(1991) 03 AHC CK 0036

Allahabad High Court

Case No: Criminal Miscellaneous Habeas Corpus Petition No. 25211 of 1990

Anil Kumar Agarwal		APPELLANT
	Vs	
State of Uttar Pradesh and Another		RESPONDENT

Date of Decision: March 11, 1991

Acts Referred:

- Constitution of India, 1950 - Article 22(5)
- Criminal Procedure Code, 1973 (CrPC) - Section 173(5)
- Customs Act, 1962 - Section 108

Citation: (1991) CriLJ 2881

Hon'ble Judges: S.R. Singh, J; A.P. Misra, J

Bench: Division Bench

Advocate: Umesh Narain Sharma, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

A.P. Misra, J.
The present petition is directed against the order dated 22nd August, 1990 detaining the petitioner and for quashing the same. The petitioner has further sought for a direction for releasing him forthwith from the detention.

2. The incident is said to have taken place on 15-3-1990 when according to the respondents the petitioner was intercepted by the G.R.P. Mughal Sarai and from his possession six gold biscuits were recovered. Since this case relates to the Customs Department, it was transferred along with the recovered articles to the officials of the Customs Department on the same day. On 16-3-1990 the petitioner was produced before the Chief Judicial Magistrate, Varanasi and after obtaining proper remand order, he was sent to Jail. Petitioner"s statement was also recorded both on 15-3-1990 and 16-3-1990 and as per his statement it is revealed that the recovered gold belonged to Ratan Kumar Agarwal of Allahabad. On 18-4-1990 the statement of Ratan Kumar Agarwal was

recorded by the Customs Officials who denied the ownership of gold and stated that Anil Kumar himself is responsible for the recovered foreign gold. From the statement of the petitioner it is further revealed that the said gold was supplied by Sri Ram Gopal Sonwaliya of Calcutta. Thereafter on 30-4-1990 the report of the Collector, Customs Calcutta regarding the said supply was received at Gorakhpur, and the Special Chief Judicial Magistrate, Economic Offences was requested to grant remand for interrogation of petitioner Anil Kumar Agarwal as the address of Sri Ram Gopal Sonawallia was found fake. Since the petitioner was already bailed out on 16-5-1990, the summon was issued and served on the petitioner on 5-6-1990 for giving his statement before the Customs Authority u/s 108 of the Customs Act on 15-6-1990. Thereafter proposal of detaining the petitioner under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as the COFEPOSA) was sent to Collector, Customs, Patna on 25-5-1990 and he after considering various aspects of the matter submitted the said proposal to State of U. P. on 26-6-1990. Thereafter the said proposal was received in the State of U. P. Confidential Section 5 Lucknow on 17-7-1990 and after preliminary examination of the proposal steps were initiated to call for a meeting of the Screening Committee fixing 27-7-1990. The Screening Committee was of the opinion that there was sufficient reason for preventively detaining the petitioner under the COFEPOSA. Thereafter the matter was placed before the Officer concerned who recorded his opinion of concurrence on 4-8-1990. On the same day the file was sent to the Judicial Section which was received thereon on 7-8-1990. Along with the office note the file was put up on 8-8-1990 before the Home Secretary/Chief Minister and on 8-8-1990 and 10-8-1990 the orders were received respectively. After completing all the necessary formalities the formal order was drawn on 20-8-1990 and was issued on 22-8-1990. Subsequently, it was learnt that on 4-9-1990 the petitioner was arrested in pursuance of the present detaining order and the copies of order of detention and grounds along with all the materials on which the reliance was placed was served on the petitioner.

