#J-1 & J-2

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 11.04.2022
Judgment Pronounced On: 02.05.2022

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+ **W.P.(CRL) 72/2022 and CRL.M.A.788/2022**

ZAKIR KHAN ..... Petitioner

Versus

UNION OF INDIA AND ORS. .....Respondents

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+ **W.P. (CRL) 73/2022 and CRL.M.A.791/2022**

SANJEEV KUMAR ALIAS SANJEEV KUMAR YADAV

..... Petitioner

Versus

UNION OF INDIA THROUGH ITS SECRETARY & ORS

.....Respondents

Advocates who appeared in this case:

For the Petitioners: Mr. Vikram Chaudhri, Senior Advocate alongwith Mr. Rishi Sehgal, Mr. Ashish Batra, Ms. Ria Khanna and Mr. Keshavam Chaudhri Advocates.

For the Respondent: Mr. Chetan Sharma, Additional Solicitor General alongwith Mr. Anurag Ahluwalia, CGSC with Mr. Danish Faraz Khan, for R-1 and R2 Union of India;
Mr. Harpreet Singh, Senior Standing Counsel with Investigating Officer Mr. Sumit Kumar for R-3/DRI

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

J U D G M E N T

SIDDHARTH MRIDUL, J

1. These two writ petitions under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure 1973, have been instituted on behalf of Zakir Khan (hereinafter "Detenu No. 1"), the Petitioner in W.P.(CRL.) 72/2022 and Sanjeev Kumar @ Sanjeev Kumar Yadav ("Detenu No. 2"), the Petitioner in W.P.(CRL.) 73/2022 (hereinafter collectively referred to as the 'Detenus'), praying for quashing of detention orders, both dated 26.11.2021, bearing No. PD-PD-12001/17/2021-COFEPOSA and PD-12001/18/2021- COFEPOSA, issued under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter "COFEPOSA") against the

Petitioners/Detenus No. 1 and 2 respectively; and for further directions that the detenus be set at liberty forthwith. As these Petitions raise common questions of law and are premised on similar facts, they are being disposed off by this common order.

FACTS OF THE CASE: -

2. The relevant facts qua the detenus, as are necessary for the adjudication of the subject writ petitions are briefly encapsulated as follows: -

i) The Income Tax Department conducted a search and seizure operation on 10.10.2021 at 23 premises allegedly belonging to the Detenu No. 1 and persons allegedly associated with him. Thereupon, a Statement (Annexure P-4) of the Detenu No.1 was recorded u/s 132(4) of the Income Tax Act, 1961, on the 11.10.2021, wherein the Detenu No. 1 admittedly stated that he had studied only till the VIII standard and therefore, expressed his volition to record his statement in Hindi.

ii) That, further on 13.10.2021, a Container No. PCIU8689880 (40 Feet) imported by one M/s Indo Fab, at Kolkata Port, with a declaration stated to contain HDMI cables, was

subjected to examination by the Income Tax Authorities in the presence of port custom officers wherein it was found that it contained several prohibited items namely, old and used/refurbished laptops, mobile phones etc. Accordingly, the same was detained by the Customs officers at Kolkata. It was alleged that the said firm M/s Indo Fab was owned/controlled by the Detenu No.1.

iii) That on the basis of information received from the Income Tax Department, New Delhi; the Directorate of Revenue Intelligence, Delhi Zonal Unit (hereinafter DRI/Respondent No.3) initiated search proceedings at the purported residential premises of the Detenu No. 1 i.e., at S-80 Greater Kailash-I, New Delhi, on the 18.10.2021. During the search, certain documents allegedly found stored in the said premises in the form of files, loose documents, writing pads, diaries, Certificate of Incorporation/Articles of Association pertaining to three Hong Kong based supplier firms on which the name of the Detenu No.1 was mentioned as nominated person were recovered. All documents relevant to the investigation were resumed for further investigations in

relation to the suspected undervaluation of imported goods by the firms allegedly controlled/owned by the Detenu No.1 and the Panchnama was drawn.

iv) On 18.10.2021, upon further search conducted at the office premises of Mr. Anurag Tiwari, Custom Broker-proprietor of M/s Anurag Tiwari situated at L-509, Gali No. 15, Mahipalpur Extension, New Delhi, when it was allegedly noticed that the clearance work of imports made in relation to the firms purportedly controlled/owned by the Detenu No. 1 was handled by one Sanjeev Kumar Yadav (Detenu No.2), having Custom Broker firm namely, M/s Sanjeev Kumar situated at Khasra No. 808, Gali No. 6B, K Block, Mahipalpur, New Delhi. Accordingly, search proceedings under the Customs Act, 1962 were carried out at the said office of Sanjeev Kumar whereupon certain documents were allegedly found stored in the said premises, in the form of files, loose documents etc. in respect of the said firms purportedly controlled/owned by the Detenu No.1. The officers of the DRI resumed the said documents for further investigations.

v) On or about the 18/19.10.2021, the Detenus were arrested by officers of the DRI and produced before the Court of CMM (Duty Magistrate), Patiala House Courts through Virtual Conference at around 08:30 PM (as it was a holiday) and were remanded to 3 days Judicial Custody.

vi) On 22.10.2021, Detenus were produced before the Learned Court of CMM, Patiala House Courts, New Delhi and remanded to 14 days judicial custody till the 04.11.2021.

vii) The Detenus admittedly filed retraction applications on the 28.10.2021, before the learned CMM Court thereby, retracting their statements recorded on 18/19.10.2021 before the DRI.

viii) The DRI then caused to be filed an application before the learned CMM, Patiala House Courts, New Delhi seeking permission to record statements of the Detenus u/s 108 of the Customs Act, 1962, which was allowed vide order dated 01.11.2021.

ix) On 02.11.2021, another container No. PCIU8010617 (40') imported by M/s Viha International at Kolkata Port, with a declaration to contain HDMI cables, was subjected to

examination by the officers of DRI, Kolkata wherein it was allegedly found that it contained several prohibited items namely, old and used laptops, CPUs. Accordingly, the same was detained by the officers of DRI, Kolkata. It is alleged that the said firm M/s Viha International was also owned/controlled by the Detenu No. 1.

x) On 05.11.2021, the DRI caused to be filed an application before the learned CMM Court seeking extension of the Detenus remand for a further period of 14 days. Vide Order dated 05.11.2021, the judicial remand was extended till 18.11.2021

xi) On 08.11.2021, Bail applications were filed by the Detenus before the learned CMM, Patiala House Courts, New Delhi, both of which were summarily declined vide an order dated 15.11.2021.

xii) Judicial remand of the Detenus was further extended for a period of 14 days till 02.12.2021 by the Ld, CMM, vide order dated 18.11.2021.

xiii) On the 26.11.2021, the subject impugned detention orders (Annexure P-1) were passed by the Detaining Authority

(Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, COFEPOSA Wing, hereinafter the Detaining Authority/Respondent No.2), which were served upon the Detenus on 27.11.2022 while they were still in judicial custody in Tihar Jail, New Delhi, pursuant to their arrest by the DRI for the purported commission of alleged offences, punishable u/s 132/135(1)(a)(b) of the Customs Act, 1962.

i) Since no criminal prosecution was filed against the Detenus in the customs case, the Detenus were granted statutory bail in terms of the mandate of the provision of Section 167(2) of the Code of Criminal Procedure vide Order dated 20.12.2021 passed by the Learned CMM.

ii) On 21.12.2021 the Detenus made a representation to the Detaining Authority, submitting that a large number of documents furnished to them were illegible and many other documents that had been relied upon and referred to were not furnished, communicated and/or supplied at all; and therefore, demanding legible copies of all of the above, so as to enable them to make an effective representation. This

detailed representation was rejected by the Detaining Authority vide order dated 28.12.2021 (received by the Detenus in the jail on 29.12.2021).

iii) On the 04.01.2022, a constitutionally provided representation was filed by the Detenus before the COFEPOSA Advisory Board (hereinafter "Advisory Board").

