#J-1

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 04.06.2021
Judgment Pronounced On : 13.08.2021

W.P.(CRL) 1924/2020

MOHD. NASHRUDDIN ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Sourabh Kirpal, Senior Advocate with Ms. Jyoti Taneja and Mr. Himanshu Lohiya, Advocates.

For the Respondents: Mr. Anurag Ahluwalia, CGSC with Mr. Abhigyan Siddhant and Mr. Nitnem Singh Ghuman, Advocates for R-1 to R-3.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

SIDDHARTH MRIDUL, J *(via Video Conferencing)*

1. The present petition under Article 226 of the Constitution of India, essentially in the nature of writ of *habeas corpus,* has been instituted on behalf of Mohammed Nashruddin Khan (hereinafter referred to as the 'detenu'), praying for quashing of detention order bearing No. PD-12001/03/2020-

COFEPOSA dated 21.01.2020 under Section 3(1) of The Conservation of Foreign Exchange And Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA'), and for a further direction that he be set at liberty forthwith.

FACTS OF THE CASE:-

2. The relevant facts *qua* the detenu as are necessary for the adjudication of the subject writ petition are briefly encapsulated as follows:

i) The detenu has been a non-resident Indian citizen based in United Arab Emirates (UAE) and has been engaged in trading in gold/gold jewellery in/from UAE in the name and style of M/s. M.N. Khan Jewellers (FZE).

ii) One Amit Pal Singh (co-detenu), who is an employee of M/s. Its My Name Private Limited (hereinafter referred to as 'IMNPL') was entrusted with the work of importing and exporting gold jewellery through hand-carry (personal carriage) to UAE; for the purpose of taking part in an exhibition organized by M/s. M.N. Khan Jewellers (FZE), as per the permission by the Gem

& Jewellery Export Promotion Council (hereinafter referred to as 'GJEPC').

iii) IMNPL is a government recognized three-star export house, engaged in the business of manufacturing, import and export of gold jewellery and other allied bullion items.

iv) IMNPL has been duly issued an Import Export Code (IEC) bearing No.0514037342 from the office of the Joint Director, Directorate General of Foreign Trade (hereinafter referred to as 'DGFT') and is stated to have earned foreign exchange valuing around US Dollars 150 million for the country.

v) IMNPL had also obtained Advance Authorization License from the office of DGFT, New Delhi, *inter alia* permitting import of 1000 kgs of gold bars.

vi) IMNPL has against the said Advance Authorization License imported 50 kgs of gold bars and completed export obligation of approximately 19 kgs of gold bars

vídé Export Invoice No.ITS/EXP/04 dated 20.04.2019; with balance export obligation of approximately 31 kgs.

vii) At this juncture, it is relevant to observe that the stock related to the aforementioned balance export obligation, was resumed by the Directorate of Revenue Intelligence (hereinafter referred to as the 'DRI') on 24-25.04.2019, from the factory premises of IMNPL at Pitampura, Delhi.

viii) IMNPL also purchased gold from the domestic market, duty and GST in relation to which has been duly paid; besides directly importing gold under the Advance Authorization Scheme, as afore-stated.

ix) IMNPL is stated to have exported domestic gold jewellery under the Exhibition Export Scheme of the Foreign Trade Policy (FTP 2015-20)

x) At this stage, it is relevant to observe that as per Para 4.46 of FTP, read with Para 4.80 of the Hand Book of Procedure, domestic jewellery can be exported for exhibitions abroad with the approval of Gems &

Jewellery Export Promotion Council (hereinafter referred to as 'GJEPC'), which approval was granted to IMNPL subject to the condition that unsold gold jewellery has to be re-imported back within 60 days from the close of such exhibition, failing which they would become liable to pay import duty on the quantity of the said re-import. Further, as per Customs Notification No.45/17 dated 30.06.2017, the condition for exemption is that, the goods that are re-imported from such exhibition abroad are required to be the same which were exported.

xi) IMNPL had, with the approval of GJEPC, exported gold jewellery manufactured from the domestic stock of gold for overseas exhibition. It is, therefore, the detenu's case that, evidently there was no duty payment required at the stage of re-import of the subject gold into the country, within the stipulated time period of 60 days.

xii) In pursuance to the said invitation, received from M/s. M.N. Khan Jewellers (FZE), as above mentioned, Amit Pal Singh, co-detenu, was entrusted with hand-carrying

(personal carriage) of the gold jewellery to UAE for the purpose of the said exhibition, in accordance with the permission granted and in compliance with the provisions applicable.

xiii) Export of the gold jewellery was done by IMNPL after filing the requisite shipping bills along with necessary documents.

xiv) The subject gold was duly assessed by the Customs at the time of clearance for export; the photographs of the goods being exported through hand-carry, were also checked and seen by the Customs Jewellery Appraiser posted at the Export Shed Air Cargo; and after verification of the same, the said photographs were signed and appraised by the Appraiser and then given back in sealed cover to the person hand-carrying the gold jewellery.

xv) The gold jewellery, which remained unsold at the time of exhibition was brought back by the co-detenu Amit Pal Singh, from UAE. The co-detenu Amit Pal Singh,

landed at the Indira Gandhi International Airport, New Delhi on 24.04.2019 at around 06.30 p.m. and approached the Red Channel for the purpose of declaration of the goods brought back by him.

xvi) Amit Pal Singh, the co-detenu is stated to have filed reimport documents such as packing lists cum invoice; and provided the sealed packet of photographs to the Customs Appraiser along with the shipping bills, Export Declaration Form and endorsed copies of packing list-cum-invoice, given to him at the time of export, respectively for the quantities of unsold gold jewellery being brought back out of earlier exported goods concerning shipping bills dated 20.02.2019 and 13.03.2019; as well as making requisite declaration, as per the Standard Operating Procedures.

xvii) The Customs Jewellery Appraiser deputed at the Red Channel, duly checked and verified the said documents and appraised the subject gold jewellery and after properly satisfying himself that the gold jewellery was the same, which was exported, allowed Amit Pal Singh,

the co-detenu to take the same by issuing necessary Customs Gate Pass in this behalf.

xviii) However, when Amit Pal Singh the co-detenu, was about to leave the IGI Airport, after clearance from the Red Channel, the officers of DRI intercepted him, statedly on specific information and carried-out search of his baggage as well as his person allegedly on the suspicion that he was illegally importing gold jewellery for evasion of customs duty.

xix) The detenu also arrived in India by the same flight as the co-detenu, albeit separately. The detenu was thoroughly searched, but nothing objectionable was found in his possession. The detenu was however, also detained by the officers of DRI at IGI Airport, New Delhi, on the allegation of involvement in illicit import and export of gold jewellery along with two co-detenus Amit Pal Singh and Gopal Gupta. The latter is statedly working as Chartered Accountant with IMNPL. During his detention by the DRI on 24/25.04.2019, he was kept at DRI Headquarters, New Delhi.

xx) According to the detenu, the statements of the detenu and co-detenus were extracted over the night of 24.04.2019, 25.04.2019 and 26.04.2019, until he was produced before the learned Duty Magistrate at 11:00 PM at the latter's residence, by the DRI by coercing, forcing, giving false promises and threatening the detenu with arrest and false implication.

xxi) All the three persons were shown to have been arrested on 26.4.2019, on which date they were produced before the learned Duty Magistrate New Delhi, in the late hours at around 23.00 hrs.

xxii) It is submitted that the allegations by the DRI are completely false and incorrect and without any basis whatsoever and in fact the DRI has tried to give a wrong colour to otherwise genuine transactions.

xxiii) The said statements under Section 108 of the Customs Act, 1962 (hereinafter referred to as the 'Customs Act') procured from all the aforementioned three persons were immediately retracted verbally before the learned

Duty Magistrate and thereafter before the Court of learned Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on 27.04.2019 in writing. Detenu also filed a detailed retraction on 26.05.2019 from Tihar Jail through Superintendent of Jail No. 7, prior to his release on bail. Retractions were filed by the detenu and also Amit Pal Singh and Gopal Gupta (co-detenus) before the learned Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on 27.04.2019 while they were lodged in Tihar Jail.

xxiv) At this juncture it is averred by the detenu that *vídé* additional submissions filed by DRI, opposing the bail application of the detenu, it was reiterated that '*it is not a case of evasion of customs duty*'. Consequently, the detenu and co-detenus were granted bail by the learned Chief Metropolitan Magistrate, Patiala House Court, New Delhi *vídé* common bail order dated 3.6.2019 wherein it was pertinently observed that "*it is not explained that as to how the duty could be saved by replacing the larger quantity of bills of entries of*

jewellery in India by bill of entry of smaller quantity" and that "*the statement of the accused persons recorded by DRI officials u/s 108 Customs Act have already been retracted and it is alleged by the accused persons therein that their statements were taken under threat and pressure. The accused persons have been in JC since 26.04.2019 and their custodial interrogation is no more required*".