3. Learned counsel for the petitioner made attack with regard to the delay in passing the detention order namely the proximity of the actual incident and passing of the detention order. The incident is said to have taken place on 15-6-1990 while the detention order was passed on 22-8-1990. During this period the main attack was with regard to delay of about one month between 25th May, 1990 which was the date on which the proposal for detaining the petitioner under COFEPOSA was sent to the Collector, Customs, at Patna and final submission of the said proposal to the State of U. P. by the State Authority on 26-6-1990. The second ground of attack was on the delay in deciding the representation of the petitioner which is in two portions; firstly, the delay being caused between the period actually when the representation is made and various nothings were prepared and formalities for sending it to the State Government for formation of its opinion and secondly, the delay caused after the proposal was received by the State Government and with all the formalities and passing of the order by the State Government itself. The main contention for the latter portion of delay was that the respondents during those two periods kept the matter pending which clearly reveals that there was inaction,

carelessness and casualness in disposing of the said representation and hence, the detention order is illegal. Finally, when making the reply in the rejoinder affidavit it is stated that the order of release of the detenu on bail finally was not being placed before the detaining authority and secondly, if placed, the documents constituting the said fact were never supplied to the detenu, hence the order is illegal.

4. Coming to the first point, we find that no doubt the incident relates for the period of 15-3-1990. Thereafter the statement was recorded as aforesaid and on the basis of the said statement enquiry was conducted since the petitioner revealed that the said recovery of gold belonged to one Ratan Kumar Agarwal of Allahabad and the statement of Ratan Kumar Agarwal was recorded on 18-4-90 by the Customs Officials in which he totally denied the ownership of the said gold and alleged that Sri Anil Kumar Agarwal, the petitioner himself is responsible for the same. Since the statement of the petitioner further reveals that the said gold was supplied by one Ram Gopal Sonawalia of Calcutta, for ascertaining the said fact, a report was asked for from the Collector, Customs, Calcutta which was received on 30-4-1990 at Gorakhpur. As per aforesaid report the said person was not found and the report revealed that it was a fake name. In view of both these statements recorded earlier, they thought it necessary to record the statement of the petitioner u/s 108 of the Customs Act. It is for that purpose that an application was made for the remand of the petitioner, and thereafter it was revealed that the petitioner was released on bail on 16-5-1990 and then summon was issued to the petitioner on 5-6-1990 by the Superintendent, Customs, Varanasi for recording his statement u/s 108 of the Customs Act. The summon was returned with an endorsement of his brother Sri G. K. Agarwal that Anil Kumar Agarwal was out of station. Thereafter Anil Kumar Agarwal did not appear in pursuance of the summon, therefore, intimation was again sent to Collector, Customs, Calcutta on 10-8-1990 for tracing out Ram Gopal Sonawalia, the alleged supplier. From the aforesaid facts we find that in between while this proceeding was going on, the proposal was sent by the Customs Authority Gorakhpur to the Collector, Customs Patna on 25-5-1990 who after considering all the matters submitted the proposal to the State of U. P. on 26-6-1990. After that it is revealed that the State of U. P. Confidential Section-5, Lucknow on 17-7-1990 after preliminary examination of the proposal took steps to call for a meeting of the Screening Committee fixing 27-7-1990 which finally approved and the said report was put up before the Officer concerned for his concurrence who recorded his concurrence on 4-8-1990 and on the same day the file was sent to the Judicial Section which was received there on 7-8-1990. Thereafter, along with the Office note the file was put on 8-8-1990 before the Home Secretary/Chief Minister and then on 8-8-1990 and 10-8-1990 the orders were received respectively. Thereafter the final order was drawn on 20-8-1990 and was issued on 22-8-1990.

5. In the case of Sk. Nizamuddin Vs. State of West Bengal, the relevant portion relied on by the learned counsel for the petitioner is quoted as under (Para 3):

"There was delay of about two and a half months in detaining the petitioner pursuant to the order of detention and this delay, unless satisfactorily explained, would throw

considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate recited in the order of detention".

This case has no application to the facts of the present case as the detenu was arrested on the same day of incident itself. The principle for; considering the inordinate delay in arresting; the detenu is from the date of the incident to the date of the detention order is passed. The chain of connection between the dangerous activities relied on and the detention order passed remained unexplained for about three months. In the case of Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, it has been held that :

"Even in absence of explanation for delay, the inference could not be drawn that subjective satisfaction arrived at by detaining authority was not genuine or that grounds were stale or illusory".