3. A further perusal of the grounds of detention, impugned in these proceedings reveal that the role assigned therein to the Detenu No.1 pursuant to the investigation carried out is that: -

(a) Detenu was the founding member/owner of three Hong Kong based supplier firms viz. M/s Trackon Logistics Limited, Yottabyte International Co. Limited and M/s SFS Import & Export Co. Limited, and from these supplier firms, goods were imported in the name of shell entities/dummy firms owned by the Detenu No.1 and that he used to decide the prices at which such goods are to be invoiced and declared before the Indian Customs. The value of the imported goods declared by these shell entities before Customs was allegedly roughly 5% (1/20th) of the actual purchase value of these goods;

(b) That the Detenu No.1 was the mastermind behind perpetrating the entire *modus operandi* of mis-declaration /undervaluation of imports through several dummy firms owned/controlled by him and differential remittances for the imported goods were remitted through hawala channels in order to evade custom duties, thereby causing huge loss to public exchequer. It is alleged that, during the period of 2017-2021, the Detenu No.1 had imported goods amounting to an estimated value of Rs.2730 crores, on which differential duty liability was estimated to be the sum of Rs 500 crores, whereas the actual declared value of the subject imported goods before the customs was statedly Rs.136 crores and the duty paid thereon was approximately Rs.42 crores.

4. Also, a perusal of the grounds of detention, impugned in these proceedings, reveal that the role assigned therein to Detenu No.2, pursuant to the investigation carried out is that:-

(a) Detenu No.2 was the proprietor of the Customs Broker firm namely M/s Sanjeev Kumar, and rendered Customs Clearing Services for past 6 years to Detenu No. 1 in importing the consignment of electronic goods and computer peripherals,

through his Custom Broker License as well as the borrowed Custom broker licenses of M/s Expert Cargo Movers of Shri Manoj Nagar and M/s Anurag Tiwari of Shri Anurag Tiwari, respectively; and paid monthly amount to the above-stated firms ranging from Rs.20,000/- to Rs.40,000/-, depending upon the volume of import in a given month.

(b) Detenu No. 2 also used the Custom broker licenses of M/s Phenomenal Logistics, M/s Anubhav Cargo, M/s Shyam Singh and M/s Satish Panjwani for the custom clearance of the goods allegedly imported by the various entities controlled by Detenu No.1.

(c) Detenu No. 2 used to charge Rs.10,000/- from Detenu No. 1 as agency charges through banking channel and, since the goods imported by Detenu No.1 were highly undervalued, Detenu No.2 used to charge Rs. One lakh per consignment in cash over and above the agency charges, for smooth clearance of the under-invoiced and under-valued imported goods.

(d) Detenu No.2 is stated to have orchestrated a plan to facilitate customs clearance of imported goods that were mis-declared and undervalued using licenses of other Customs Brokers

despite the fact that the Detenu No.2 himself has a Customs Broker License in his name.

ARGUMENTS ON BEHALF OF THE PETITIONERS: -

5. Mr. Vikram Chaudari, learned Senior Counsel appearing on behalf of the Detenus vehemently assails the impugned orders of detention; Firstly, by submitting that, the now admitted position regarding the supply of illegible copies of Relied Upon Documents ("RUDs") including but not limited to those supplied to the Detenus, but also those on the record with the Detaining Authority; and the axiomatic consequential non-consideration thereof by the Detaining Authority has rendered of the impugned detention order invalid. Counsel also submitted that the supply of illegible copies of RUDs to the Detenus, has further severely prejudiced the detenus from filing an effective representation before the Detaining Authority as well as the Advisory Board.

6. It is submitted in this behalf by the Ld. Senior Counsel that, the proposal for preventive detention was received by the Detaining Authority from the Advisory Board only on 24.11.2021 and with surprising alacrity less than 2 days thereafter on the 26.11.2021, the impugned detention order was passed after considering and relying

upon 977 pages of RUDs including the admittedly illegible documents. It is further submitted that it would be humanly impossible for the Detaining Authority to sift through such voluminous documents diligently in the said short span of a day and half; and for the Detaining Authority to arrive at the subjective satisfaction; and as a result the impugned Detention Order is evidently passed in a rushed, casual and cavalier manner, which is in gross violation of the Constitutional right guaranteed under Article 22(5) of the Constitution of India and the same is consequently liable to be quashed, on this ground alone.

7. It is further submitted that, a plethora of referred to and/or RUDs have not been supplied to the Detenus at all, despite the specific demand made by them vide Representation dated 21.12.2021 (Annexure P-26) which *inter alia* include:-

"i. Search authorisation issued by Deputy Director, DRI, DZU, vide DIN No. 202110DDZ4000000C568 dated 18.10.2021;

ii. Order for extension of Judicial Remand of Zakir Khan and Sanjeev Kumar for further 14 days till 02.12.2021;

iii. Documents/loose papers found at the Petitioner's residence and mentioned in Panchnama dated 18.10.2021;

iv. Documents/loose papers found at Sanjeev Kumar's residence and mentioned in Panchnama dated 18.10.2021;

v. Grounds of arrest mentioned in Arrest Memo dated 19.10.2021;

vi. E-mails downloaded at the office of Custom Broker M/s Sai Dutta Clearing Agency Pvt. Limited, situated at Mumbai, and mentioned in the Panchnama dated 18.10.2021;

vii. Documents pertaining to M/s Vijay Overseas, M/s Meena Prints and M/s Z.K. Overseas which have been seized and mentioned in panchnama dated 18.10.2021 drawn at the office of Custom Broker M/s Sai Dutta Clearing Agency Pvt. Limited;

viii. Pages seized and mentioned in Panchnama dated 22.10.2021 drawn at the office of M/s Jyoti Enterprises Custom Broker situated at Kolkata;

ix. Application for extension of Judicial Remand and the subsequent order extending Judicial Remand till 04.11.2021;

x. Application for extension of Judicial Remand and the subsequent order extending Judicial Remand till 18.11.2021;

xi. Application for extension of Judicial Remand and the subsequent order extending Judicial Remand till 02.12.2021;

xii. RUDs to the 3 Show Cause Notices (at serial number 37, 38 & 40 of the list of RUDs respectively);

xiii. Final proceedings in the aforementioned SCNs Notices (at serial number 37, 38 & 40 of the list of RUDs respectively) or the final orders passed thereof in adjudication or appeal;

xiv. Application has been moved by the Petitioner and Sanjeev Kumar informing the Court that they do not want to move any bail application;

xv. Preliminary investigation report enclosed in letter dated 18.10.2021 received from DRI HQ;

xvi. Statement of Sh. Ravichandra Mishra registered by Income Tax department referred to in the Detention Order;

xvii. Signed pages of Sh. Javed Khan's statement dated 22.10.2021;

xviii. Summons issued to persons who have allegedly not joined investigation (mentioned in Ground [xxvi] of the impugned detention order)"

