

THAHIRA HARIS ETC.

v.

GOVT. OF KARNATAKA & ORS.
(Criminal Appeal Nos. 723-724 of 2009)

APRIL 15, 2009

**[DALVEER BHANDARI AND ASOK KUMAR
GANGULY, JJ.]**

Constitution of India, 1950: Article 22(5) and (6) – Preventive detention – Smuggling of red sanders – Detention order – Non-supply of relied upon documents – Detenu allegedly abetted in smuggling – Detention order of the mastermind of the alleged offence not supplied to the detenu – Held: In the absence of relied upon documents, detenu was prevented from making effective representation which violated his constitutional rights – Detention order quashed – COFEPOSA – s.8.

The appellant is wife of detenu. She filed writ petitions challenging the order of detention dated 24th May, 2008 on the ground of non-supply of relied upon and relevant documents. High Court dismissed the writ petitions.

In appeals to this Court, appellant contended that the detention order of 'AK' was not supplied; that even according to the detaining authority, 'AK' was the master mind in the entire operation and allegation against the detenu was of abetting him in smuggling therefore order of detention passed against 'AK' was of great significance.

Disposing of the appeals, the Court

HELD:1. Admittedly, the order of detention of 'AK'

A dated 13.9.2004 was not supplied to the detenu. The document mentioned at serial number 90 is the detention order dated 13.9.2004 of 'AK', the master mind, whereas the document supplied to the detenu was only the confirmation order dated 29.1.2005 passed under section 8 of the COFEPOSA Act. Both are different and distinct and, therefore, the High Court was wrong in holding that the detention order and confirmation order was one and the same. The period of detention in such case would be reckoned from 13.9.2004 and not from 29.1.2005. [Para 7] [946-C-D]

2. According to the detaining authority, copy of the detention order issued under COFEPOSA is a relied upon document. This document was admittedly not supplied to the detenu. [Para 9] [946-G-H]

3.1. Indian Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detenu who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the ground of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenu at the earliest opportunity to make effective and meaningful representation against his detention. [Para 28] [955-C-D]

Dr. Ram Krishan Bhardwaj v. The State of Delhi and Ors. 1953 SCR 708; *Shalini Sonio (Smt.) & Others v. Union of India and Others* (1980) 4 SCC 544; *Ichhu Devi Choraria (Smt.) v. Union of India & Others* (1980) 4 SCC 531; *Khudiram Das v. State of West Bengal & Others* (1975) 2 SCC 81; *Vakil Singh v. State of J & K & Another* (1975) 3 SCC 545; *Ganga Ramchand Bharvani v. Under Secretary to the Government of Maharashtra & Others* (1980) 4 SCC 624; *S. Gurdip Singh v. Union of India & Others* (1981) 1 SCC 419;

Golam alias Golam Mallick v. State of West Bengal (1975) 2 A
SCC 4; *Mohd. Ala, v. State of West Bengal* (1974) 4 SCC
463; *Kirit Kumar Chaman Lal Kundaliya v. Union of India &*
Others (1981) 2 SCC 436; *Ramchandra A. Kamat v. Union*
of India & Others (1980) 2 SCC 270; *Tushar Thakker (Shri)*
v. Union of India & Others (1980) 4 SCC 499; *Ram Baochan B*
Dubey v. State of Maharashtra and Another (1982) 3 SCC
383; *Sophia Gulam Mohd. Bham v. State of Maharashtra &*
Others (1999) 6 SCC 593 and *District Collector, Ananthapur*
& Another v. V. Laxmanna (2005) 3 SCC 663, relied on.

3.2. On proper construction of clause (5) of Article 22 C
read with section 3(3) of COFEPOSA Act, it is imperative
for valid continuance of detention that the detenu must
be supplied all documents, statements and other
materials relied upon in the grounds of detention. In the D
instant case, admittedly, the relied upon document, the
detention order of 'AK' was not supplied to the detenu
and the detenu was prevented from making effective
representation which has violated his constitutional right
under clause (5) of Article 22 of the Constitution. The E
impugned detention order is quashed and the detenu is
directed to be released forthwith, if not required in any
other case. [Paras 29 and 30] [955-D-G]

Case Law Reference:

1953 SCR 708	relied on	Para 10	F
(1980) 4 SCC 544	relied on	Para 12	
(1980) 4 SCC 531	relied on	Para 13	
(1975) 2 SCC 81	relied on	Para 14	G
(1975) 3 SCC 545	relied on	Para 15	
(1980) 4 SCC 624	relied on	Para 16	

A	(1981) 1 SCC 419	relied on	Para 17
	(1975) 2 SCC 4	relied on	Para 19
	(1974) 4 SCC 463	relied on	Para 20
B	(1981) 2 SCC 436	relied on	Para 21
	(1980) 2 SCC 270	relied on	Para 22
	(1980) 4 SCC 499	relied on	Para 23
C	(1982) 3 SCC 383	relied on	Para 24
	(1999) 6 SCC 593	relied on	Para 25
	(2005) 3 SCC 663	relied on	Para 26

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 723-724 of 2009.