In this case there was no explanation for the delay between 2nd February, and 28th May, 1987. It was further held in this case :

"that even though there was no explanation for the delay between 2nd February and 28th May, 1987 it could not give rise to a legitimate inference that the subjective satisfaction arrived at by the District Magistrate was not, genuine or that the grounds were stale or illusory or that there was no rational connection between the grounds and the impugned order of detention".

There are catena of decisions of various Courts on this point of explaining delay in taking action and it has been held that mere delay in making order was not sufficient to hold that the District Magistrate must not have been satisfied about the necessity of the detention order. While dealing with this point, we have to distinguish the delay caused between the incident and the passing of the detention order and the delay in disposal of the representation after the petitioner being taken into custody. So far as the first part is concerned, the delay is only tested as to whether on account of this delay subjective satisfaction could be arrived at or not. There cannot be any mathematical calculation or fixed formula in respect of coming to the conclusion that on account of delay of few days or few months it can be held that no subjective satisfaction could be arrived at. Each case has to be examined on its own fact. In view of the aforesaid decisions and coming to the facts of the present case we have to examine these facts in the light of the said decisions and the law existing on this point. In the present case we find that the incident in question took place on 15-3-90. Before passing the detention order the facts disclosed by the petitioner himself were to be enquired into as to whether the statements were true or not. This was necessarily to ascertain whether the said solitary incident was such as involving the gang or other persons or was a case of individual act. The two informations given on 15/16-3-1990 before the Chief Judicial Magistrate were enquired into. The first was in respect of the recovery of gold belonging to Ratan Kumar Agarwal of Allahabad and the second was that the said gold was supplied by Ram Gopal Sonawalia of Calcutta. These enquiries took some time when it was found that the statement given by the petitioner

was either disowned or the person found was fake. It is thereafter the aforesaid authorities took precaution to collect material first after making attempt to record the statement of the petitioner again u/s 108 of the Act. Then the proposal by the Customs Authorities at Gorakhpur was forwarded to the Customs Authority at Patna and after making proper enquiry sent it to the State of U. P. on 26-6-1990 which was received in the confidential Section-5 Lucknow on 17-7-1990 and immediately thereafter the meeting of the Screening Committee was called for on 27-7-1990. As the matter was considered and after the said Committee approved for the preventive detention, the same was put up before the Officer concerned who also recorded his own concurrence on 4-3-1990 and on the same date the file was sent to Judicial Section which was received on 7-8-1990 and thereafter the order was passed by the Home Secretary/Chief Minister and then on 8-8-1990 and 10-8-1990 the orders were received respectively. Thereafter the final order was drawn on 20-8-1990 and was issued on 22-8-1990. From these facts we are not satisfied that this delay in any way affected the subjective satisfaction of the detaining authorities.

6. Again reliance was also placed on behalf of the petitioner in the case of K. M. Abdulla Kunhi and K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, . In this case the Constitution Bench has held as under :

"Time operative for consideration can never be absolute or obsessive. It will depend upon the necessities and time at which representation is made. An avoidable delay would be a breach of constitutional imperative".

7. Coming to the second ground of attack that there was delay in disposal of the petitioner"s representation, it has been urged that the petitioner"s wife has made the representation on 21-9-1990 which was received on 27-9-1990. There was also a second representation which was made by the petitioner himself through the Central Jail Varanasi dated 1-10-1990 which was received on 4-10-1990 on which parawise comments from the Customs Department was asked on 6-10-1990. The comments from the relevant department on these two representations were received on 5-10-1990 and 11-10-1990 respectively. With the office comments the said representations were placed on 6-10-1990 and 12-10-1990 respectively for orders and these representations were placed before the Home Secretary on 14-10-1990 and in the absence of the Chief Minister the order was passed by the Chief Secretary on 15-10-1990 approving the proposal for rejection and, therefore, the representations were formally rejected by the Government on 20-10-1990. The main contention is that in view of the aforesaid facts when the comment was received in the office on 6-10-1990, the matter being sent to the Home Secretary on 14-10-1990, so far the first representation is concerned, shows the inaction of the respondents, hence this delay is fatal and the order for detaining the detenu is illegal. So far the second representation is concerned it has been urged that the delay caused in the first representation cannot be compensated on account of the second representation by the petitioner and thus even if it can be said there is no delay in

disposal of the second representation, the detention order would be illegal on the basis of the inordinate delay in disposal of the first representation. On behalf of the State of U. P. learned Additional Government Advocate has urged that in view of Article 22(5) of the Constitution and in view of the fact while communicating the order of detention to the petitioner along with the relevant records, the documents itself made it clear that if the petitioner so desires, he can make representation as against his detention and it is on account of that since his representation is received subsequently, it was thought desirable to dispose of the said representation also for which comment was sent and accordingly both the representations were disposed of simultaneously.