At this stage it is observed that in the RUDs, that were supplied, the following documents were found to be completely illegible: -

Sr. No. of list of RUDs	Description	Page No.
3.	Statement of Zakir before I/Tax Deptt	61 to 68, 75 to 89, 93 to 100 & 105 to 110
3.	Statement of Priyanka Razdan before I/Tax Deptt	135, 137 to 139, 141 to 150, 155, 156, 166,

		167, 170 to 172
9.	Statement of Sanjeev Kumar u/s 108 Customs Act	217, 220 & 223
15.	Panchnama dated 18.10.2021 drawn at the office of Custom Broker M/s Sai Dutta Clearing Agency Pvt. Ltd	244 & 245
18.	Letter dated 19.10.2021 from I/Tax pertaining to forensic image of PR iphone and Zakir Khan iphone.	248
19.	Panchnama dated 21.10.2021 in respect of goods stuffed in Container consigned in the name of M/s R.K. Overseas imported at Kolkata.	251 & 252
24.	Panchnama dated 22.10.2021 at the office premises of Custom Broker M/s Jyoti Enterprises	270
25.	Statement under 108 of the Customs Act dated 22.10.2021 – Ravichandra Mishra, Custom Broker.	275
26.	Statement under 108 of the Customs Act dated 22.10.2021 – Javed Khan	280
30.	Panchnama dated 02.11.2021 in respect of goods contained in Container	293 to 295
66.	Excerpt of extraction report wrt to mobile phone of Zakir Khan …….	574, 575, 590, 593, 596, 599, 605 & 608
67.	Excerpt of extraction report retrieved forensically wrt. to mobile phone of Zakir Khan ……..	612, 635, 649, 653, 747, 748, 757 to 759, 766 to 768, 936 & 937

It is further averred that, even if for the sake of argument, it is assumed that the said documents were placed before the Detaining Authority, the non-consideration thereof in its entirety and not making them a part of RUDs, has vitiated the detention order. It is urged that, either the Sponsoring Authority has withheld the material and vital documents from the gaze of scrutiny of the Detaining Authority or in

any event, these vital materials have been ignored by the Detaining Authority, which is a clear non-application of mind. It is trite to state that, if a vital piece of evidence which is likely to influence the subjective satisfaction of the Detaining Authority is not placed before it, then the detention order would be vitiated in law and fact on the ground of suffering from the vice of non-application of mind. In support of this argument, the learned Senior Counsel placed reliance on the following decisions of the Hon'ble Supreme Court: -

> "(i) **Taramati Chandulal Sejpal v. State of Maharashtra**; (1981) 2 SCC 17;
> (ii) **Icchudevi Choraria v. Union of India**, (1980) 4 SCC 531;
> (iii) **Kamla Kanyalal Khushalani v. State of Maharashtra**, (1981) 1 SCC 748;
> (iv) **Shalini Soni v. Union of India**, (1980) 4 SCC 544;
> (v) **Ibrahim Ahamad Batti v. State of Gujarat**, (1982) 3 SCC 440;
> (vi) **Ahmed Nasar v. State of Tamil Nadu**, (1999) 8 SCC 473;
> (vii) **Kamlesh Kumar Ishwardas Patel v. Union of India**, (1995) 4 SCC 51;
> (viii) **State of Rajasthan v. Talib Khan**, (1996) 11 SCC 393; and
> (ix) **Chandra Prakash v. State of U.P.**, (2002) 4 SCC 234."

8. It is furthermore submitted that, the Detenus representation dated 21.12.2021 seeking legible copies of RUDs was summarily rejected by Detaining Authority vide communication dated 28.12.2021 in the most casual, cavalier and mechanical manner. It is reiterated

that, not furnishing, or supplying the relevant material(s) or document(s) despite demand, is grossly violative of the fundamental rights of the detenus as enshrined and guaranteed under Article(s) 14, 21 & 22 of the Constitution.

9. The learned Senior Counsel appearing on behalf of the Detenus submits that, the Detaining Authority has merely acted as a rubber stamp by issuing the Detention Order, based solely upon the specious allegations made by the Sponsoring Authority. There was no subjective satisfaction and considered formulation of grounds on the part of the Detaining Authority, which could warrant the passing of the detention order under Section 3(1) of the COFEPOSA. The Detaining Authority has relied upon certain documents, copies whereof were not made a part of the RUDS, as for example, in Para xiv of Grounds of Detention, wherein the statement of one Ravichandra Mishra before the Income Tax Department has been extensively relied upon by the Detaining Authority, however the same statement has not been made a part of the RUDs. It is therefore submitted that, owing to glaring instances of non-application of mind by the Detaining Authority, the same have entirely and unequivocally vitiated the said order; since they have rendered nugatory and illusory

the fundamental right of the Detenu to make an effective representation.

10. It is also contended that, the impugned Detention Orders have been passed in the most hurried and casual manner. In other words, in the Detention Order against Detenu No.1, it is averred that it is necessary to make the Order of Preventive Detention against the Detenu;

> "*with a view to preventing him from smuggling of goods, abetting the smuggling of goods, and engaging in transporting* ***or*** *concealing* ***or*** *keeping smuggled goods in future."*

Even in the grounds of detention, the Detaining Authority has recorded its subjective satisfaction by stating that,

> *"….you i.e., Zakir Khan has shown a general habit and propensity to indulge in fraudulent activities by way of smuggling goods, abetting the smuggling of goods, and engaging in transporting* ***or*** *concealing* ***or*** *keeping smuggled goods at the cost of government revenue and national security……"*

In this behalf it is stated that it is no more *res integra* that where various grounds could be joined by the conjunctive "***and***" the use of the disjunctive "***or***" in such a case is impermissible. It is further submitted that, the Grounds of Detention served to Detenu No.1 are exactly the same as those served on the co-accused Detenu No.2; and all that the Detaining Authority has done is substitute the name of

Detenu with the expression "you". That apart, both the Detentions Orders are *exfacie* verbatim copies of each other. The Impugned Detention Order is thus, passed in the most cavalier manner, thereby resultantly invalidating the same.

11. In order to buttress his exhaustive oral submissions, Mr. Vikram Chaudari, learned Senior Counsel appearing on behalf of the Detenus, has pressed into reliance the following decisions: -

i. **Rajesh Vashdev Adnani v. State of Maharashtra** reported as (2005) 8 SCC 390.
ii. **Rakesh Sherpal Singh Rana v. State of Maharashtra,** reported as 2000 SCC OnLine Bom 684.
iii. **Narendra Bahadur Lama v. Union of India**, reported as 2001 SCC OnLine Del 521.
iv. **Dimple Prakash Shah vs. UOI**- reported as 2010 SCC Online Del 1605.
v. **Anwar Abdulla v. UOI**, reported as 1991 SCC Online Kar 470.
vi. **Mohinder Singh Gill v. Chief Election Commr**., reported as (1978) 1 SCC 405.
vii. **Gautam Jain v. Union of India**, reported as (2017) 3 SCC 133.
viii. **Mohd. Nashruddin v. Union of India**, reported as 2021 SCC OnLine Del 4017.
ix. **Manjit Singh Grewal v. UOI**, reported as 1990 (Supp) SCC 59.
x. **Dharmista Bhagat v. State**, reported as 1989 Supp (2) SCC 155.
xi. **Bhupinder Singh v. UOI**, reported as (1987) 2 SCC 234.
xii. **A. Geetha vs. State of T.N.**, reported as (2006) 7 SCC 603.