xxv) Our attention is invited by the detenu to the circumstance that the DRI arrested Jewellery Appraiser Vikram Bhasin and on several dates his statements were recorded which were relied on as well. Since the statements recorded were not voluntary in nature and were statedly recorded under duress, threat and coercion; the Jewellery Appraiser, Vikram Bhasin duly retracted his statement through an application directly addressed to Learned Chief Metropolitan Magistrate on 03.06.2019. The DRI has, however, sent a letter dated 17.01.2020, thereby rebutting the retraction application

of the Vikam Bhasin. Further a reply to said rebuttal has been sent by Vikram Bhasin to DRI on 02.03.2020

xxvi) It was further submitted that DRI has been approaching different statutory authorities from time to time in order to somehow harass the IMNPL/detenu etc., DRI also sent a UO Note dated 18/21.06.2019 to DG, DGFT and acting merely upon the said Note, a Show Cause Notice dated 27.06.2019 has admittedly issued to the company IMNPL by DGFT, recording as under:-

> "01. Whereas DRI Hqrs. has informed that firm M/s Its My Name Pvt. Ltd. (IEC No.0514037342) is suspected to be misusing the Advance Authorization and the Exhibition Reimport Scheme through circular trading of gold jewellery exported under the guise of goods for exhibition purpose from India through hand carriage….."

xvii) Even prior to the issuance of the Show Cause Notice., *vídé* Order dated 26.06.2019, the DGFT placed the IEC (Import Export Code) of the Company IMNPL in Denied Entity List (DEL) – Blacklist.

xviii) In relation to the dispute regarding the local address of the present detenu, a verification report was filed in compliance to order dated 20.06.2019 passed by learned Chief Metropolitan Magistrate by the DRI Headquarters, New Delhi. The report expressly states that "*..the department has no objection in serving the summons/other correspondence pertaining to Mohd. Nashruddin till pendency of investigation through Mr. Himanhu Lohiya as requested in application and affidavit dated 20.06.2019 filed by Mohd. Nashruddin*."

xix) In relation to the seizure of the gold jewellery from the co-detenu Amit Pal Singh at the IGI Airport, New Delhi on 24.04.2019 and further seizure of gold jewellery from the IMNPL business premises on 24-25.04.2019, purportedly after completion of the investigation, a Show Cause Notice dated 26.09.2019 was issued by the DRI, New Delhi, wherein the detenu was also made a noticee and penalty was proposed upon the detenu under the provisions of Customs Act.

xxx) The detenu's passport was released *vídé* order dated 07.01.2020 by the learned Chief Metropolitan Magistrate, Patiala House Courts, New Delhi and he was permitted to travel abroad. The DRI carried the said order passed by the learned Chief Metropolitan Magistrate in appeal to the Sessions Court, as well as this Court, but to no avail.

xxxi) It is also averred on behalf of the detenu that despite the release of his passport and the permission granted to the detenu to travel abroad; the detenu has not exercised his liberty to travel abroad, exhibiting his *bona fides* and negating the stand taken by the DRI *qua* his propensity to indulge in the alleged act in any manner.

xxxii) It is curious to observe that after almost 09 months of the detenu's arrest and the filing of retraction statement before the learned Chief Metropolitan Magistrate, DRI belatedly sent a letter to him dated 16.01.2020 and dispatched only on 22.01.2020 by them, stating therein that his retraction had been dismissed by the "Competent Authority". It is relevant to note that the

said communication dated 16.01.2020 was received by the detenu only on 23.01.2020 i.e. after issuance of the impugned order of detention.

xxxiii) Insofar as, the detenu is concerned, when he came to know about the passing of the impugned detention order dated 21.01.2020, he assailed the same before the Hon'ble Supreme Court of India *vídé* W.P. (CRL.) No.63/2020, which however, was disposed of by the Hon'ble Supreme Court granting him liberty to institute the same before this Court. In terms of the aforesaid liberty, the detenu filed W.P.(CRL.) No.786/2020, challenging the impugned detention order at the pre-detention stage. However, the same came to be dismissed by this Court *vídé* order dated 11.09.2020. The detenu carried the said order dated 11.09.2020 in appeal before the Hon'ble Supreme Court *vídé* SLP (CRL.) No.4618/2020, which was however dismissed by the Hon'ble Supreme Court *vídé* order dated 30.092020.

xxxiv) The detenu after exhausting his legal remedies in the form of the above mentioned writ petitions, then surrendered before the learned Additional Sessions Judge, Patiala House Court, New Delhi, by filing a surrender application dated 11.10.2020, whereupon he was served with a one-page detention order dated 21.01.2020 in the court premises on 12.10.2020 by officers of the executing authority, and then taken to Tihar Jail, New Delhi, in pursuance to the detention order.

xxxv) The detenu filed a representation dated 27.10.2020 before the Detaining Authority as well as Central Government on the grounds stated therein and praying for revocation of the detention order. Simultaneously, the detenu *vídé* separate letter dated 27.10.2020 sought for supply of the relevant documents from the Detaining Authority. The Joint Secretary, COFEPOSA however rejected the representation made *vídé* letter dated 27.10.2020 filed by the detenu praying for supply of the relevant documents *vídé* Memorandum dated

09.11.2020. It is the detenu's case that his representation was rejected without any valid or proper explanation and without supplying the documents asked for by him, thereby preventing him from making an effective representation against the impugned detention order.

xxxvi) A perusal of the grounds of detention impugned in these proceedings reveals that the role assigned to the detenu therein, pursuant to the investigation carried-out, is that IMNPL, in connivance with the detenu, opened a dummy company in the name and style of M/s. M.N. Khan Jewellers (FZE) in UAE in the year 2015 to manage the business interest of IMNPL and other related firms of the company at Dubai. The detenu is a key member of the syndicate and its conduit in UAE and abetted the company in the execution of conspiracy relating to misuse of the Advance Authorization Scheme. In order to fulfil the export obligation under the said scheme, IMNPL hatched a conspiracy, whereby gold jewellery was exported to the detenu's company M/s. M.N. Khan Jewellers (FZE), U.A.E. for exhibition

purpose through hand-carry, either by co-detenu Amit Pal Singh or by the detenu himself. The said gold jewellery was subsequently re-imported into India fraudulently. On 24.04.2019 M/s. M.N. Khan Jewellers (FZE) filed declaration before the Federal Customs Authority, U.A.E. that 51.172 kgs of gold jewellery were exported to Kathmandu, Nepal through hand-carry by Mustafa Kamal and 0.745 kgs of gold jewellery was exported to Delhi through Amit Pal Singh, the co-detenu.

ARGUMENTS ON BEHALF OF THE PETITIONER:-

3. Mr. Sourabh Kirpal, learned Senior Counsel appearing on behalf of the petitioner vehemently assails the impugned order of detention whilst submitting that the Sponsoring Authority has suppressed and failed to supply vital documents i.e. (i) Order dated 26.06.2019 passed by DGFT placing the co-detenu's company "It's My Name Private Limited" in Denied Entity List; (ii) Retraction statement dated 03.06.19 of Mr. Vikram Bhasin; (iii) Suspension order dated 22.05.2020 of Mr. Vikram Bhasin; (iv) Retraction

statement dated 31.10.19 of Mr. Mahesh Jain; (v) Reply dated 08.05.19 filed by IMNPL before Sponsoring Authority explaining the transaction; (vi) Order dated 25.09.19 passed by learned Chief Metropolitan Magistrate, Patiala Hose Court, New Delhi, rejecting the application seeking cancellation of Bail filed by DRI; (vii) Panchnamas dated 09.01.2017, 13.01.2017 and 19.01.2017 and other documents heavily relied upon in Grounds of Detention by Sponsoring Authority from the previous case of M/s. Bharti Gems Private Limited, to the Detaining Authority necessary to form subjective satisfaction by the latter. Also, the material documents were not supplied to the detenu disabling him from making an effective, purposeful and meaningful representation. It is submitted that the Detention Order is liable to be set-aside as there is an obligation upon the Sponsoring Authority to place all relevant documents before the Detaining Authority to form subjective satisfaction. Non-placement of such relevant and vital documents, has resulted in non-consideration of the same; thus affecting the decision making process of the Detaining Authority in recording his

subjective satisfaction, and consequently vitiating the Detention Order. It is pertinent to note that the COFEPOSA does not recognize any authority like the 'Sponsoring Authority'. It appears that in the present case the officers of the DRI have been conducting the investigation which they are not authorized under law to do, as they are not *'proper officers'* for the said purpose under the provisions of Customs Act.