From the Judgment & Order dated 18.11.2008 of the High Court of Karnataka at Bangalore in W.P. (HC) Nos. 79 & 80/2008.

E L. Nageswara Rao, Mahalakshmi Pavani, G. Balaji and Shakeel Abdul Rahiman (for Mahalakshmi Balaji & Co.) for the Appellant.

Sanjay R. Hedge and A. Rohen Singh, for the Respondent.

F The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

G 2. These appeals are directed against the judgment dated 8th November, 2008 passed by the High Court of Karnataka at Bangalore in Writ Petition (Habeas Corpus) Nos.79-80 of 2008 by which both the writ petitions were dismissed. We propose to dispose of both the appeals by this judgment.

H 3. These writ petitions (Habeas Corpus) were filed by Mrs.

THAHIRA HARIS ETC. v. GOVT. OF KARNATAKA & 945
ORS. [DALVEER BHANDARI, J.]

Thahira Haris, wife of the detenu B. Mohammed Haris A
challenging the order of detention dated 24th May, 2008
passed by the Additional Secretary & Principal Secretary to the
Government of Karnataka, Home Department, Vidhana
Soudha, Bangalore on a number of grounds. Grounds 15 and
17 relate to the detenu. The main allegation against the detenu B
is abetting in smuggling of red sanders out of the country.

4. In pursuance to the show cause notice issued by the
Division Bench of the High Court of Karnataka, statement of
objections (counter affidavit) was filed by the detaining authority. C
According to the appellants, the High Court did not consider
the case in proper perspective and dismissed both the writ
petitions filed by the detenu. The detenu, aggrieved by the
impugned judgment of the High Court, has preferred these
appeals before this Court on the following grounds: D

- (i) non-supply of relied upon and relevant documents
vitiates the detention order;
- (ii) the detention order is vitiated on the ground of non-
application of mind; E
- (iii) the detention order is liable to be quashed because
of failure to place all relevant documents before the
detaining authority; and
- (iv) the prejudice cannot be urged in detention matters. F

5. We propose to deal with the impact of non-supply of
relied upon and relevant documents on the detention order.

6. In ground no.15 of detention, it is categorically
mentioned that the detenu was abetting in smuggling of red G
sanders. Again, in ground no.17, the detaining authority while
recording its satisfaction has again reiterated that "I am
satisfied that you are abetting in smuggling red sanders as
described above". In this light, we would examine whether it
was imperative for the detaining authority to supply document H

A at Sl. No. 90 i.e. detention order of Anil Kumar, the master mind. It may be pertinent to mention that the order of detention was passed against Anil Kumar on 13.9.2004. According to the detaining authority, Anil Kumar is the master mind in the entire operation and allegation against the detenu is of abetting him
B in smuggling, therefore, any order of detention passed against Anil Kumar assumes great significance and the same would weigh heavily with the detaining authority while passing the detention order.

C 7. Admittedly, the order of detention of Anil Kumar dated 13.9.2004 was not supplied to the detenu. The document mentioned at serial number 90 is the detention order dated 13.9.2004 of Anil Kumar, the master mind, whereas the document supplied to the detenu was only the confirmation order dated 29.1.2005 passed under section 8 of the
D COFEPOSA Act. Both are different and distinct and, therefore, the High Court was wrong in holding that the detention order and confirmation order was one and the same. The period of detention in such case would be reckoned from 13.9.2004 and not from 29.1.2005.

E 8. It is interesting to note that even according to the learned Additional Government Advocate, who has represented the detaining authority before the High Court, the detention order of Anil Kumar and Kannan was relevant. The Division Bench
F noted the submission of the detaining authority, which is reflected in para 14 of the judgment and reads as under:

".....The role of Anil Kumar and Kannan being clear in the instant case, their past activities and detention orders were relevant....."

G 9. According to the detaining authority, copy of the detention order issued under COFEPOSA is a relied upon document. This document was admittedly not supplied to the detenu. Now it has become imperative to examine the settled
H law crystallized by a catena of judgments of this Court. Some

of the ratios of those judgments are recapitulated as under.