ARGUMENTS ON BEHALF OF THE RESPONDENT

12. Per Contra, Mr. Chetan Sharma, the learned Additional Solicitor

General of India appearing on behalf of the Respondents would submit that the impugned detention orders dated 26.11.2021 passed by the Competent Authority under Section 3 (1) of the COFEPOSA are legal, valid and constitutional and the same have been passed by the Competent Authority with due application of mind and after arriving at the requisite subjective satisfaction; based on the sufficient material facts and circumstances of the case. It is further submitted that the subjective satisfaction of the Detaining Authority is elaborated in the grounds of detention communicated to the Detenus vide letter dated 26.11.2021 (Annexure P-3). Therefore, sensing the magnitude of offences being committed by the detenus with utter disregard to the law of land, the Detaining Authority was convinced and issued the Detention Order after carefully and exhaustively examining all the documents / information submitted before it. It is further urged that all requirements of the COFEPOSA Act, 1974 as well as the relevant Constitutional provisions have been scrupulously complied with.

13. It is submitted that, all the documents relied upon by the Detaining Authority had already been supplied to the Detenus. It is further submitted that it is a well-settled law that each and every document is not required to be furnished to the Detenu. It is further

submitted that only copies of documents on which the Impugned Detention Order is primarily based are required to be supplied to the Detenus. It is furthermore submitted that mere reference of certain instances in the order of Detention for the purposes of completion of narration, would not entitle the detenu for copies of such documents. In the present case, all the relied upon documents have been duly supplied to the Detenu under his dated acknowledgement within the stipulated statutory time period of 5 days, from the date of detention.

14. It is also submitted that that the language used in the Detention Order as well as in the Ground of Detention is in consonance with the Section 3 (1) of the COFEPOSA Act, 1974 and the same are not based on any inference drawn by the Detaining Authority. The Detention Order has been passed and issued following the due process of law and after due application of mind and deliberations after taking into consideration the facts of the case. It is consequently denied that the order of detention has been passed a in casual manner.

15. It is urged that the Detaining Authority has not relied on illegible documents. It is asserted that the Hon'ble Court must sift and weigh, between vital and essential documents, and not be swayed by the purported illegible documents which have not influenced the

decision making of the Detaining Authority in any manner.

16. It is submitted that all evidences relied upon in this case and served on the Detenus were invariably produced before the Detaining Authority for the latter's subjective satisfaction. It is further submitted that any proposal for preventive detention under COFEPOSA must pass through an elaborated procedure of screening and approval from officers of the Department as well as from a Screening Committee comprising of senior officers of Customs, CBI and the Law Department. Only thereafter does the detaining authority consider the proposal along with all the relevant materials and arrive at the subjective satisfaction that preventive detention of the detenu(s) is necessary. The Detention Order is then issued along with the detailed grounds of detention. It is further submitted that, every document / material which was relied upon for the purpose of arriving at the subjective satisfaction in the issuance of the detention order, has been supplied to the Detenus under proper acknowledgement. It is further submitted that therefore, the subjective satisfaction of the detaining authority cannot be argued to stand vitiated.

17. It is submitted that; the present Detenus are involved in duty

evasion to the tune of more than Rs. 500 crores. It is emphasized that the present case is not a 'run of the mill' case but an instance of an organized syndicate of smuggling and evasion of duties and prohibitions wherein the mastermind, along with his associates have a remarkable proclivity towards indulging in gross misdeclaration with impunity and absolute disregard for law. It is further submitted that the booking of previous offences against the Detenus, the plethora of evidence available in relation to past misdeclarations, the period for which the contraventions have happened in the past, and the sheer value of Government revenue involved are clear indications towards the need to curtail the liberty of the Detenus with the intent to prevent them from indulging in such contraventions again.

18. Upon a specific query from the bench, it has been fairly admitted on behalf of the Detaining Authority – though not on affidavit – that various documents sent for consideration to the detaining authority, were admittedly wholly illegible and therefore the said RUDs supplied to the Detenus were also consequently illegible; which factual position was accepted on behalf of the DRI, as is clearly recorded in the order dated 03.03.2022 passed by this Court, in the present petitions.

19. In this behalf, it is submitted that, it is incumbent upon the Detenus to show that prejudice was caused owing to the illegible RUDs.

It is further submitted that the Detenu must show that the failure to supply the RUDs or the supply of illegible RUDs had impaired or prejudiced his right, however, slight or insignificant it may be. Reliance is place on ***Kamarunnissa Ec. versus Union of India and Ors.*** reported as ***(1991) 1 Supreme Court Cases 128.***

20. The learned ASG asserted vehemently on behalf of the detaining authority in his oral arguments that, the illegible documents are irrelevant and ought to be eschewed from consideration; in view of the provision of Section 5A of the COFEPOSA, which stipulates that the grounds of detention may be severable, particularly in cases where the order of detention has been passed on the basis of two or more grounds. It is submitted that, the grounds which indicate reliance upon the illegible RUDS may therefore, in law, be severed from the remaining grounds that have led to the subjective satisfaction of the Detaining Authority. It is further submitted that, the Detenu instead of seeking legible copies, should have ignored the illegible document and should have filed his representation by excluding the illegible

documents. The summary of the argument was that in view of section 5A issues relating to illegible documents having been placed before the Detaining Authority, and consequent supply of illegible documents as relied upon document must be ignored. Reliance in this regard has been placed on the judgement of the Hon'ble Supreme Court in ***Gautam Jain v. Union of India*** reported as ***(2017) 3 SCC 133***.

21. It is lastly submitted that, the case laws on which the Detenus have placed reliance in support of their case are distinguishable from the present case as in those cases, the alleged illegible documents were vital documents and had a bearing on the mind of the detaining authority. However, in the present case the alleged illegible documents are not vital and material or have a bearing on the formulation of the grounds of detention. The alleged illegible documents are the additional and supporting documents in the form of annexures of the statements/panchnamas wherein all such documents were duly explained. Further, such documents are fully comprehensible and understandable when seen with the statements/panchnamas to which they are made part of as acknowledged by the Detenus in their own handwriting. This amounts to due communication of the grounds of detention, in terms of the requirements of Article 22(5) of the

Constitution of India.

22. In support of his arguments, Mr. Chetan Sharma, learned ASG appearing on behalf of the respondents relied upon the following decisions: -

i. **Naresh Kumar Goyal v. Union of India and Others**, reported as (2005) 8 SCC 276
ii. **State of Maharashtra and others v. Bhaurao Punjabrao Gawande**, reported as (2008) 3 SCC 613
iii. **Haradhan Saha versus State of West Bengal and Others**, reported as (1975) 3 SCC 198
iv. **Romesh Chandra Mehta vs State of West Bengal**, before the Hon'ble Supreme Court in Criminal Appeal No. 27 of 1967
v. **Kamarunnissa Etc. vs Union of India and Ors**, reported as 1991 AIR SC 1640
vi. **Gautam Jain v. Union of India**, reported as (2017) 3 SCC 133.

DISCUSSSION

23. Having heard learned counsel appearing on behalf of the parties and after due consideration of the rival submissions in the context of the facts and circumstances on record, as well as the relevant provisions of law and the decisions relied upon by the parties and having perused the material on record, including the pleadings and the original file, the following issues arise for the consideration of this Court in these proceedings: -

A) Whether the non-supply of certain RUDs and the supply of illegible RUDs, vitiates the subjective satisfaction arrived at by the Detaining Authority; and whether the detention orders passed are resultantly vitiated on the ground of non-application of mind; thereby rendering them invalid and bad in law.