4. Further, it is submitted that the material documents i.e. (i) Advance Authorisation License, whose Condition 6 was alleged by the DRI to have been violated, stipulating that "*The exempt goods imported against the authorization shall only be utilized in accordance with the provisions of Paragraph 4.16 of the Foreign Trade Policy 2015-20 and other provisions and the relevant Customs Notification - [Custom Notification 18/2015 dated 01.04.2015 (for physical exports), 21/2015 dated 01.04.2015 (for deemed exports) 22/2015 dated 01.04.2015 (for Advance Authorization for prohibited goods) and 20/2015 (for Annual Advance Authorization) as the case may be]*"; and (ii) Statements of

Mr. Amit Pal Singh and Mr. Gopal Gupta, the co-detenus and the detenu recorded while in judicial custody during the investigation in the case of M/s Bharti Gems Private Limited, were neither supplied to the detenu nor were made part of Relied Upon Documents but have been heavily relied in establishing Grounds of Detention, thus disabling the detenu from making an effective purposeful and meaningful representation.

5. It was further submitted that by learned Senior Counsel appearing on behalf of petitioner that there has been **delay in deciding Representation by the Central Government** as the petitioner was detained on 12.10.2020; the petitioner filed representation dated 27.10.2020 with the Detaining Authority and with the Central Government (DG, CEIB); the Detaining Authority rejected the representation made by the petitioner *vídé* Memorandum dated 09.11.2020; however, the DG CEIB, did not deal with the representation of the detenu expeditiously and instead made a Reference dated 10.11.2020 in terms of Section 8(b) of COFEPOSA to the Central Advisory Board. The Central Advisory Board gave

its opinion that there existed sufficient grounds for the detention of the petitioner. Basis the opinion of the Central Advisory Board, the Central Government on 21.12.2020, in exercise of powers under Section 8(f) of COFEPOSA, confirmed the Detention Order dated 21.01.2020. Representation of the petitioner was rejected *vídé* Memorandum dated 24.12.2020. Peculiarly, the order confirming the detention was passed on 21.12.2020 i.e., 03 days prior to rejection of the Representation. This shows complete non-application of mind by the Central Government while dealing with the petitioner's representation.

6. It is further argued, that there has been a complete and utter non-application of mind by the Detaining Authority, while passing the impugned detention order, as is further evident from the fact that the grounds of detention in the case of the petitioner are identical to the grounds of detention of another detenu in an entirely different case. A person named Happy Arvind Kumar Dhakad came to be detained *vídé* Detention Order dated 17.05.2019, also passed by the same officer Mr.

R.P. Singh. On a comparison between the impugned detention orders and the detention order dated 17.05.2019 in respect of Happy Arvind Kumar Dhakad, it is clear that the same are identical, barring a few differences in names and references etc. The petitioner have filed the Detention Order dated 17.05.2019 passed in the case of Happy Arvind Kumar Dhakad along with a comparison of the grounds of detention in the impugned detention orders dated 21.01.2020. A comparison makes it clear that the entire exercise of passing the impugned detention orders is mechanical, as grounds have been lifted from the grounds of an altogether distinct case. Such a blatant copy-paste job by the Detaining Authority shows non-application of mind.

7. It was further submitted that by learned Senior Counsel appearing on behalf of petitioner that the proposal for preventive detention was sent to the Detaining Authority on 02.01.2020 and the meeting of the Central Screening Committee was held on 13.01.2020 and the recommendations of the Central Screening Committee were submitted to the Detaining Authority on 14.01.2020. The

Grounds of Detention relies on a rebuttal of retraction application by DRI dated 16.01.2020, which implies that the said document was placed by the Sponsoring Authority before the Detaining Authority only after 16.01.2020 (the said day being a Thursday). It is further a matter of record that the Detention Order and Grounds of Detention for the detenu and the co-detenus i.e. Amit Pal Singh and Gopal Gupta, were passed on 21.01.2020 (the said day being a Tuesday). Accordingly, three detention orders running into some 50 pages each i.e., 150 pages plus the Relied Upon Documents, running into some 6000 pages came to be passed on the same day, which it is difficult to believe was possible for an ordinary human to process. It is thus apparent that the Detaining Authority did not apply its mind on the available material at one time and instead scrutinised the documents in a piece meal manner while passing the detention order.

8. It has also been argued on behalf of petitioner that there was **delay in passing of Detention Order dated 21.01.2020,** viewed within the four corners of the settled position of law that a detention order will be vitiated if on account of delay

in passing the Detention Order, the live-link between the prejudicial activities of the detenu and the rationale of clamping a detention order on the detenu is snapped, since the impugned detention order was passed on 21.01.2020, after:

- 272 days from date of incident (24.04.2019);
- 270 days from formal arrest (26.04.2019);
- 232 days of grant of bail (03.06.2019); and
- 117 days of issuance of Show Cause Notice

This evidently reflects that there is inordinate delay of 272 days in passing of the impugned detention orders from the date of the alleged incident. The live-link between the alleged prejudicial activities and the impugned detention orders stood snapped in the intervening 272 days. Moreover, when the petitioner had already been released on bail on 03.06.2019, there is no justification for clamping a detention order after 232 days from such release, especially in the absence of any material that indicates their involvement in the alleged prejudicial activities since their release on bail.

9. Learned Senior Counsel would further urge that the ground of delay was first urged by the petitioner in the aforesaid writ

petitions filed at the pre-detention/pre-execution stage. At that time, the respondents sought to explain the delay in the counter affidavit as follows : -

27.06.2019	Investigation concluded and culminated into SCN.
2nd Week Oct. 2019	Proposal for invoking COFEPOSA was first *'mooted'*.
1st Week Nov. 2019	Further overseas evidence was received from Dubai.
02.01.2020	Proposal was further analysed.
13.01.2020	Proposal was put up to Central Screening Committee (CSC).
14.01.2020	Recommendations of the CSC were submitted to the Detaining Authority.
21.01.2020	Impugned Detention Order was passed.

10. It is also submitted that the gap between October, 2019 and January, 2020 was sought to be explained away by receipt of overseas evidence from Dubai, purportedly in the month of November, 2019, as evident from the counter affidavit filed by the respondents in the pre-execution writ petitions and the

dates extracted above. Even otherwise, *vídé* order dated 11.09.2020 passed by this Court dismissing the pre-execution writ petitions, the aspect of delay was dealt with in paragraphs 67-69 wherein this Court analysed the explanation of delay given by the respondents. However, at that stage the petitioner did not have the benefit of the impugned detention orders as the same had not been served upon the petitioner. Upon being served with the impugned detention orders the petitioner learnt that any reference to overseas evidence from Dubai in November, 2019 was conspicuously absent and no such documents were placed before the Detaining Authority. Instead, what emerges from the detention order is that all the material evidence, including overseas evidence, sought to be used against the petitioner was already collected by as early as July, 2019.

11. It was further submitted by Senior Counsel for the petitioner that another aspect which became strikingly noticeable to the petitioner, which was not known to the petitioner at the pre-execution stage, is that Mr. R.P. Singh was all long aware of the case against the petitioner, at least as early as 02.08.2019.

The aspect of delay, therefore, assumes a different complexion. There is nothing in Section 3 of COFEPOSA or in the scheme of the Act which suggests that the specially empowered officer under Section 3 of COFEPOSA must act only on receipt of a proposal of some other agency or *"Sponsoring Authority"*. In fact, the expressions *"Sponsoring Authority"* and *"Detaining Authority"* find no mention in the statute.

12. It is also submitted that the dual role played by Mr. R.P. Singh - first, in the Economic Intelligence vertical of the CEIB (as claimed by the respondents) in the active investigation; and second, as J.S. (COFEPOSA) in passing the impugned Detention Order, goes to the root of the matter and defeats the very purpose of appointing a *"specially empowered"* officer under Section 3(1) of COFEPOSA, whose satisfaction must be independent and free from any bias or predisposition. As such, the subjective satisfaction of the Detaining Authority in the present case stands vitiated and the impugned detention order ought to be quashed.

13. In order to support his exhaustive oral submissions, Mr. Sourabh Kirpal, learned Senior Counsel appearing on behalf of the petitioner, has pressed into reliance the following decisions :-

(i) ***Ankit Ashok Jalan v. Union of India & Ors.*** reported as **(2020) 16 SCC 127.**

(ii) ***Golum Biswas v. Union of India*** reported as **(2015) 16 SCC 177.**

(iii) ***Vimal Ashok Dhakne v. State of Maharashtra*** reported as **Crl. Appeal No. 163 of 2012**

(iv) ***M/s Canon India Private Limited v. Commissioner of Customs*** reported as **2021 SCC OnLine SC 200.**

(v) ***Daljit Singh Sandhu v. Union of India*** reported as **(1993) 51 DLT 667.**

(vi) ***Satnam Singh v. Union of India*** reported as **1992 SCC Online Del 328.**

(vii) ***Saeed Zakir Hussain v. State of Maharashtra*** reported as **(2012) 8 SCC 233.**

(viii) ***Pooja Batra v. Union of India*** reported as **2009 5 SCC 296.**

(ix) ***Union of India v. Happy Dimple Dhakkad*** reported as **2019 (20) SCC 609**.