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10. More than half a century ago, the Constitution Bench of this Court has interpreted Article 22(5) of the Constitution in *Dr. Ram Krishan Bhardwaj v. The State of Delhi and Ors.* 1953 SCR 708 observed as under:

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".....Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 22(5), as interpreted by this Court by majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him." We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22. That not having been done in regard to the ground mentioned in sub-paragraph (e) of paragraph 2 of the statement of grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of article 21. The petitioner is therefore entitled to be released and we accordingly direct him to be set at liberty forthwith."

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11. The right which the detenu enjoys under Article 22(5) is of immense importance. In order to properly comprehend the submissions of the detenu, Article 22(5) is reproduced as under:

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"22(5). 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

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A order."

This Article of the Constitution can be broadly classified into two categories: (i) the grounds on which the detention order is passed must be communicated to the detenu as expeditiously as possible and (ii) proper opportunity of making representation against the detention order be provided.

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12. In *Shalini Soni (Smt.) & Others v. Union of India and Others* (1980) 4 SCC 544, this Court aptly observed that the accused must have proper opportunity of making an effective representation. The Court observed thus:

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"....Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, It is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on

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the detenu authority to communicate the grounds of detention to the detenu. From what we have said above, it follows that the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority. The matter may also be looked at from the point of view of the second facet of Article 22(5). An opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is dear that "grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The 'grounds' must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the 'grounds' must be supplied to the detenu as part of the 'grounds'.

13. This Court in *Ichchu Devi Choraria (Smt.) v. Union of India & Others* (1980) 4 SCC 531 in para 6, dealt with in great detail the significance of clause (5) of Article 22 and sub-section 3 of section 3 of the COFEPOSA Act. The court observed as under:

"Now it is obvious that when Clause (5) of Article 22 and Sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu.

- A If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated, in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to Clause (6) of Article 22 in order to constitute compliance with Clause (5) of Article 22 and Section 3, Sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no doubt that on a proper construction of Clause (5) of Article 22 read with Section 3, Sub-section (3) of the COFEPOSA Act, it is necessary for the valid continuance of detention that subject to Clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu alongwith the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of Clause (5) of Article 22 read with Section 3, Sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void."

H 14. In *Khudiram Das v. State of West Bengal & Others* (1975) 2 SCC 81, the Court observed that Article 22(5) insists

THAHIRA HARIS ETC. v. GOVT. OF KARNATAKA & 951
ORS. [DALVEER BHANDARI, J.]

that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu. Para 13 of this case reads as under: A

"..... Section 8(1) of the Act, which merely re-enacts the constitutional requirements of Article 22 (5), insists that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, therefore, not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction. The judicial scrutiny cannot be foreclosed by a mere statement of the detaining authority that it has taken into account only certain basic facts and materials and though other basic facts and materials were before it, it has not allowed them to influence its satisfaction. The Court is entitled to examine the correctness of this statement and determine for itself whether there were any other basic facts or materials, apart from those admitted by it, which could have reasonably influenced the decision of the detaining authority and for that purpose, the Court can certainly require the detaining authority to produce and make available to the Court the entire record of the case which was before it. That is the least the Court can do to ensure observance of the requirements of law by the detaining authority." B C D E F

15. In *Vakil Singh v. State of J & K & Another* (1975) 3 SCC 545, the court clarified that grounds meant materials on which the order of detention was primarily based, that is to say, all primary facts though not subsidiary facts or evidential details. G

16. In *Ganga Ramchand Bharvani v. Under Secretary to* H

A *the Government of Maharashtra & Others* (1980) 4 SCC 624, the court in para 16 observed as under:

B "The mere fact that the grounds of detention served on the
C detenu are elaborate, does not absolve the detaining
D authority from its constitutional responsibility to supply all
the basic facts and materials relied upon in the grounds
to the detenu. In the instant case, the grounds contain only
the substance of the statements, while the detenu had
asked for copies of the full text of those statements. It is
submitted by the learned Counsel for the petitioner that in
the absence of the full texts of these statements which had
been referred to and relied upon in the grounds 'of
detention', the detenus could not make an effective
representation and there is disobedience of the second
constitutional imperative pointed out in *Khudiram's* case.
There is merit in this submission."

E 17. In *S. Gurdip Singh v. Union of India & Others* (1981)
1 SCC 419, this court, while reiterating the legal position,
observed that failure to furnish documents or materials which
formed the basis of detention order along with grounds of
detention and even on demand subsequently made by the
detenu would amount to failure to serve grounds of detention
and, therefore, would vitiate the detention order and make it *void ab initio*.

F 18. In *Khudiram Das's* case (supra), Article 22 has been
succinctly analyzed by this court. It was observed that the
detaining authority cannot whisk away a person and put him
behind bar at its own sweet will. It must have grounds for doing
so and those grounds must be communicated to the detenu as
G expeditiously as possible, so that he can make effective
representation against the order of detention. The court further
observed that Article 22 provides various safeguards calculated
to protect personal liberty against arbitrary restraint without trial.
H These safeguards are essentially procedural in character and
their efficacy depends on the care and caution and the sense

of responsibility with which they are regarded by the detaining authority. These are barest minimum safeguards which must be strictly observed by an executive authority.

