulged in smuggling could not of course be denied. It is stated in the counter that the detention of persons under the COFEPOSA Act serves two purposes: (1) to prevent the person concerned from engaging himself in an activity prejudicial to the conservation of foreign exchange and also preventing him from smuggling activities and thereby to render him immobile by the detaining authority so that during that period the society is protected from such prejudicial activities on the part of the detenu; and (2) to break the links between the persons so engaged and the source of such activity and from his associates engaged in that activity or to break the continuity of such prejudicial activities so that it would become difficult, if not impossible, for him to resume the activities. There is undoubtedly scope for interpreting that the above two purposes envisage continuous residence of the person engaged in smuggling and as such may be more readily applicable to a resident of the country. But such habitual smuggling activity may not have similarly been envisaged in respect of a foreign national who is not a resident of this country. The customs Act itself makes appropriate provisions for adjudication, confiscation and punishment for smuggling and prevents possible repetition or recurrence.

Preventive detention of a foreign national who is not

resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. The universal declaration of human rights include the right to life, liberty and security of person, freedom from arbitrary arrest and detention; the right

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to fair trial by an independent and impartial tribunal; and the right to presume to be an innocent man until proved guilty. When an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the State's international obligations as was pointed out by Krishna Iyer, J. in *Jolly George Verghese v. The Bank of Cochin*, AIR 1980 SC 470. There is need for harmonisation whenever possible bearing in mind the spirit of the Covenants. In this context it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conforming line with those in the Declaration & The Covenant on Civil and Political Rights and the Covenant, Economic, Social and Cultural Rights to which India has become a party by ratifying them. *Crimen Trahit personam*. The crime carries the person. The commission of a crime gives the court of the place where it is committed jurisdiction over the person of the offender. Legal relations associated with the effecting of legal aid on criminal matters is governed in the international field either by the norms of multilateral international conventions relating to control of crime of an international character or by special treaties concerning legal cooperation. Smuggling may not be regarded as such a crime. The system of extradition of criminals represents an act of legal assistance by one State (the requestee) to another State (the requestor) with the aim of carrying out a criminal prosecution, finding and arresting a suspected criminal in order to bring him to court or for executing the sentence. In concluding such convention the States base themselves on principles of humanitarianism in their efforts to contribute to the more effective achievement of the objectives of the correction and re-education of violators of the law. Where such conventions exist, the citizens of a State who were convicted to deprivation of freedom in another signatory State are in accordance with mutual agreement of

States, transferred to the country of which they are citizens to serve their sentences. The transfer of the convicted person may take place only after the verdict has entered into legal force and may be carried out on the initiative of either of the interested States. The punishment decided upon with regard to a convicted person is served on the basis of the verdict of the State in which he was convicted. On the strength of that verdict the competent court of the State of which the person is a citizen adopts a decision concerning its implementation and determines, in accordance with the law of its own State, the same period of deprivation of freedom as was assigned under the verdict. While such ameliorative practices may be available in case of a foreign

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national being criminally prosecuted, tried and punished, no such proceedings are perhaps possible when he is preventively detained. A preventive detention as was held in *Rex v. Holiday*, 1917 AC--268 "is not punitive but precautionary

measure." The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated; and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention the person concerned is detained by way of punishment after being found guilty of wrong doing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society. There may, therefore, be cases where while a citizen and resident of the country deserves preventive detention apart from criminal prosecution, in case of a foreign national not resident of the country he may not be justifiably subjected to preventive detention in the event of which no international legal assistance is possible unlike is case of criminal prosecution and punishment. Considering the facts and circumstances of the instant case, however, we find sufficient evidence of the detenu having visited this country though on earlier occasions he was not found to have been carrying on such smuggling activities. However, in view of our decision in the earlier submissions we do not express any opinion on this submission.

In the result we find force in the second submission and hold that continued detention of the detenu has been rendered illegal by nonconsideration of his representation by the appropriate Government according to law resulting in violation of Article 22(5) of the Constitution; and he is to be set at liberty forthwith in this case.

R.N.J.
allowed.
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Petition