(x) ***Madasamy v. Pasumponpandian*** reported as **2016 SCC OnLine Mad 20650.**

(xi) ***Jeganath v. Principal Secretary*** reported as **2017 SCC OnLine Mad 27423.**

(xii) ***Avtar Singh v. Union of India & Ors.*** reported as **2013 SCC OnLine Del 3806**.

(xiii) ***A.Sowkath Ali v. Union of India*** reported as **(2000) 7 SCC 148.**

(xiv) ***P. Saravanan v. State of Tamil Nadu*** reported as **(2001) 10 SCC 212**.

(xv) **Ashadevi v. K Shivraj** reported as **(1979) 1 SCC 222**.

(xvi) ***Union of India v. Ranu Bhandari*** reported as **(2008) 17 SCC 348**.

(xvii) ***Sahil Jain v. Union of India*** reported as **2014 (140) DRJ 319.**

(xviii) ***Gimik Piotr v. State of Tamil Nadu*** reported as **(2010) 1 SCC 609.**

(xix) **Rajesh Gulati v. State of NCT of Delhi** reported as **(2007) 7 SCC 233**.

(xx) ***Naresh Kumar Jain v. UOI*** reported as **2011 SCC OnLine Del 442.**

(xxi) ***T.A. Abdul Rahman v. State of Kerela*** reported as **(1984) 4 SCC 741**.

(xxii) ***Ahmad Nassar v. State of Tamil Nadu*** reported as **(1999) 8 SCC 473**.

(xxiii) Order dated 12.04.2021 passed by the Hon'ble High Court of Delhi in W.P.(Crl.) No.821/2021.

14. Per Contra, Mr. Amit Mahajan, learned Central Government Standing counsel appearing on behalf respondents would submit that impugned detention order dated 21.01.2020 passed by the Competent Authority under Section 3(1) of the COFEPOSA is legal and constitutional and the same has been passed by the Competent Authority with due application of mind and after arrival of subjective satisfaction, based on the sufficient material facts and circumstances of the case.

15. It is further argued that the Detaining Authority is a different and an independent authority from the Sponsoring Authority and that before issuing the impugned detention order, the Detaining Authority has applied its mind fully independent of the Sponsoring Authority. Further, before the proposal is placed before the Detaining Authority, the Central Screening Committee (CSC) consisting of senior officers from different Miniseries/Departments screen the entire proposal and make its recommendations; it is only after the recommendation is made by the CSC, that the proposal goes to the Detaining Authority. It is, thus, evident that there are three different and independent authorities entrust with the task of examining the

incriminating material and facts available against the proposed detenu. The Detaining Authority has to arrive at his subjective satisfaction, fully independent of the prosecution proceedings initiated by the Sponsoring Authority. The Detaining Authority passes the Detention Order upon satisfying itself about the propensity of the proposed detenu to indulge in prejudicial activities in future and it has nothing to do with the prosecution proceedings. Hence, the allegation of malice in issuing the impugned order is fundamentally unfounded, wrong, misconceived and untenable.

16. It was further submitted by counsel for the respondent that the detenu acted as a dummy owner of M/s. M.N. Khan Jewellers FZE which got registered in the year 2015, working as a covert employee of IMNPL at the behest of Mr. Rahul Gupta and was paid monetary consideration by latter/owner of IMNPL for aiding and assisting circular trading of gold jewellery. As an employee of IMNPL, Mr. Rahul Gupta used to pay AED 6000 as monthly salary to detenu, out of which AED 3000 were credited in detenu's wife's account

maintained with Bank of India in Mau District (U.P.) and the remaining amount was paid to the detenu in cash in Dubai.

17. Further, it is submitted that the primary allegation of the petitioner, that Mr. R.P Singh was not only aware but also took an active part in the investigation and issued detailed communications with respect to ongoing investigation *vídé* letter dated 02.09.2019, is misleading and frivolous since CEIB is the nodal agency and as such the information was shared with the DGFT for necessary action in the routine course. Also, the detention order passed against the petitioner and other co-detenus under Section 3 of the COFEPOSA was based on Mr. R.P Singh's independent evaluation and subjective satisfaction as an officer of the Detaining Authority.

18. It has been argued on behalf of respondents that the respondents have followed the law in letter and spirit while issuing the impugned Detention Order. It was submitted that an order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even

acquittal. The pendency of prosecution is no bar to an order of preventive detention.

19. Further, it is submitted that preventive detention is a "suspicious jurisdiction" i.e. jurisdiction based on suspicion and an action is taken "with a view to preventing" a person from acting in any manner prejudicial to certain activities enumerated in the relevant detention law and the Detaining Authority has issued the Detention Order after it had arrived at the subjective satisfaction that the detenu had to be preventively detained, which has been elaborated in the grounds of detention. Similarly the allegation of ill treatment, custodial violence, etc, ought not to affect the Detention Order.

20. It is further argued that without prejudice, all the relevant documents and vital documents were placed before the Detaining Authority and only after arriving at its subjective satisfaction was the Impugned Detention Order passed.

21. It was further submitted by the learned counsel for the respondent that that only copies of documents on which the impugned detention order is primarily based are required to

be supplied to the detenu and not any and every document. Mere reference of certain instances for the purposes of completion of narration would not entitle the detenu to be supplied copies of such documents. It is submitted that all the relevant and vital documents/material was placed by the Sponsoring Authority before the Detaining Authority, the perusal of which led to subjective satisfaction of the Detaining Authority in passing the detention order.

22. It is also submitted that contention of the petitioner that there was delay of 9 months in passing of the detention order has previously been agitated by the petitioner and has been dealt by this Court in W.P (CRL.) No. 786/2020 titled *"Mohd. Nashruddin Khan v. Union of India & Ors."* decided on 11.09.2020 wherein this Court categorically observed that there was no delay.

23. It has been argued on behalf of respondents that in so far as the allegation *qua* the overseas evidence is concerned, the authorities during investigation are at liberty to gather all evidence pertaining to the offence, and by no stretch of imagination can gathering and collating of information by the

Sponsoring Authority be held to be the cause of delay in passing of the detention order.

24. It is also submitted that as far as the averment regarding retractions filed by the detenu is concerned, the detenu did not file any retraction at the time of first production before the Judicial Magistrate. The retraction was filed subsequently and was general and vague in nature and was filed as an after-thought. The subsequent retractions have already been duly rebutted and are on record of the learned Chief Metropolitan Magistrate. Further, the detenu has time and again relied upon the observations made in the bail order dated 03.06.2019 of the learned Chief Metropolitan Magistrate, including in his challenge to the Detention Order at the pre-execution stage *vídé* W.P.(CRL.) No. 1009/2020; however, it is submitted that the granting of bail by no stretch of imagination can be inferred as absolving the proposed detenu of the alleged offence. It is also trite that a Court does not go deep into the merits of the matter while considering an application for bail and only forms a *prima facie* opinion; however the merits of the matter are to be tested at the stage of trial. It is further

submitted that by virtue of COFEPOSA, the respondents have vested powers in them to issue detention order against the petitioner. It is further submitted that grant of bail or its denial is not a ground for quashing of the detention order, as long as the said fact is taken note of by the Detaining Authority and subjective satisfaction is arrived at the propensity of the person to indulge into prejudicial activities.

25. It is further argued that the contention of non-consideration of other documents/material cannot be a ground for vitiating the detention order. As sufficient documents and materials were placed before the Detaining Authority and upon considering the individual role of the petitioner, the Detaining Authority satisfied itself as to his continued propensity and his inclination to indulge in the act of smuggling in a planned manner to the detriment of the economic security of the country, which necessitated the need to prevent the petitioner from smuggling goods, and detain him.

26. It is also contented that delay either in passing the detention order or execution thereof is not fatal, except where the same remains unexplained. Even in a case of undue or long delay

between the prejudicial activity and the passing of the detention order, if the same is satisfactorily explained and a tenable and reasonable explanation is offered, the order of detention is not vitiated.

27. It was further submitted by the learned counsel for respondent that the contention of the petitioner that the communication from FCA, Dubai, in November, 2019 was not made a Relied Upon Document, is wrong, baseless and misleading. As regards that contention, relating to guidelines issued by the department itself, it is respectfully submitted that the relevant guidelines are internal, executive instructions for use by the department officer; and the same have been complied with in the instant case in addition to all the statutory and constitutional provisions.

28. It has been argued on behalf of respondents that persons engaged in smuggling activities pose a serious threat to the economy and thereby security of the nation; and as a precaution, no hard and fast rule can be precisely formulated that would be applicable under all circumstances; rather it follows that the test of proximity is not a rigid or mechanical

test by merely counting number of months between the offending acts and order of detention.