B) Whether in the event that issue A (Supra) is answered in the affirmative, the argument premised on S.5A of the COFEPOSA Act, in the facts and circumstances of the present case will have the effect of saving the detention order from invalidation.

24. At the outset we consider it relevant to observe that on a specific query from the Court as to why no criminal prosecution has been filed as yet against the Detenus resulting in their release on statutory bail under the mandate of Section 167(2) of the CrPC, no cogent or satisfactory explanation was offered or forthcoming.

25. We find it apposite at this stage to extract the observations made by the Hon'ble Supreme Court in a recent decision in ***Mallada K. Sri Ram vs. The State of Telangana & Ors.*** in ***Criminal Appeal No. 561 of 2022 (Arising out of SLP (Crl) No. 1788***

of 2022, reported as ***LQ/SC/2022/476***, specifically paragraph 15 as is reproduced hereunder: -

> "15. A mere apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the maintenance of public order. In this case, the apprehension of a disturbance to public order owing to a crime that was reported over seven months prior to the detention order has no basis in fact. The apprehension of an adverse impact to public order is a mere surmise of the detaining authority, especially when there have been no reports of unrest since the detenu was released on bail on 8 January 2021 and detained with effect from 26 June 2021. **The nature of the allegations against the detenu are grave. However, the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a draconian and arbitrary exercise of state authority. The case at hand is a clear example of non-application of mind to material circumstances having a bearing on the subjective satisfaction of the detaining authority.** The two FIRs which were registered against the detenu are capable of being dealt by the ordinary course of criminal law."

26. Insofar as the **first** issue, as to whether the non-supply of certain RUDs and the supply of illegible RUDs, vitiates the subjective satisfaction arrived at by the Detaining Authority; and whether the detention orders passed are resultantly vitiated on the ground of non-application of mind is concerned; we have considered the rival submissions made before us in the backdrop of the perusal of the

original record as well as the material placed before us in the present proceedings.

27. It is imperative at this juncture to observe, that vide order dated 03.03.2022 passed by this Court in the present petitions, it was noted as follows: -

> "Mr. Vikram Chaudhri, learned senior counsel appearing on behalf of the petitioners in these writ petitions has handed over in Court today the original set of relied upon documents RUDs furnished to the detenues at the time of their detention.
>
> The Court has perused the said documents. The Court has further asked Mr. Sumit Kumar, Senior Intelligence Officer, Directorate of Revenue Intelligence to examine the said original documents and inform this court as to whether they are the set of documents that were served upon the detenues.
>
> The said official appearing on behalf of DRI confirms that the set of documents produced in court on behalf of the detenues are the originals, which were served upon them at the time of their detention."

28. It is observed that it was fairly admitted before this Court that several RUDs including not only those supplied to the Detenus, but also those on the record with the Detaining Authority are illegible i.e., not readable. In this regard, this Court's decision in ***Mohd. Nashruddin v. Union of India & Ors.***, reported as ***2021 SCC OnLine Del 4017*** and the relevant paragraphs thereof are reproduced hereunder:-

> "47. It is trite to say that a person detained in pursuance of an order

for preventive detention, has a constitutional right to make an effective representation against the same. The authorities are constitutionally charged with the responsibility to ensure that the grounds of detention, including all relevant documents that are considered whilst forming the subjective satisfaction, W.P.(CRL.) 1924/2020 Page 52 of 86 are provided to the detenu by the Detaining Authority, so as to enable the detenu to make an effective representation to the Advisory Board, as well as to the Detaining Authority. **Therefore, the non-supply of legible copies of all relevant documents inspite of a request and representation made by the detenu for the supply of the same, renders the order of detention illegal and bad; and vitiates the subjective satisfaction arrived at by the Detaining Authority.**

48. In our considered view, therefore, the supply of the following documents namely, a) Passport, b) Identity Cards of codetenu's, c) WhatsApp chats, d) bill of entry, e) invoice, f) the statement of Mr. Rohit Sharma who is alleged to have defaced the gold bars imported illegally etc. **was critical, in order to enable the detenu to make a comprehensive, holistic and effective representation against the impugned detention order, both before the Advisory Board, as well as before the Detaining Authority.**

49. In the present case, the denial by the official respondent to supply legible copies of the relevant documents to the detenu, despite his express request to do so, tantamount to denial of his constitutional right, thereby vitiating the detention order, founded on the said relevant material.

50. In this regard the Hon'ble Supreme Court has, in ***Dharmistha Bhagat V State of Karnataka & Ors*** reported as ***1989 Supp (2) SCC 155*** and in particular paragraph 5 thereof, observed that non-supply of legible copies of vital documents would render the order of detention illegal and bad. The relevant portion has been extracted hereinbelow:

> 5. The learned counsel appearing on behalf of Respondent 1, Union of India has contended that even though legible copy of panchnama referred to in the list of documents mentioned in the grounds of detention has not been supplied to the detenu yet the fact that five gold biscuits of foreign marking were recovered from the possession of the detenu was sufficient for subjective satisfaction of the detaining authority in making the said order of detention. So the detention order cannot be termed as illegal and bad for non-supply of legible/typed copy of the said document i.e. panchnama dated 12-2-1988. The panchnama dated 12-2-1988 which had been referred to in the

list of documents referred to in the grounds of detention and a copy of which had been given to the detenu along with the grounds of detention, **is not at all legible as is evident from the copy served on the detenu. It is also not in dispute that on receiving the documents along with the grounds of detention the detenu had made a representation to Respondent 1 stating that some of the documents including the panchnama which had been supplied to him are illegible and as such a request was made for giving typed copies of those documents to enable the detenu to make an effective representation against the same. The detaining authority on receipt of the said representation sent a reply denying that the copies of those documents were illegible and refusing to supply typed copies of the same. It is clearly provided in sub-article (5) of Article 22 of the Constitution of India that:**

> **"(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 order."**

Therefore, it is imperative that the detaining authority has to serve the grounds of detention which include also all the relevant documents which had been considered in forming the subjective satisfaction by the detaining authority before making the order of detention and referred to in the list of documents accompanying the grounds of detention in order to enable the detenu to make an effective representation to the Advisory Board as well as to the detaining authority. Therefore, the non-supply of legible copy of this vital document i.e. panchnama dated 12-2-1988 in spite of the request made by the detenu to supply the same renders the order of detention illegal and bad. This Court in Mehrunissa v. State of Maharashtra [(1981) 2 SCC 709 : 1981 SCC (Cri) 592 : AIR 1981 SC 1861] has observed that: (SCC p. 710)

> "The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents. The failure of the detaining authority to supply copies of such documents vitiated the detention, as has been

held by this Court in the two cases cited by counsel. The detenu is, therefore, entitled to be released. He is accordingly directed to be released forthwith."

51. To the similar effect are the observations recorded in the judgment of the Apex Court in ***Manjeet Singh Grewal vs. UOI & Ors.*** reported as ***1990 Supp SCC 59***."

29. Upon a plain reading of the said order dated 03.03.2022 and the above extracted decision of this court, we are of the view that, as the RUDs; supplied to the Detenus as well as relied upon by the Detaining Authority, in arriving at its subjective satisfaction were admittedly illegible; it has the unnerving consequence of violating the constitutional rights guaranteed to the Detenus.