8. In Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, similar question arose, in this case two representations were made, one by the Secretary Khed Taluka Martha Sewa Sangh and the other by the petitioner and on considering the contents thereof the Sangh''s representation was disposed of which was the first one and, therefore, the disposal of the second representation which was made by the petitioner on the same score held that the delay in disposing of that representation did not really prejudice the detenu''s case. In this case even though the petitioner made second representation the Supreme Court held the first representation to be valid and did not reject the said representation on the ground of Article 22(5) of the Constitution that it is only the petitioner''s representation to be considered. Similarly even the case reported in 1983 All LJ 545 (Awadh Kumar Shukla v. Adhikshak Kendriya Karagar, Naini, Allahabad is of no avail to the respondents. On the facts of this case we find that the first representation was made by the wife of the petitioner where it was specifically stated that since the petitioner was not able to to write on account of injury, this was sent by her. In fact, even otherwise the second representation made by the petitioner himself was nothing but identical representation to the one sent by the wife. On behalf of the State of U. P. it has not been denied that the second representation was, in fact, the copy of the first representation. In view of the fact that both the representations being the same, it was not necessary either to dispose of the second representation afresh or to wait for its disposal before the representation is disposed of. We are of the opinion that if there was any delay in disposal of the first representation, then that by itself would be sufficient for holding the detention order to be vitiated. The benefit of the second representation cannot be given on the facts of this case to the respondents on account of the petitioner himself making the second representation. Therefore, the question whether there was any delay in disposal of the first representation or not is to be decided.

9. As aforesaid, it is not in dispute that the matter was received in the office on 6-10-1990 and was sent to the Home Secretary on 14-10-1990. The question is whether there was inaction by the respondents during this period or not. For this purpose we summoned the original file and have thoroughly examined the same. We have seen that on 6-10-1990 the file was forwarded to the Under Secretary Finance Section, U. P. Government. 7-10-1990 was Sunday and on 9-10-1990 the special Secretary to U. P. Government sent the same along with the report to the Joint Legal Remembrancer on 9-10-1990 and on

10-10-1990 the file was sent to Home Department and on 11-10-1990 the second representation was received. On 12-10-1990 both of them were sent to the higher authorities. Thereafter on 13-10-1990 it was forwarded by the special secretary to the Home Secretary and on 14-10-1990 the Home Secretary passed order. Similarly on 15-10-1990 the Chief Secretary passed order. After persual of the said file we find that it cannot be said that there was any inaction or inordinate delay or slackness on the part of the respondents in dealing with the file. Similarly, on examination of the file, so far the second part of the argument made by the petitioner''s counsel is concerned, we find that after the order being passed on 15-10-1990, the order of rejection by the State is passed on 20-10-1990. On persual of the file we also find that after the order was passed by the Chief Secretary on 15-10-1990 on the same day the approving order was prepared for sending it to the Jail Superintendent. On 16-10-1990 it is reported that whole order of the file need not be sent, only crux of the order was to be sent. On 17-10-1990 we find that the approval of the final order was made. Thereafter there was holiday for one day and then finally on 20-10-1990 the order was passed. In view of this fact and also on the facts of this case we do not find that there was any inordinate delay or any inaction or casualness in rejecting the representation of the petitioner.

9A. Reliance was placed by the petitioner''s counsel on the case of Harish Pahwa Vs. State of U. P. and Others, where it has been held that:

''The representation made by the detenu has to be considered without any delay when the question of liberty of detenu is involved. The delay in considering the representation, the question of liberty of a person is involved, may be vital''.