29. Lastly, it is also submitted that there was no inordinate delay in deciding representation of the petitioner by the Central Government as the representation dated 27.10.2020 was received from the petitioner through his counsel in the office of the Director General, CEIB on 27.10.2020 itself and the requisite information/comments of the Sponsoring Authority were sought on 28.10.2010 on the said representation. The requisite information/comments of the Sponsoring Authority were received on 06.11.2020 and thereafter the matter was referred to the Advisory Board on 10.11.2020. The answering respondents on 02.12.2020 sent copies of the representation of the detenu to the Advisory Board along with the comments on the representation of the detenu, prepared by the Sponsoring Authority. The Advisory Board on 14.12.2020 opined that there exists sufficient cause for detaining the detenu in pursuance to the Detention Order dated 21.01.2020. Thereafter the opinion of the Advisory Board was submitted for necessary approval of the Hon'ble Finance Minister on

behalf of the Central Government on 15.12.2020. The approval was received on 21.12.2020 and thereafter the representation was disposed on 23.12.2020 and communicated to the Petitioner on 24.12.2020. Thus, there was no inordinate delay in deciding representation of the petitioner by the Central Government.

30. In support of his arguments, Mr. Amit Mahajan, learned CGSC appearing on behalf of the respondents' has relied upon the following decisions:-

(i) ***Union of India & Ors. v. Muneesh Suneja*** reported as **[(2001) 3 SCC 92).**

(ii) ***Licil Antony v. State of Kerala & Anr.*** reported as **[(2014) 11 SCC 326].**

(iii) ***T.A.Abdul Rahman vs State of Kerala***, reported as **(1989) 4 SCC 741.**

(iv) ***Mohd. Nashruddin Khan v. Union of India & Ors*** in **W.P. (Crl) 786/2020, decided on 11.09.2020**

(v) ***Mohd. Nashruddin Khan v. Union of India & Ors*** in **W.P.(Crl) 786/2020**, decided on 11.09.2020.

(vi) ***Radhakrishnan Prabhakaran v. State of Tamil Nadu & Ors*** reported as **(2000) 9 SCC 170.**

(vii) ***Union of India & Anr. v. Dimple Happy Dhakad*** reported as **(2019 SCC Online SC 875).**

(viii) ***Haradhan Saha v. The State of West Bengal & Ors***. reported as **(1975) 3 SCC 198.**

(ix) ***State of Maharashtra & Ors. v. Bhaurao Punjabrao Gawande*** reported as **(2008) 3 SCC 613.**

(x) ***Madan Lal Anand v. UOI & Anr*** reported as **(1990) 1 SCC 81**.

(xi) ***Kamarunnisa v. Union of India & Anr.*** reported as **(1991) 1 SCC 128.**

(xii) ***Union of India v. Yumnam Anand M. Alias Bocha Alias Kora Alias Suraj & Anr.*** reported as **(2007) 10 SCC 190.**

(xiii) ***Golam Biswas v. Union of India & Anr*** reported as **(2015) 16 SCC 177.**

(xiv) ***Mohammad Seddiq Yousufi v. Union and Anr***. decided on 21.01.2020.

(xv) ***Sheetal Manoj Gore v. State of Maharashtra & Ors*** reported as **(2006) 7 SCC 560**.

(xvi) ***Maya Ajit Satam v. The State of Maharashtra*** reported as **2012 (114) BOMLR 2969.**

(xvii) ***Shabnam Arora v. Union of India and Ors*** reported as **2017 (357) ELT 127(Del.).**

DISCUSSION AND CONCLUSIONS. :-

31. 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, the detailed written submissions filed on behalf of the parties and the original file, the following issues arise for consideration in these proceedings:-

a) Whether the Detaining Authority acted independently and without any bias, whilst rendering the impugned order of detention;

b) Whether the detenu's constitutionally secured right of making an effective representation has been jeopardized, by the non-supply of legible and complete documents, inspite of the detenu's request in this regard; thereby rendering the order of detention illegal and bad;

c) Whether the impugned order of detention passed is bad in law and vitiated on the ground of inordinate delay;

d) Whether the impugned detention order is vitiated on the ground of non-application of mind;

e) Whether the detaining authority has arrived at its subjective satisfaction without properly appreciating and satisfying itself *qua* the propensity of the detenu to continue indulging in prejudicial activities;

f) Whether there has been delay on the part of the Central Government in deciding the representation filed by the detenu; and lastly

g) Whether the detention order stands vitiated owing to the reason that the grounds stated therein have been lifted from the grounds taken in an entirely different case.

32. Insofar as the **first** issue, *viz.* whether the Detaining Authority acted independently and without any bias whilst passing the impugned order of detention is concerned; we have considered the rival submissions made before us in the backdrop of the original records and material placed before us in the present proceedings. We have also considered the

judgment dated 11.09.2020 passed by this Court at the pre-detention stage in W.P.(CRL.) No. 786/2020 titled *"Mohd. Nashruddin Khan vs Union of India & Ors"*.

33. Whilst declining to entertain the aforesaid petition at the pre-execution stage, this Court observed as follows:-

> **"There is nothing produced before us by the petitioners to show that the Detaining Authority had any interaction with either of these petitioners, or in relation to their respective cases, before he passed the Detention Orders** against each of them. There is absolutely no material placed on record by the petitioners to justify the claim of either malice in fact, or in law, against the members of the Central Screening Committee, or the Detaining Authority."

34. The petitioner has in the course of the present proceeding placed on record by way of his rejoinder affidavit, a letter dated 02.09.2019 addressed by Mr. R.P. Singh, Joint Secretary (COFEPOSA) to the DGFT; the opening paragraph of which reads as under:-

> "This has reference to a letter bearing DR/HQ-GI/338/VI/Enq-2/ENT-NIL/2019/2835 dated 02.08.2019, in the matter of a case of misuse of hand carry & exhibition provision of the Foreign Trade Policy (FTP) in respect of precious Metals & Jewellery and Advance Authorization Scheme, received in the Bureau from Directorate of Revenue Intelligence.

> 2. It has been reported that a person was intercepted by DRI at IGI airport on 24.04.2019 and found in possession of 51.172 kg of assorted gold jewellery……"

The aforesaid letter concludes with the following directions:-

> "9 …..since the case involves huge revenue implication/fraud angle and has multi-agency ramifications, it is requested that the Bureau may be given periodic updates in the matter so that effective coordination in the investigation may be achieved."

35. It is pertinent to observe here that the aforesaid letter predates the detention order dated 21.01.2020 by approximately four and half months.

36. From a plain reading of the said communication dated 02.09.2019, it is clear beyond doubt that, Mr. R.P. Singh, who passed the detention order, was actively involved in the investigation, which was being conducted into the case against the petitioner much prior to the passing by him of the detention order. Mr. R.P. Singh, in his letter dated 02.09.2019 elaborately summarized the specifics of the investigation, which was initiated by the DRI in the matter pertaining to the petitioner's involvement in the case of misuse of hand-carry and exhibition provisions of the FTP in

collusion with IMNPL, in respect of the precious Metals and Jewellery and Advance Authorization Scheme.

37. In this behalf, it is observed that the respondents have not disputed the contents of the aforesaid letter or the circumstance that Mr. R.P. Singh was the author of the said communication. However, the respondents have in their affidavits dated 10.02.2021, taken the stand, that the said letter dated 02.09.2019 was authored by Mr. R.P. Singh *"…….while working in the additional capacity of other vertical i.e. Economic Intelligence of the CEIB….."*

38. The petitioner has refuted the said stand by urging that no such distinction is discernible from the said letter itself. It is further submitted by him that in the said affidavit dated 10.02.2021, the respondent has also admitted that the CEIB is headed by a Director General, who is assisted by one Joint Secretary, designated as JS (COFEPOSA). Thus, there is no manner of doubt that the letter dated 02.09.2019 is signed by Mr. R.P. Singh, in his capacity as Joint Secretary and not in any other capacity. In this regard, it is also the submission of the petitioner that Mr. R.P. Singh himself filed an affidavit

dated 26.02.2021, in CONT. CAS (C) No. 84/2021, wherein he rebutted the facts stated in the affidavit dated 10.02.2021.

39. In view of the above, upon a perusal of the documents placed before us, we have no hesitation in holding that Mr. R.P. Singh was actively involved in the subject investigation and was closely monitoring the same with different agencies, as early as on 02.09.2019.

40. It is, therefore, irrefutable that the Detaining Authority had prior interaction with the petitioner's case. At this juncture, we must observe that this Court while rendering the judgment dated 11.09.2020 admittedly did not have the benefit of considering the said letter dated 02.09.2019.

41. We are thus of the considered view, as submitted on behalf of the petitioner, that Mr. R.P. Singh was actively involved in the case pertaining to the detenu for a long period, prior to the passing by him of the impugned detention order; and was admittedly coordinating the investigation undertaken by the Competent Agencies, in that regard.