30. In this behalf, the contention made on behalf of the official respondents is to the effect that, it is incumbent upon the Detenus to show that prejudice was caused to them owing to the supply of illegible RUDs; the specific contention being that, the Detenu must establish that the failure to supply the RUDs or the supply of illegible RUDs had impaired or prejudiced his right.

31. In our opinion, the aforementioned contention raised on behalf on the official respondents is untenable in light of the Hon'ble Supreme Court's decision in ***Mrs. Tsering Dolkar vs. Administrator, Union Territory Of Delhi & Others*** reported as ***(1987) 2 SCC 69*** and in particular paragraph 12, wherein it was observed as under: -

> "12. The learned Additional Solicitor General relied upon the feature that the petitioner-wife knew both English and Tibetan languages and an effective representation as a fact had been made. There can be no two opinions that the requirement of law within the provisions of Article 22(5) of the Constitution is that the detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenus wife knew the language in which the grounds were flamed does not satisfy the legal requirement. Reliance was placed by the learned Additional Solicitor General on a decision of this Court in Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala &Ors., [1985] 3 SCR 679 in support of his contention that unless the detenu was able to establish prejudice on account of the fact that the grounds of detention and the documents accompanying the grounds were not in a language known to the detenu the order would not be vitiated. There is no clear indication of the test of prejudice being applied in that case. On the facts relevant before the Court, a conclusion was reached that the detenu was merely reigning ignorance of English and on the footing that he knew English, the matter was disposed of. **We must make it clear that the law as laid down by this Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order.** (See AIR 1975 SC 1513, [1975] 2 SCR 832 , AIR 1975 SC 245)."

32. Further, we are constrained to observe that in the grounds of detention, strong reliance has been placed upon the statements of the detenus and co-detenus, recorded under the provisions of Customs Act, 1962. A plain reading of the said grounds of detention clearly reflects the extensive reliance placed upon the said statements by the Detaining Authority, for arriving at its subjective satisfaction. In this behalf, it is observed that the impugned orders of detention only a passing reference has been made to the circumstance that the

Department of Revenue had issued rebuttals to the subject retractions of the Detenus and that too only on 24.11.2021, merely two days before the passing of the impugned orders. For abundant clarity the relevant portions of the impugned order of detention passed against Detenu No.2 are reproduced below: -

> "xxxvi. Zakir Khan filed an application dated 28.10.2021 before the Ld. CMM, Patiala House, New Delhi stating that the statements dated 18/19.10.2021 before the DRI officers have been obtained under coercion and torture and he was forced to write a statement which is totally false. He accordingly prayed the Ld. CMM, Patiala House, New Delhi that he may be permitted to retract his statement dated 18/19.10.2021 and same may be treated as false and inadmissible. The DRI filed a rebuttal dated 24.11.2021 before the Ld. CMM, Patiala House, New Delhi stating inter alia that retraction application contained untrue averments and are without any substance, afterthought, and farce. In reply, DRI stated that the applicant tendered his voluntary statement under his signature and the said statement has also been confirmed in his handwriting towards the end. Further, the retraction has been made 10 days of the statement; the long gap between the recording of the statement and the retraction application makes it clear that the retraction application filed by him is an afterthought and based on legal tutoring. It was further stated by DRI that the applicant was medically examined at Ram Manohar Lohia Hospital Delhi and thereafter produced before the Ld. Duty Magistrate. As per the reply of the DRI filed before the Ld. CMM Patiala House, New Delhi no injury marks (fresh or otherwise) or bruises was reported by the duty doctors during the medical examination.
>
> xxxvii. You i.e. Sanjeev Kumar Yadav filed an application dated 28.10.2021 before the Ld. CMM, Patiala House, New Delhi stating that the statements dated 18/19.10.2021 before the DRI officers have been

> obtained under coercion and torture. You accordingly prayed the Hon'ble Court that your statement dated 18/19.10.2021 may be ignored and you mat be allowed to retract the same. The DRI filed a rebuttal dated 24.11.2021 before the Hon'ble Court stating inter alia that retraction application contained untrue averments and are without any substance, afterthought, and farce. In reply, DRI stated that the applicant i.e. you tendered your voluntary statement under his signature and the said statement has also been confirmed in your handwriting towards the end. Further, the retraction has been made 10 days of the statement; the long gap between the recording of the statement and the retraction application makes it clear that the retraction application filed by you is an afterthought and based on legal tutoring. It was further stated by DRI that the applicant i.e. you was medically examined at Ram Manohar Lohia Hospital Delhi and thereafter produced before the Ld. Duty Magistrate. As per the reply of the DRI filed before the Ld. CMM Patiala House, New Delhi no injury marks (fresh or otherwise) or bruises was reported by the duty doctors during the medical examination."

This above extracted grounds highlight the considerable gap of time between the retraction of their statements by the detenus and co-detenus, and the rebuttal thereof by the DRI. This belated rebuttal on the part of the official respondents was relevant and germane and therefore, merited consideration by the Detaining Authority, particularly when extensive reliance was evidently placed upon those statements. The Detaining Authority would also have been well-advised to consider the aspect of admissibility of the statements, which stood retracted; and were only belatedly rebutted by the

Sponsoring Authority, two days before the passing of the impugned orders of detention. Further, we find from the record of the Detaining Authority that strong reliance has been placed upon the statement of not just the detenus but also the statements allegedly recorded of Sanjeev Kumar Yadav (Detenu No. 2), statedly the co-accused. In this behalf, the record reflects that Detenu No. 2 retracted his statement on the very same day as Detenu No. 1 on 28.10.2021, which retraction has evidently not been placed before the Detaining Authority by the Sponsoring Authority. **In our view, once the Detaining Authority has relied upon the inculpative statements of the co-accused their retractions assumed great relevance in the factual backdrop of the present case. Consequently, the admissibility of the said statements becomes dubious once there is a retraction, which issue merited consideration, was evidently not afforded to it by the Detaining Authority.** In this behalf, reliance is placed on this Courts decision in ***Gopal Gupta vs. Union of India & Ors.*** reported as ***2021 SCC OnLine Del 3926.***

33. In this behalf, it is also trite to state that the Sponsoring Authority was under a legal obligation to have placed the said retractions before the Detaining Authority for the latter's subjective

satisfaction. In this regard, it would be beneficial first to consider the observations of the Hon'ble Supreme Court in ***A Sowkath Ali vs. Union of India & Others***, reported as ***(2000) 7 SCC 148*** and particularly in paragraph 20 thereof. The said paragraph is extracted hereinbelow for the sake of facility: -

> "20. There can be no doubt, it was not necessary, while considering the case of the petitioner detenu, to place all or any of the documents which are relevant and are relied on in the proceedings of a co-accused, **but where the sponsoring authority opts out of its own volition to place any document of the other co-detenu, not merely as a narration of fact but reiterating in details the confession made by him, then it cannot be said it would not prejudice the case of the detenu. If this has been done it was incumbent for the sponsoring authority to have placed their retraction also. As held in Rajappa Neelakantan case [(2000) 7 SCC 144 : (2000) 2 Scale 642] the placement of document of other co-accused may prejudice the case of the petitioner. In the first place the same should not have been placed, but if placed, the confessional statement and the retraction, both constituting a composite relevant fact both should have been placed. If any one of the two documents alone is placed, without the other, it would affect the subjective satisfaction of the detaining authority. What was the necessity of reproducing the details of the confessional statement of another co-accused in the present case? If the sponsoring authority would not have placed this then possibly no legal grievance could have been made by the detenu. But once the sponsoring authority having chosen to place the confessional statement, then it was incumbent on it to place the retraction also made by them. In our considered opinion, its non-placement affects the subjective satisfaction of the detaining authority. This Court has time and again laid down that the sponsoring authority should place all the relevant documents before the detaining authority. It should not withhold any such document based on its own opinion. All documents, which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before him**. Of course a document which has no link with the issue cannot be construed as relevant."