It has been further held in this case that a few days the file remained unattended and there was total inaction on behalf of the respondents. In this background it has been held that it is the duty of the State Government to decide the same expeditiously until the final decision is made and communicated to the detenu. To the similar effect is the decision reported in Smt. Khatoon Begum Ors. Vs. Union of India (UOI) and Others, , Vijay Kumar Vs. State of Jammu and Kashmir and Others, . Youssuf Abbas Vs. Union of India (UOI) and Others, . To the same effect is the decision reported in 1983 All LJ 545 (Awadh Kumar Shukla v. Adhikashak Kendria Karagar, Naini). On the other hand, reliance was placed on the case of Mohammad Jafar Vs. Union of India (UOI), This case was about six days'' delay and it has been held (Para 10 of AIR 1990 SC):

''Thus the time actually taken by the Central Government in considering the representation was six days. The said period of six days cannot, in our opinion, be regarded as unduly long. It is, therefore, not possible to hold that there was inordinate delay in the consideration of the representation of the petitioner by the Central Government and the detention of the petitioner cannot be held to be invalid on that basis''.

The principles of various decisions which were referred are not necessary to be repeated here and are to the effect that no mathematical forma could be formulated for drawing

inference whether the order of detention vitiates on account of two days'' delay, six days'' delay or larger delay. The Court has to examine when the question of liberty of a detenu is involved by seeing whether in dealing with such representation there is any inaction, carelessness of the authority concerned in dealing with the representation. If found in positive, then even shortest period of delay may be vital and the Court may hold in such cases that the detention of the detenu is illegal. However, on examination of the material the Court came to the conclusion that the file was moved and attended and then placed before the officer concerned, therefore, the delay on account of such movement cannot be said to such as holding the said order to be invalid. In the present case we have summoned the relevant file, perused the same and are satisfied that there was no inordinate delay in considering the representation of the petitioner nor there is any inaction or carelessness on the facts existing in the file.

10. In view of this we are of the opinion that the delay as pointed out by the petitioner in this case cannot constitute the ground for holding that the detention order vitiates.

11. Last ground of attack by the learned counsel for the petitioner is the fact that the petitioner was already granted bail and was not under detention and this fact was not brought to the notice of the detaining authority. All the documents supplied to the petitioner reveal that the petitioner''s application for bail was rejected by the Sessions Judge and his application for bail before the High Court was pending and as such not bringing this aforesaid information before the detaining authority being vital for passing the preventive detention order and withholding of such material vitiates the said order. This point was not clearly taken initially though factually it is referred in the rejoinder affidavit. Since it goes to the root, we permitted to be raised and accordingly we called for the relevant file for examination in this respect. The objection raised on behalf of the respondents was rejected. We find that similar objection was raised in the case of Harish Pahwa v. State of U.P. 1981 Cri LJ 950 (supra) where it was held that the point was not raised in the petition but the Supreme Court held that in view of its importance and the fact that material necessary for its determination being available on record, the point could be allowed. We feel in present case also the question whether the detaining authority was supplied with the material relating to the continued detention or granting bail was there or not, being vital and is allowed. We permitted the point to be raised and accordingly the file was summoned. On perusal of the file we find that there was noting by the office addressed to the under secretary referring the detenu being released on bail on 11-5-1990 and the fact regarding the petitioner being released was placed before the detaining authority. The question which has been raised for consideration was initially that since the fact that the petitioner was enlarged on bail was not brought to the notice of the detaining authority, hence the order of detention is illegal. In defence, the learned Additional Government Advocate placed this file before us to show that there was noting and the fact that the petitioner was enlarged on bail was brought to the notice of the detaining authority prior to the passing of the said order. The next question which arose after perusal of the file and was also raised on behalf of the petitioner was that since