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19. In *Golam alias Golam Mallick v. State of West Bengal* (1975) 2 SCC 4, a four-Judge Bench of this court has reiterated the legal position. The court observed as under:

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"No doubt, Clause (5) of Article 22 of the Constitution and Section 8 of the Act do not, in terms, speak of 'particulars' or 'facts', but only of 'grounds' to be communicated to the detenu. But this requirement is to be read in conjunction with and subservient to the primary mandate: "and shall afford him the earliest opportunity of making a representation against the order", in the aforesaid Clause (5). Thus construed, it is clear that in the context, 'grounds' does not merely mean a recital or reproduction of a ground of satisfaction of the authority in the language of Section 3 of the Act; nor is its connotation restricted to a bare statement of conclusions of fact. It means something more. That 'something' is the factual constituent of the 'grounds' on which the subjective satisfaction of the authority is based. All the basic facts and material particulars, therefore, which have influenced the detaining authority in making the order of detention, will be covered by "grounds" within the contemplation of Article 22(5) and Section 8, and are required to be communicated to the detenu unless their disclosure is considered by the authority to be against public interest."

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20. This Court in *Mohd. Alam v. State of West Bengal* (1974) 4 SCC 463 in para 19 observed that the non-communication of that material was violative of Article 22(5) of the Constitution and the Act inasmuch as it did not intimate to the detenu the full grounds or material to enable him to make an effective representation.

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21. This Court in *Kirit Kumar Chaman Lal Kundaliya v.*

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A *Union of India & Others* (1981) 2 SCC 436 (para 12) observed that once the documents are referred to in the grounds of detention it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or *pari passu* the grounds of detention.

B 22. In the case of *Ramchandra A. Kamat v. Union of India & Others* (1980) 2 SCC 270, this Court clearly held that even the documents referred to in the grounds of detention have to be furnished to the detenu.

C 23. In *Tushar Thakker (Shri) v. Union of India & Others* (1980) 4 SCC 499, this Court mentioned that the detenu has a constitutional right under Article 22(5) to be furnished with copies of all the materials relied upon or referred to in the grounds of detention, with reasonable expedition.

D 24. In *Ram Baochan Dubey v. State of Maharashtra and Another* (1982) 3 SCC 383, this Court reiterated the legal position and observed that mere service of the grounds of detention is not a compliance of the mandatory provisions of Article 22(5) unless the grounds are accompanied with the documents which are referred to or relied on in the grounds of detention. Any lapse would render the detention order void.

E 25. This Court in *Sophia Gulam Mohd. Bham v. State of Maharashtra & Others* (1999) 6 SCC 593 para 11 observed that effective representation by the detenu can be made only when copies of the material documents which were considered and relied upon by the Detaining Authority in forming his opinion were supplied to him.

F 26. In *District Collector, Ananthapur & Another v. V. Laxmanna* (2005) 3 SCC 663, this Court again reiterated that the documents and materials relied upon by the detaining authority must be supplied to the detenu for affording him opportunity to make effective representation.

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THAHIRA HARIS ETC. v. GOVT. OF KARNATAKA & 955
ORS. [DALVEER BHANDARI, J.]

27. There were several grounds on which the detention of the detenu was challenged in these appeals but it is not necessary to refer to all the grounds since on the ground of not supplying the relied upon document, continued detention of the detenu becomes illegal and detention order has to be quashed on that ground alone. A B

28. Our Constitution provides adequate safeguards under clauses (5) and (6) of Article 22 to the detenu who has been detained in pursuance of the order made under any law providing for preventive detention. He has right to be supplied copies of all documents, statements and other materials relied upon in the grounds of detention without any delay. The predominant object of communicating the grounds of detention is to enable the detenu at the earliest opportunity to make effective and meaningful representation against his detention. C D

29. On proper construction of clause (5) of Article 22 read with section 3(3) of COFEPOSA Act, it is imperative for valid continuance of detention that the detenu must be supplied all documents, statements and other materials relied upon in the grounds of detention. In the instant case, admittedly, the relied upon document, the detention order of Anil Kumar was not supplied to the detenu and the detenu was prevented from making effective representation which has violated his constitutional right under clause (5) of Article 22 of the Constitution. E F

30. Consequently, we accept these appeals. The impugned detention order is quashed and the detenu is directed to be released forthwith, if not required in any other case.

31. The appeals are disposed of accordingly G

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Appeals disposed of.