34. In a similar vein are the observations of the Hon'ble Supreme Court in ***P. Sarvanan vs. State of T.N. and Others***, reported as ***(2001) 10 SCC 212*** and in particular paragraphs 7, 8 and 9 thereof. The said paragraphs as extracted hereinbelow: -

> "7. When we went through the grounds of detention enumerated by the detaining authority we noticed that there is no escape from the conclusion that the subjective satisfaction arrived at by the detaining authority was the cumulative result of all the grounds mentioned therein. It is difficult for us to say that the detaining authority would have come to the subjective satisfaction solely on the strength of the confession attributed to the petitioner dated 7- 11-1999, particularly because it was retracted by him. It is possible to presume that the confession made by the co-accused Sowkath Ali would also have contributed to the final opinion that the confession made by the petitioner on 7-11-1999 can safely be relied on. What would have been the position if the detaining authority was apprised of the fact that Sowkath Ali had retracted his confession, is not for us to make a retrospective judgment at this distance of time.
> 8. The second contention that non-placement of the retraction made by Sowkath Ali would not have affected the conclusion as the petitioner's confession stood unsullied, cannot be accepted by us. The detaining authority had relied on different materials and it was a cumulative effect from those materials which led him to his subjective satisfaction. What is enumerated in Section 5-A of the COFEPOSA Act cannot, therefore, be applied on the fact situation in this case.
> 9. In this context, it is to be mentioned that the detention order passed against Sowkath Ali was quashed by this Court when he challenged that detention order under Article 32 of the Constitution (vide A. Sowkath Ali v. Union of India [(2000) 7 SCC 148 : 2000 SCC (Cri) 1304 : (2000) 5 Scale 372]."

35. Further, in ***Union of India vs. Ranu Bhandari***, reported as ***(2008) 17 SCC 348***, the Hon'ble Supreme Court has observed so in Paragraphs 33, 34 and 35, which are reproduced hereunder: -

> "33. In the instant case, as some of the vital documents which have a direct bearing on the detention order, had not been placed before the detaining authority, there was sufficient ground for the detenu to question such omission. We are also of the view that on account of the non-supply of the documents mentioned hereinbefore, the detenu was prevented from making an effective representation against his detention.
> 34. In the said circumstances, we do not see any reason to interfere with the judgment and order of the High Court and the appeal is accordingly dismissed.
> 35. In parting, we may reiterate what we have indicated hereinbefore, that since the personal liberty and individual freedom of a citizen is curtailed by an order of preventive detention, the detaining authorities must apply their minds carefully and exercise great caution in passing such an order upon being fully satisfied from materials which are both for and against the detenu that such an order is required to be passed in the interest of the State and for the public good."

36. As regards, the emphasis placed by the respondents on the decision of the Hon'ble Supreme Court in ***Madan Lal Anand vs. UOI***, reported as ***(1990) 1 SCC 81***, to the effect that it has been held therein that only copies of documents, on which the impugned detention orders are primarily based should be supplied to the detenus and not any and every document; we only observe that it was also clearly held therein in paragraph 24 thereof as under: -

> "We must not, however, be understood to say that the detaining authority will not consider any other document."

37. In view of the aforementioned decisions, the legal position that emerges on this aspect is that, if the documents are relevant and have a direct bearing on the case, they must be placed before the Detaining

Authority for its 'subjective satisfaction'.

38. The reliance placed by the respondent upon the decision of ***Kamarunnisa vs. Union of India***, reported as ***(1991) 1 SCC 128***, does not come to their aid, since in the present case we agree with the submissions made on behalf of the Detenus, that the present is a case of non-placement of vital facts and documents before the Detaining Authority owing to their illegibility and that the 'subjective satisfaction' is vitiated since the latter was not in possession of vital RUDs. The ratio in ***Kamarunnisa*** (supra) is, therefore, distinguishable on the facts thereof. Therefore, we have no hesitation in holding that, the Detaining Authority fell into error in relying upon illegible documents which is the equivalent of non-placement of RUDs, by the act of omitting them from consideration, thereby vitiating its subjective satisfaction, for suffering from the vice of non-application of mind.

39. It is trite to say that when a person is detained in pursuance to an order of preventive detention, the statutory authorities are constitutionally charged with the responsibility of ensuring that the grounds of detention, **including legible copies of all RUDs** and other relevant documents that are considered whilst forming the subjective

satisfaction, are provided to the detenu by the Detaining Authority; so as to enable the detenu to make an effective representation to the Advisory Board, as well as to the Detaining Authority. Therefore, the failure and non-supply of legible copies of all RUDs despite of a request and representation made by the Detenus for the supply of the same, renders the order of detention illegal and bad in law; and vitiates the subjective satisfaction arrived at by the Detaining Authority.

40. We, therefore, answer the first issue by observing that, the Detaining Authority gravely erred in relying upon illegible documents which is equivalent to non-placement of RUDs by the act of omitting them from due consideration which consequently vitiates the subjective satisfaction arrived at by the detaining authority. Resultantly, in our considered view, the impugned detention order stands invalidated.

41. It therefore becomes incumbent upon us to determine the alternative issue framed hereinabove. Insofar as the **second** issue, as to whether the argument premised on S.5A of the COFEPOSA Act by the official Respondents has the effect of saving the detention order; in the facts and circumstances of the present case is concerned; we have accorded our careful consideration to the rival submissions made

before us in this regard, in the backdrop of the original records and material placed before us in the present proceedings.

42. The issues as canvassed before this Court on behalf of the Detenus is not of mere non supply of legible copies of illegible documents despite demand. It is the contention of the Ld. Senior Advocate on behalf of the Detenus that had the Detaining Authority himself considered the documents for arriving at subjective satisfaction, rather than adopting any draft grounds of detention, the Detaining Authority would have been alive to the fact that several RUDs placed before it were wholly illegible. The specific contention canvassed is that the subjective satisfaction of the Detaining Authority, which is **condition precedent** for issuance of the Detention Order, is in the circumstance vitiated for non-application of mind. If the condition precedent for issuance of a detention order is not satisfied, then such an order cannot be saved even by Section 5A of the COFEPOSA.

43. The contention made on behalf of the Detenus needs to be examined in light of the aforesaid specific claim on affidavit filed on behalf of the Detaining Authority that, *"all the documents supplied to the detenues were relied upon by it for arriving at subjective*

satisfaction."

44. It is settled law and not in dispute that under section 3 of COFEPOSA it is only the detaining authority, which can ultimately decide to pass or not, a detention order against any person, and that too, after himself perusing each and every document and material placed before it. It is also not in dispute that the subjective satisfaction of the detaining authority itself is to be arrived at after perusing all the relevant documents and material. This is a constitutionally provided condition precedent for passing a valid order of Detention. We find considerable force in the contention that had the Detaining Authority himself perused the RUDs for arriving at its subjective satisfaction and formulation of grounds, it would have been alive to the fact that various RUDs placed before it were illegible.