there was material which was placed before the authority concerned, and the copy of which was not supplied to the petitioner, the order of detention vitiates on account of lack of proper opportunity to the petitioner in making the representation in respect of the fact which was the foundation and essential fact that constitute the opinion for directing the detention of the petitioner under the preventive detention law. The principle that the material relevant for formation of opinion for preventive detention, if not supplied to the detenu is fatal and the same has not been disputed by the learned Additional Government Advocate. The argument is that actually the order of detention looking to the grounds of detention itself reveals that the fact that the petitioner was released on bail was not the fact which constituted the formation of the opinion, of the detaining authority. He further urged that the formation of opinion for the ground of detention in other manner was there and thus even though these materials before the authority concerned, even if were not supplied, could not be fatal. Secondly, it was urged that if the petition or did not demand the document while making the representation or appearing before the Advisory Board or even prior to the making the said representation non-supply on this material also will not vitiate the order for which the reliance was placed on behalf of the State of U. P. on the cases of Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, , Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, and Haridas Amarchand Shah of Bombay Vs. K.L. Verma and Others, In the case of Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, the question arose regarding non-supply of the First Information Report to the detenu. It has been held that u/s 173(5), Cr. P. C. the detenu had already been supplied all the documents and relevant extracts thereof on which the prosecution relied in the criminal cases. There was thus no need to supply the copy of the First Information Report referred in the grounds of detention over again, and no grievance can be made that the detenu was deprived of the right of making a representation at the earliest opportunity due to non supply of these documents. Thus this case has no application to the facts of the present case.

12. Next reliance was placed on the case of Bhawarlal Ganeshmalji v. The State of Tamil Nadu (supra). In this case the intelligence report which was the second ground of detention was not given to the detenu and hence the order was challenged. The Court held that of course it is a detenu''s right for obtaining all the essential grounds and particulars forming the basis of the said ground and where in our opinion the particulars are mentioned in the ground, the detenu is entitled to call for better-particulars. It has been further held where the grounds are vague, no question would arise of the detenu asking for better particulars but it was held that in that case there was no vagueness of the ground. The ground was very specific and if the detenu wanted any more particular such as the name of the intelligence officer or other information, he could have well asked for the particulars before making his representation. Since the detenu could not ask for, it cannot be said that merely non supply would vitiate the detention order. Next reliance was placed on the case of Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, . In this case reference was made of the case of Wasiuddin Ahmed Vs. District Magistrate, Aligarh, U.P. and Others, in which the following passage has been relied on :

"Where privilege had been claimed against disclosure of the source as also the contents of the information. In view of the privilege claimed this Court took the view that supply of intelligence report of secret nature cannot be insisted upon and non disclosure of such information does not provide a basis for challenging the detention."

In the present case there is no question of privilege pertaining to documents in question and, therefore, the view taken in the aforesaid case is not applicable to the present case. Again reliance was placed on the case of Haridas Amarchand Shah of Bombay Vs. K.L. Verma and Others, . The relevant portion relied on in this case is quoted as under:--

"The application for variation of condition of bail and the order passed by the Metropolitan Magistrate varying the condition of bail is, in our opinion, not a vital and material document inasmuch as the granting of bail by the Magistrate enable the detenu to come out and carry on his business activities as before. The condition imposed by the Magistrate has no relation to the activities carried on by the detenu and as such the High Court after considering all the circumstances held that the order varying the condition of bail was not a relevant document and failure to produce the document before the detaining authority before arriving at his subjective satisfaction not vitiated the order."

In all the aforesaid cases it has been held that non-supply of certain document on facts existing in those cases would not vitiate the order of detention. The emphasis and ratio of these cases are that where the detention order is very specific and clear and there is no supply of any document, it is always open to the detenu to call for the said document from the respondent and the detenu not requiring those documents from the respondent and not making any request, could not make the detention order invalid. This point is very specifically made clear in the case of Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, . In this case distinction has been made between two classes of cases, one where in the detention order there is no specific ground and the other where there is vagueness in the ground. Of course, where the grounds are vague, no question would arise of the detenu asking for better particulars. But where there is specific ground, and if the detenu wanted any particular, it should have asked for the same. However, the same principle could not apply when there is no specific ground in the detention order but there is vagueness in the detention order itself. The principle in all the aforesaid decisions are whenever the detaining authority recorded its satisfaction for passing the order of preventive detention and every fact which constituted foundation of drawing inference must be supplied to the detenu. It may be, if a document which may be classified as one which may be before the detaining authority, the detenu may ask for and the respondent is bound to supply the same and there may be other class of documents which may not be relevant as they do not form foundation for passing detention order though they might have been placed before the detaining authority. We are not concerned in respect of such class of cases. Whenever, the detaining authority formulates its opinion for passing the detention order and if a fact constitutes the basic fact, then that document constituting the basic fact must be supplied to the detenu in order to make proper defence. However, exception carved out on the basis of the authorities referred to above are cases where