42. The dual role played by Mr. R.P. Singh-first, in the Economic Intelligence vertical of CEIB (as claimed by the respondents)

during the active investigation; and second, as J.S. (COFEPOSA), in passing the impugned Detention Order, goes to the root of the matter and defeats the very purpose of appointing a "specially empowered" officer under Section 3(1) of the COFEPOSA, whose satisfaction, jurisprudentially, must be independent and free from any bias or predisposition. As held by us in the recent decision in W.P.(Crl.) 1829/2020 titled as "*Gopal Gupta vs. Union of India & Ors.'* and in W.P.(Crl.) 1830/2020 titled as '*Amit Pal Singh vs. Joint Secretary COFEPOSA & Ors.',* both dated 06.08.2021, in our opinion, the test to be applied for bias or predisposition is that of 'identity of intellectual apparatus', namely, whether the person who passed the detention order, purporting to act as the 'specially empowered' human agency, has dealt with the same matter prior to that in any other capacity. It is of no consequence to say that the same person, with the same intellectual apparatus, acted under a different official designation or in a different official capacity. Therefore, the issue of a pre-determined approach and bias, while passing the impugned order of detention, is

writ large in the instant case; and as such, the subjective satisfaction of the Detaining Authority in the present case stands vitiated.

43. In our view, the powers conferred under Section 3(1) of the COFEPOSA have not been complied with independently in the present case. We are also in agreement with the submissions made by learned Senior Counsel in this behalf that, there is nothing in Section 3 of the COFEPOSA or in the scheme of the Act, which suggests that the especially empowered officer must act only on receipt of the proposal of some other agency or "Sponsoring Authority". In fact the expression "Sponsoring Authority" and "Detaining Authority" find no mention in the statute.

44. In this behalf, it is therefore observed that there was nothing that prevented Mr. R.P. Singh, whilst acting as J.S. (COFEPOSA), from passing the impugned order of detention at the first opportunity. Resultantly, in our view, the argument of pre-determined approach and bias stands established in the present case.

45. Our view is elucidated appositely by the decision of the Hon'ble Madras High Court in ***Madasamy vs. Secretary to Govt. & Ors.,*** reported as **2016 SCC OnLine Mad 20650** and in particular paragraphs 41 to 43 of the said report, wherein it was observed as under:-

> "41. The Detaining Authority should act independently and with an open mind. He should not prejudge the issue even before considering the materials produced before him by the sponsoring authority.
>
> 42. In the subject cases, it is clear that the Commissioner of Police actively took part in the process of sponsoring the case of the detenus for detention. The affidavits of the sponsoring officers were attested by the Commissioner of Police by sitting in the arm-chair of the Detaining Authority. He was, therefore, in the know of things, even before the commencement of statutory proceedings for detention. In short, the Commissioner of Police himself was part of the team of complainants otherwise called as sponsoring authorities. Thereafter, he turned the chair and acted in a different capacity as the Detaining Authority. The sponsoring authority and Detaining Authority are practically one and the same in all these matters.
>
> 43. The active participation of the Detaining Authority in the process of sponsoring the name of the detenus for detention would go to the root of the matter and, therefore, is sufficient to set aside the orders of detention on the ground of predetermination. We are, therefore, of the view that the detention orders are unsustainable in law."

46. Insofar as the **second** issue, whether the detenu's constitutionally secured right of making an effective representation has been jeopardized, by the non-supply of legible and complete documents, inspite of the detenu's request in this regard, thereby rendering the order of detention illegal and bad; is concerned, it is observed that the request for supply of legible copies of documents *inter alia* the passport, identity cards of co-detenu's, WhatsApp chats, bill of entry, invoice, statement of Mr. Rohit Sharma—who is alleged to have defaced the gold bars imported illegally—etc.; was made by the petitioner *vídé* request letter dated 27.10.2020 to the Detaining Authority, which request was erroneously and wrongly refused *vídé* memorandum dated 09.11.2020.

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,

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 co-detenu'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.**

52. Insofar as the **third** issue, as to whether the order of detention is bad in law and vitiated on the ground of inordinate delay is concerned, our attention was invited on behalf of the petitioner to the Chart of Events placed on record, in conjunction with the dates thereof, which preceded the passing of the detention order.

53. It is the petitioner's submission that there was inordinate and unexplained delay of 272 days in passing the impugned detention order from the date of the alleged initial incident.

54. In this regard, it is submitted on behalf of the petitioner that the respondent had sought to justify the delay before this Court at the pre-execution stage by contending that overseas evidence had been received from Dubai in the first week of

November, 2019 and that the proposal for detention was resultantly analysed on 02.01.2020, which was then put up before the Central Screening Committee on 13.01.2020; and after receiving the recommendations of the Central Screening Committee on 14.01.2020, the impugned orders of detention were passed on 21.01.2020; and that, therefore, there was no delay in passing the same.

55. The respondents at the post-execution stage have taken the stand that since the aspect of delay was already considered by this Court and rejected at the pre-execution stage, it is no longer open to the detenu to re-agitate the same before this court. The respondents have alternatively submitted that the plea of delay cannot be taken when the same is satisfactorily explained, as in the present case.

56. The petitioner has sought to counter the said argument on behalf of the respondents that the overseas evidence from Dubai was received in the first week of November, 2019, by submitting that there is nothing on record to indicate or substantiate the said assertion. It is further stated by the petitioner that, it is only upon the receipt of the detention

order that the petitioner became aware that reference to overseas evidence from Dubai which was allegedly received by the DRI in November, 2019, was conspicuous by its absence in the detention order; and no material or documents in this regard were placed before the Detaining Authority. As a matter of fact, what emerges from the detention order, is the position that all the material evidence, including the purported overseas evidence, sought to be relied upon against the petitioner, had already been collected, as early as in July, 2019, as is clear from the record, and had already culminated into the issuance of Show Cause Notice dated 26.09.2019. Therefore, it is apparent that the stand taken by the respondents *qua* the receipt of overseas evidence from Dubai in November, 2019 was merely window-dressing, used to cover-up the massive delay that transpired from the time of issuance of the said Show Cause Notice dated 26.09.2019 and the proposal of detention being issued in January, 2020 and that the same is specious and untenable. In these circumstances, the question of delay assumes relevance and is germane and requires *de novo* consideration by this Court.

57. Having perused the impugned order of detention, as well as, the grounds of detention, it is observed that although it was urged before this Court by the respondents at the pre-execution stage about the overseas evidence received from Dubai in November, 2019; however, no reference to such evidence is to be found in the impugned detention order.

58. We are, therefore, of the view that in the absence of any mention of such overseas evidence in the subject detention order, the same cannot be considered as germane in order to satisfactorily explain the delay occasioned in passing of the impugned order of detention.

59. This Court while passing the said judgment dated 11.09.2020 had proceeded on the basis of the stand taken by the respondents that gathering of overseas evidence had delayed the issuance of the subject detention order. However, since in the post-execution proceedings, the respondents have failed to even cite or rely upon the purported overseas evidence collected; nor did they place any such evidence before the Detaining Authority, the respondents have failed to explain away the delay on that count. This Court is

therefore obliged to re-consider the issue of delay at the post-execution stage in the present proceedings.

60. In view of the facts and circumstances elaborated hereinabove and the judicial pronouncements on the issue, to the effect that the Court can interfere with the order of detention on the ground of inordinate and unexplained delay, *a fortiori* we are of the view that there has been substantial, unexplained delay in passing the impugned order of detention. As a result, in the absence of any satisfactory explanation for it, the inordinate delay leads to snapping of the required live and proximate link and direct nexus with the immediate need to detain the petitioner.

61. In this behalf, it is incumbent upon us to emphasise the dictum of the decisions of the Hon'ble Supreme Court in the following cases:-

a) In ***Saeed Zakir Hussain Malik vs. State of Maharashtra & Ors.***, reported as **(2012) 8 SCC 233** and in particular paragraphs 22 to 28 thereof, the Hon'ble Supreme Court whilst considering the question of delay in relation to detention order, has observed as follows:-

"22. In *Rajinder Arora* v. *Union of India* [(2006) 4 SCC 796 : (2006) 2 SCC (Cri) 418] this Court considered the effect of passing the detention order after about ten months of the alleged illegal act. Basing reliance on the decision in *T.A. Abdul Rahman* [(1989) 4 SCC 741 : 1990 SCC (Cri) 76] the detention order was quashed on the ground of delay in passing the same.

xxxx xxxx xxxx xxxx

xxxx xxxx xxxx xxxx

27. As regards the second contention, as rightly pointed out by the learned counsel for the appellant, **the delay in passing the detention order, namely, after 15 months vitiates the detention itself. The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case.** Though there is no hard-and-fast rule and no exhaustive guidelines can be laid down in that behalf, **however, when there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the court to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay has occasioned.**

28. It is also the duty of the court to investigate whether causal connection has been broken in the circumstance of each case. We are satisfied that in the absence of proper explanation for a period of 15

> months in issuing the order of detention, the same has to be set aside. Since, we are in agreement with the contentions relating to delay in passing the detention order and serving the same on the detenu, there is no need to go into the factual details."

b) In ***T.A. Abdul Rahman vs. State of Kerala and Others***, reported as **(1989) 4 SCC 741**, the Hon'ble Supreme Court has elaborated on the issue of when unexplained delay vitiates the detention order by observing as follows:-

> **"10.** The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case."