45. It is pertinent to observe the Detenus submission that the order of detention was passed in a tearing hurry without due application of mind. A timeline of the passing of the detention order is as follows; the last document furnished to Detenu is dated 24.11.2017 (RUD-60 to 64). Since one of the last document is prepared only on 24.11.2017 by the counsel for the detenu and filed in the lower Court on the same day, copy of which was supplied to the sponsoring authority on

24.11.2017 itself, which was presumably forwarded by the sponsoring authority to the Detaining Authority only on or about 25.11.2021, it is axiomatic that it would be humanly impossible for the Detaining Authority to scrutinize 977 pages of documents and formulate the grounds of detention and thereafter pass the detention order on 26.11.2017 within a day and a half that too against two detenus. The Detaining Authority while arriving at its conclusions, inter alia, in Para 11 of the Grounds of Detention has clearly and categorically averred as under:

> "11. While passing the Detention Order under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act; 1974, I have referred to and relief upon the documents mentioned in the enclosed list, which are also being served to you along with the grounds of detention"

The paucity of time for the Detaining Authority to himself consider the voluminous documents to form its subjective satisfaction, and thereafter to formulate lengthy grounds of detention, rather than merely approving draft grounds of detention, also tilts the scale in favour of the Detenus.

46. It is pertinent at this juncture to observe that, the official Respondents have pleaded the ground of severability under Section 5A of the COFEPOSA only by way of oral submissions before this Court, the same is not reflected in the counter affidavit, barring a

passing reference to ***Gautam Jain (Supra)*** in the written submissions filed on behalf of the official Respondents. The omission is found to be conspicuous by its absence in the affidavits filed on behalf of the official Respondents.

47. The reliance placed by the respondent upon the decision of ***Gautam Jain vs. Union of India***, reported as ***(2017) 3 SCC 133***, does not come to their assistance, since in the present case we agree with the submissions made on behalf of the Detenus. The Hon'ble Supreme Court enunciated therein, the undisputed legal position that, if the detention order is based on more than one grounds, independent of each other, then the detention order will still survive even if one of the grounds is found to be is non-existing or legally unsustainable. However, it must be observed that, on the other hand, if the detention order is founded substantially on one composite ground, though containing various species or sub-heads, the detention order would be vitiated if such ground is found fault with.

48. The instant case, does not attract the dictum enunciated in ***Gautam Jain (Supra),*** since the grounds of detention in the present petition are not severable, in view of the patent and palpable vice of non-application of mind by the Detaining Authority antecedent and

attendant in the passing of the detention order. Premised on averments made of behalf of the Respondents, it is found that illegible documents supplied to the detenu were clearly and categorically admitted to have been relied upon by the Detaining Authority. Therefore, the instant case is distinguishable from the aforementioned case; as the very grounds of detention in these impugned orders are not severable in the peculiar facts and circumstances of the present petition.

49. In the case of **Praduman Singh v. Union of India & Ors.**, **2004 SCC Online Del 446,** this Court had held that-

> "15. There seems to be force in this argument because according to this reply, the file was submitted to the detaining authority on 6th May, 2003 along with the document at Sl. No. 37 of the relied upon documents together with the draft Grounds of detention by the Deputy Secretary (COFEPOSA) so that in case the detaining authority ultimately decided to pass the detention order against the accused person, it may also like to go through the Grounds of detention placed on the file and vet the same with whatever changes or additions it may deem fit. Whether such a procedure/practice as has been adopted in the case can be said to be in accordance with law or established procedure and practice which is followed in such like matters? We must remember that Section 3 of the Act provides for power to make detention order. Sub-Section (1) of Section 3 of the Act speaks of the authorities who are competent to make detention orders. In the case of Central Government, an officer not below the rank of a Joint Secretary and in the case of State Government, not below the rank of a Secretary to that Government, who have been specially empowered for the purposes of Section 3, can only make detention orders. This clearly depicts the legislative intent that the task of passing a detention order can only be entrusted to high/senior functionaries of the State. Only such functionaries who are specially empowered in this behalf are entitled to pass the

detention order if they are satisfied that the detention of any person is required with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling of goods, etc. Therefore, the satisfaction envisaged in Section 3 has necessarily to be of the officer specially empowered in that behalf and of nobody else. We do not mean to stretch this proposition to the extent that only the specially empowered officer himself has to do each and every thing in connection with the passing of the detention order. He is certainly entitled to take the assistance, from his lower functionaries for accomplishing this task but their input will be limited only to place the entire material before the detaining authority and they should not involve themselves in decision making process about the recording of satisfaction. That is entirely within the domain of the detaining authority. What has been done in the case in hand is somewhat disturbing because even before the detaining authority considered the matter and applied its mind to the material placed before him and recorded his satisfaction about making the detention order, the lower functionaries had actually put up a draft of detention order for the approval/vetting by the detaining authority which implies that the lower functionaries presumed that the detaining authority is going to pass the detention order in all eventualities/probabilities. **Such a procedure or practice of putting up draft orders for approval/vetting by the competent authorities/senior functionaries can perhaps be justified in the routine discharge of administrative functions and duties in various Ministries and Departments of the Governments while dealing with purely administrative matters. The Rules of business allocation of the Government permits such a procedure but when it comes to the passing of quasi-judicial orders or a detention order under various preventive detention laws, it has to be different. Adoption of such a practice or procedure would vitiate the order as the detaining authority is likely to be influenced by such an assistance rendered by the lower functionaries, with whatever bona fide or sincerity it may be.** It would have been a different thing if the entire material had been placed before the detaining authority and he had applied his mind and reached a satisfaction about the need to detain the petitioner on certain grounds and then the lower functionaries

had assisted him in formalising the task of preparation and issuance of the detention order. **We have, therefore, no hesitation in holding that the impugned detention order can again be termed as without application of mind by the detaining authority himself and the satisfaction recorded in the case in hand was not solely of the detaining authority. The impugned order is vitiated on this count as well."**

50. Significantly, the aforementioned judgement also held,

".....Therefore, it is not possible to hold that the impugned order which is vitiated on account of non-application of mind by the detaining authority, can be saved on the strength of Section 5A of the Act. We, therefore, hold that the impugned order is vitiated and is liable to be quashed on this ground alone."

51. We are therefore of the considered view that, in cases where orders of detention fail on the ground that the subjective satisfaction of the Detaining Authority is vitiated owing to non-application of mind; the protection afforded qua severability of grounds stipulated under the provision of 5A of the COFEPOSA Act, are neither attracted nor available, in law.

52. In view of the foregoing discussion and having accorded our thoughtful consideration to the facts and material on record, the issues struck hereinabove for consideration; are decided in favour of the detenus and against the respondents.

53. The writ petitions are accordingly allowed. As a result, the detention orders bearing No. PD-PD-12001/17/2021-COFEPOSA and

PD-12001/18/2021- COFEPOSA, both dated 26.11.2021 passed against the Detenu No. 1 and No.2 respectively are hereby set-aside and quashed. The detenus are directed to be set at liberty forthwith unless their custody is required in connection with any other case. Pending applications stand disposed of.

54. The Court Master is directed to return the original file, retained for the perusal of this Court, to Mr. Anurag Ahluwalia, learned CGSC forthwith.

55. Copies of this Judgment be provided to the learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court forthwith.

SIDDHARTH MRIDUL
JUDGE

RAJNISH BHATNAGAR
JUDGE

MAY 02, 2022
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