the ground is specific and the details may be lacking has been accepted and where no such request was made by the detenu, it may not be a case where the order of detention may vitiated on that ground. Coming to the facts of the present case we are concerned to the question whether the person enlarged on bail who was under detention, would be a basic fact for passing the order of detention. In our opinion, whenever question of preventive detention arise the fact whether the petitioner is in jail or if he is in jail, there is likelihood of his being enlarged on bail or he is already enlarged on bail, is the basic fact which constitutes formation of opinion for passing detention order. Unless those facts are found and existing on record, the exercise of passing order of detention may not be said to be proper. It is in this context it becomes necessary and relevant for consideration whether the detenu is already enlarged on bail or likely to be enlarged on bail. It is on these facts if it exists, the detaining authority may draw the inference whether there is likelihood of the detenu committing offence in future also and whether it is necessary or not to prevent reoccurrence by preventive detention.

13. The argument raised on behalf of the learned Additional Government Advocate is that the order of detention was not passed in the absence of knowledge that he was enlarged on bail and it is for that purpose the reference was made in the file showing the noting as aforesaid that the petitioner has been enlarged on bail. Once that facts existed in the file, it cannot be urged either that this material did not constitute facts for passing detention order or its non supply to the detenu would be fatal. We having found it to be an essential fact for passing an order of detention and in the present case this having been placed before the authority concerned, it was necessary for the respondent-State to have given the same to the detenu for making effective representation. In the case of Anant Sakharam Raut Vs. State of Maharashtra and Another, the following view has been taken :

"Detention was based on certain incidents and criminal cases were pending in respect of these incidents. The detaining authority was not made aware of the fact that detenu had moved applications for bail and that he was enlarged on bail. The detention order was silent about these facts. It was held that in that case it may be a case of total absence of mind on the part of the detaining authority and as such the detention order was held valid."

Reliance was also placed by the learned counsel for the petitioner on the case of P.U. Abdul Rahiman Vs. Union of India and others, referring the principle laid down by the Supreme Court in the case of M. Ahamedkutty Vs. Union of India (UOI) and Another, which is quoted as under :

"considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had; been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents

supplied to the detenu with the ground of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold, that it amounted to denial of the detenu''s right to make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of detenu illegal and entitling the detenu to be set at liberty in this case.''

From the aforesaid decisions of the Supreme Court it is pellucid that this awareness is must and even the same is not referred to in the ground of detention could make no difference.

14. However, once the respondent-State takes it as a defence as awareness was there by the detaining authority regarding the petitioner being enlarged on bail, the condition of awareness is a part of the basic fact constituting for passing detention order even if it does not record in the detention order itself. Once it is held, it cannot be said that non-supply of this fact would not be fatal in rejecting the detenu''s representation. It amounts to not giving adequate opportunity to the detenu for making effective representation. In a case where the detenu is enlarged for several months being brought to the notice of the detaining authority and which constitutes the fact for formation of opinion for passing the detention order, he may have made representation specifically mentioning that after enlargement on bail there is no such activity or no continuity in the chain for which the incident is alleged. This fact about the petitioner being enlarged on bail though was brought to the notice of the detaining authority but the same was not communicated to the detenu which in our considered opinion, was vital for making the proper and effective representation. In view of this and on this ground alone the order of detention in the present case vitiates.

15. In view of the aforesaid findings we are of the opinion and accordingly we hold that the order of detention of the petitioner dated 22-8-1990 is illegal. It is hereby quashed. In this view of the matter, we direct the respondents to release the detenu forthwith unless he is required in connection with some other case. The present petition is accordingly allowed.