62. In view of the *ratio decidendi* of the above extracted decisions, we are of the view that in the facts and circumstances of the present case, the causal connection between the alleged prejudicial activities of the detenu and the necessity of the passing of order of detention *qua* the petitioner stands broken.

63. We hasten to add that, whilst arriving on this conclusion, we have given our careful consideration to the judgments relied upon by the respondents on the question of delay in issuing the order of detention. In this behalf, we observe that the reliance placed by the respondents on the decision in the case of ***Union of India vs. Muneesh Suneja***, reported as **(2001) 3 SCC 92**, does not come to the aid of the respondents, inasmuch as, that was a case where the detention order was quashed by the High Court at the pre-detention stage and consequently, the Supreme Court observed that the same was not a fit case for the issuance of any writ of *habeas corpus* but for certain other types of reliefs and, therefore, the matter was examined as any other ordinary writ petition. In this

behalf, the Hon'ble Supreme Court held as under in the concluding paragraph:-

> *"*In addition, we may also notice that the order made by us will not prejudice the interest of the respondent that in the event the said order of detention is given effect to, it is open to the respondent to raise all grounds as are permissible in law notwithstanding what we may have observed in the course of this order."

64. A plain reading of the paragraph extracted above leaves no manner of doubt that the detention order may be quashed at the post execution stage, even though it has not been quashed at the pre-detention stage. It leads to but one inescapable conclusion that considerations while examining the validity of detention order at post-detention stage can be different from the considerations that obtain at the time of examining such an order at the pre-detention stage.

65. The respondents have also invited our attention to the judgment of ***Licil Antony vs. State of Kerala and Another***, reported as **(2014) 11 SCC 326,** in addressing the issue of delay in issuing the order of detention.

66. In ***Licil Antony*** *(supra)* the said decision, while dealing with the question of delay, the Hon'ble Supreme Court in

paragraph 18 thereof has observed that '*the question whether the prejudicial activity of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activity and the purpose of detention is snapped depends upon the facts and circumstances of each case'.*

67. The facts and circumstances, which demonstrates the snapping of the live-link between the alleged prejudicial activity and the purpose of detention have been copiously detailed in the petition and the written submissions filed on behalf of the petitioner.

68. The present case is, therefore, entirely distinguishable on the facts, from the case of ***Licil Antony*** *(supra),* since in that case there was a delay of one month between the arrest of the detenu and the issuance of proposal of detention by the Sponsoring Authority. The detenu in ***Licil Antony*** *(supra)* was arrested on 17.11.2012 and the proposal for detention dated 17.12.2012 was received by the Detaining Authority on 21.12.2012.

69. In the present case, however, the petitioner was admittedly arrested on 26.04.2019, whereas the proposal for detention by the Sponsoring Authority was made belatedly only in January, 2020. Thus, evidently in the present case, there is a delay of over 08 months between the arrest of the petitioner and the proposal for detention by the Sponsoring Authority to the Detaining Authority; which is in complete contrast, when compared to delay of just one month in the relied upon decision in ***Licil Antony*** *(supra)*.

70. Further, in ***Licil Antony*** *(supra),* the Detaining Authority after scrutinizing and evaluating the proposal dated 25.01.2013, placed the same before the Screening Committee and forwarded the same on 01.02.2013. The Detaining Authority took the decision to detain the detenu on 15.04.2013. The detention order was expeditiously passed on 06.05.2013, after the draft grounds in English were approved on 19.04.2013 post-translation to Tamil, which took time till 03.05.2013. It is in these circumstances that the delay in passing the detention order was considered satisfactory in the facts and circumstances of ***Licil Antony***

(supra). However, in the present case, as elaborated hereinabove, there has been no satisfactory explanation forthcoming as to why there was delay of more than 08 months on the part of the Sponsoring Authority in issuing a proposal for the detention of the petitioner.

71. Even in ***Licil Antony*** *(supra),* the Hon'ble Supreme Court in paragraph 09 thereof observed that *the delay in issuing order of detention, if not satisfactorily explained, itself is a ground to quash the order of detention.* It is in these circumstances that we are of the view that the decision relied upon by the respondents do not support their contentions in the present case.

72. Mr. Amit Mahajan, learned Central Government Standing Counsel appearing on behalf of the respondent, has vehemently argued that the question of delay in relation to the passing of the detention order cannot be re-agitated in these proceedings, since that aspect had already been dealt with by this Court in ***Mohd. Nashruddin vs. Union of India & Ors.***, **W.P.(CRL.) No.786/2020 decided on 11.09.2020**,

wherein it was held that there was no delay in passing of the impugned detention order.

73. In this behalf, it is observed that, this Court was clearly disinclined to accept the argument of delay urged on behalf of the detenu herein, at the pre-execution stage, which finding is reflected in paragraphs 68 and 69 of the said judgment dated 11.09.2020. However, as is evident from the dictum of the Hon'ble Supreme Court in ***Muneesh Suneja*** *(supra)*, there can be no quarrel with the legal position that, even though the detention order has not been quashed at the pre-detention stage, it may be quashed at the post-detention stage. In this behalf, it would be pertinent to observe that, at the time of mounting a challenge to the impugned detention order at the pre-detention stage, the petitioner admittedly did not have access to the detention order, the grounds thereto, as well as the Relied Upon Documents, since the same were served upon him only on 12.10.2020, pursuant upon his arrest and detention.

74. It is at that stage, the petitioner became aware for the first time about the absence of the details and particulars of overseas

evidence from Dubai in November, 2019, since the same was neither mentioned in the impugned detention order nor formed part of the Relied Upon Documents. It is in this view of the matter, as well as in light of the dictum of the Hon'ble Supreme Court in ***Muneesh Suneja*** *(supra),* that we find ourselves unable to agree with the respondent's submission that since the aspect of delay was dealt with by this Court in ***Mohd. Nashruddin*** *(supra)* in the earlier round at the pre-detention stage, we ought not to examine that issue at the post-detention stage. The parameters, in our considered view, in relation to the consideration of the subject detention order at the post-detention stage are entirely different.

75. The **fourth** issue that requires adjudication is whether the impugned detention order is vitiated on account of non-application of mind. In this behalf, we are constrained to observe that in the grounds of detention, strong reliance has been placed upon the statements of the detenu 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.

76. It is immediately evident, however, that the Detaining Authority did not consider the circumstance that the detenu, and the co-detenus and others, whose statements formed the basis of the grounds of detention, had long since retracted their statements. In this behalf, the impugned order of detention makes only a passing reference to the circumstance that the DRI had issued rebuttals to the said retractions on 16.01.2020, barely five days before passing the subject order. This circumstance highlights the considerable gap of time between the retraction of the statements by the detenu and co-detenus, and rebuttal thereof by the DRI. This belated rebuttal on the part of the official respondents was relevant and 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 rebutted by the Sponsoring Authority, a few days before the

passing of the impugned order 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 detenu but also the statements allegedly recorded of Vikram Bhasin and Mahesh Jain, statedly the co-accused in the prosecution. In this behalf, the record reflects that Vikram Bhasin and Mahesh Jain retracted their statements, as far back as on 03.06.2019, which retractions had evidently not been placed before the Detaining Authority by the Sponsoring Authority. In our view, once the Detaining Authority has relied upon the inculpatory statements of the co-accused, their retractions also assumed great relevance in the factual backdrop of the present case. Consequently, the admissibility of the said statements becomes questionable once there is a retraction, which issue merited consideration, not accorded to it by the Detaining Authority.

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

78. In this behalf, it would be profitable 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 pace 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."

79. 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]).”

80. Further, in ***Ashadevi vs. K. Shivraj***, reported **(1979) 1 SCC 222** the Hon’ble Supreme Court has held as under:-

“6. It is well-settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the

passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. In *Sk. Nizamuddin* v. *State of West Bengal* [(1975) 3 SCC 395 : 1975 SCC (Cri) 21 : AIR 1974 SC 2353] the order of detention was made on September 10, 1973 under Section 3(2)(*a*) of MISA based on the subjective satisfaction of the District Magistrate that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and this subjective satisfaction, according to the grounds of detention furnished to the petitioner, was founded on a solitary incident of theft of aluminium wire alleged to have been committed by the petitioner on April 14, 1973. In respect of this incident of theft a criminal case was filed inter alia against the petitioner in the Court of the Sub-Divisional Magistrate, Asansol, but the criminal case was ultimately dropped as witnesses were not willing to come forward to give evidence for fear of danger to their life and the petitioner was discharged. It appeared clear on record that the history-sheet of the petitioner which was before the District Magistrate when he made the order of detention did not make any reference to the criminal case launched against the petitioner, much less to the fact that the prosecution had been dropped or the date when the petitioner was discharged from that case. In

connection with this aspect this Court observed as follows:

> "We should have thought that the fact that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. That circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, no order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the pendency of a criminal case against him to the District Magistrate."

It is true that the detention order in that case was ultimately set aside on other grounds but the observations are quite significant. These observations were approved by this Court in *Suresh Mahato* v. *District Magistrate, Burdwan* [(1975) 3 SCC 554 : 1975 SCC (Cri) 120 : AIR 1975 SC 728] . The principle that could be clearly deduced from the above observations is that if material or vital facts which would

influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order."

81. In ***Union of India vs. Ranu Bhandari,*** reported as **(2008) 17 SCC 348**, the Hon'ble Supreme Court has also 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."

82. The reliance placed by the respondent 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 order is primarily based, should be supplied to the detenu and not any and every document; we 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."

83. In view of the above extracted 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 were required to have been placed before the Detaining Authority for its 'subjective satisfaction'.

84. 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 petitioner, that the present is a case of non-placement of vital facts and documents before the Detaining Authority and that the 'subjective satisfaction' is vitiated since the latter was not in possession of vital material. The ratio in ***Kamarunnisa*** *(supra)* is, therefore, distinguishable on the facts thereof. We, therefore, answer the fourth issue by observing that the Detaining Authority fell into error in not considering the vital material, thereby vitiating its subjective satisfaction, being hit by the vice of non-application of mind.

85. As far as the **fifth** issue is concerned, we observe that the Detaining Authority whilst arriving at its 'subjective

satisfaction' failed to properly examine whether the detenu exhibited propensity to continue indulging in any prejudicial activities, for the reason that there was no consideration of the circumstance that despite the fact that the passport of the detenu was released by DRI on 07.01.2020, he did not attempt to travel abroad; as well as the fact that IMNPL had been placed under the Denied Entity List, thereby clearly indicating that it could no longer import gold under the Advance Authorization Scheme, and completely eliminating the possibility of it misusing the said scheme. The consideration of the said aspect is conspicuous by its absence in the impugned detention order.

86. The decision to place IMNPL under the Denied Entity List was taken by the DGFT pursuant to an UO Note dated 21.06.2019, issued by the DRI; which note was never placed before the Detaining Authority.

87. Also the factum of suspension of Vikram Bhasin, the co-accused, who was the Jewellery Appraiser, was neither placed before nor considered by the Detaining Authority. It this behalf, it would be pertinent to observe that it was the

case of the Sponsoring Authority itself that *"The role of Vikram Bhasin was so crucial since without his collusion, the smuggling of Gold could not have been possible".* It was, therefore, incumbent upon the DRI to place the suspension order *qua* Vikram Bhasin for its due consideration of the Detaining Authority.

88. Lastly, the Detaining Authority did not consider the conduct of the detenu, post his enlargement on bail whilst rendering the impugned order of detention, since despite the release of his passport and the granting of the requisite permission to travel abroad, the detenu voluntarily chose not to travel overseas, clearly and unequivocally establishing his *bona fides* and debunking the arguments of his propensity to continue to indulge in prejudicial activities in the immediate future. This was never brought to the notice of the Detaining Authority, thereby precluding the latter from considering this relevant and germane circumstance, whilst arriving at its subjective satisfaction in this behalf.

89. Additionally, the order of CESTAT dated 13.11.2019 directing the provisional release of the goods, was also a

relevant factor, that was not accorded any consideration by the Detaining Authority, in the present case.

90. We are, therefore, of the view that the Detaining Authority has erred in arriving at the finding *qua* the propensity of the detenu to involve himself in further prejudicial activities, by failing to consider the facts and circumstances, elaborated hereinabove.

91. On the **sixth** issue regarding the delay on the part of the Central Government in deciding the representation filed by the detenu, it would be relevant to consider the circumstance that the detenu was detained on 12.10.2020 and filed representation dated 27.10.2020 with the Detaining Authority, as well as before the Central Government. Although the Detaining Authority rejected his representation on 09.11.2020, no decision was taken by the Central Government on the detenu's representation. Instead the Central Government made a reference dated 10.11.2020 to the Central Advisory Board, which gave its opinion *qua* the sufficiency of the grounds with regard to the detenu's detention. The subject representation was finally rejected by

the Central Government only on 23.12.2020, three days after confirmation by it of the order of detention by the Central Advisory Board.

92. A bare perusal of the above clearly reflects that there was massive delay of 57 days by the Central Government in dealing with the petitioner's representation.

93. In ***Ankit Ashok Jalan vs. Union of India and Others,*** reported as **(2020) 16 SCC 127**, the Hon'ble Supreme Court has observed, particularly in paragraph 17 thereof, as under:-

> **"17.** In terms of these principles, the matter of consideration of representation in the context of reference to the Advisory Board, can be put in the following four categories:
>
> **17.1. If the representation is received well before the reference is made to the Advisory Board and can be considered by the appropriate Government, the representation must be considered with expedition. Thereafter the representation along with the decision taken on the representation shall be forwarded to and must form part of the documents to be placed before the Advisory Board.**
>
> **17.2. If the representation is received just before the reference is made to the Advisory Board and there is not sufficient time to decide the representation,** in terms of law laid down

in *Jayanarayan Sukul* [*Jayanarayan Sukul* v. *State of W.B.*, (1970) 1 SCC 219 : 1970 SCC (Cri) 92] and *Haradhan Saha* [*Haradhan Saha* v. *State of W.B.*, (1975) 3 SCC 198 : 1974 SCC (Cri) 816] **the representation must be decided first and thereafter the representation and the decision must be sent to the Advisory Board.** This is premised on the principle that the consideration by the appropriate Government is completely independent and also that there ought not to be any delay in consideration of the representation.

17.3. If the representation is received after the reference is made but before the matter is decided by the Advisory Board, according to the principles laid down in *Haradhan Saha* [*Haradhan Saha* v. *State of W.B.*, (1975) 3 SCC 198 : 1974 SCC (Cri) 816] , the representation must be decided. The decision as well as the representation must thereafter be immediately sent to the Advisory Board.

17.4. If the representation is received after the decision of the Advisory Board, the decisions are clear that in such cases there is no requirement to send the representation to the Advisory Board. The representation in such cases must be considered with expedition."

94. It is, therefore, well settled that the right of the detenu to make a representation and have it considered by the appropriate Government with expedition, is a constitutional right under

Article 22(5) of the Constitution of India and any unreasonable and unexplained delay in considering the representation is fatal to the continued detention of the detenu.

95. In this view of the matter and the circumstance that this proposition is too well settled by a long line of decisions, it is not considered necessary for us to examine the authorities relied upon by the respondents on this aspect.

96. We, therefore, hold that there has been inordinate and unexplained delay on the part of the Central Government in deciding the statutory representation filed by the detenu.

97. The **last** issue that arises for determination before us is whether the subject detention order stands vitiated for the reason that the grounds stated therein have been lifted from the grounds taken in an entirely different case.

98. The petitioner herein have produced certified copies of the detention order dated 17.05.2019 passed in the case of ***Union of India & Anr. vs. Dimple Happy Dhakad***, reported as **(2019) 20 SCC 609** (filed by the detenu's wife) from the records available in the Supreme Court of India. A

purposive, comparative consideration of the grounds of detention dated 17.05.2019 in ***Dimple Happy Dhakad*** *(supra),* also passed by Mr. R.P. Singh, the Detaining Authority in these proceedings and the impugned detention order, the inference clearly is that barring a few differences in the names and references etc——*mutatis mutandis*——the grounds are unerringly identical. The said comparison ground-for-ground leads but to one inescapable conclusion, that the entire exercise of passing the detention order was mechanical, as the grounds have been lifted from the grounds of an altogether distinct case. Such a blatant *copy-paste* job by the Detaining Authority demonstrates clear non-application of mind.

99. We, therefore, hold that the impugned order of detention is vitiated on this ground as well.

100. In view of the foregoing discussion, and having accorded our thoughtful consideration to the material on record, the issues struck hereinabove are decided in favour of the detenu and against the respondents.

101. The writ petition accordingly succeeds. In the result, the detention order bearing No. PD-12001/03/2020-COFEPOSA dated 21.01.2020 passed against the detenu is set-aside and quashed. The detenu is directed to be set at liberty *forthwith* unless his custody is required in connection with any other case.

102. The writ petition is disposed of in the above terms.

103. A copy of this judgment be provided to learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court *forthwith*.

SIDDHARTH MRIDUL
(JUDGE)

ANUP JAIRAM BHAMBHANI
(JUDGE)

AUGUST 13, 2021
dn/di

Click here to check corrigendum, if any