

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 01.03.2011

W.P.(CRL) 1854/2010

SUNNY KANODIA

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Detenu : Mr Vikram Chaudhary with Mr Saurabh Kirpal,
Mr Akshay Anand, Mr Sanjay Agarwal, Ms Sonam
Nagrath, Mr Deepak Kumar and Ms Jyoti Taneja.

For the Respondent : Mr Jatan Singh for UOI.
Ms Meera Bhatia for the State.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE MANMOHAN SINGH

- | | |
|---|------|
| 1. Whether Reporters of local papers may be allowed to see the judgment ? | Yes. |
| 2. To be referred to the Reporter or not ? | Yes. |
| 3. Whether the judgment should be reported in Digest ? | Yes. |

MANMOHAN SINGH, J.

1. The present writ petition has been filed by the petitioner under Article 226 of the Constitution of India read with Section 482 of Code of Criminal Procedure, 1973 seeking quashing of the impugned detention order F.No.673/13/2010-CUS VIII dated 07.07.2010, issued under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA Act'). The detenu is the nephew of Bhimendra Kumar Goyal @ B.K. Gupta @ Munna Goyal (hereinafter referred to as "detenu").

2. The detenu was detained on 22.09.2010 under COFEPOSA Act pursuant to the impugned order dated 07.07.2010 issued by respondent No. 2 which was served upon him along with the grounds of detention with a view to prevent him from engaging in smuggling, abetting the smuggling, engaging in transporting, concealing, keeping, dealing in smuggled goods and harbouring persons engaged in smuggling goods in future under Section 3(1) of the COFEPOSA Act.

3. The relevant facts leading up to the filing of the present writ petition are as follows :

- (i) On 15/16.10.2009 the investigation commenced with alleged information that the detenu, along with Shri Vikash Bajoria, Shri Shakil Ahmed, Chhaliya Srivastava and other associates were involved in smuggling activities. A 40 Feet Nepal bound container stuffed with smuggled goods as well as other goods available in Hooghly were seized under Panchnama. A laptop and a computer was taken over from the premises of Chhaliya Srivastava as well as of Shri Deepak Sharma, Assitant of Shri Vikash Bajoria and Chhaliya Srivastava from which 68 nos. of hard copy printouts were retrieved.
- (ii) Three godowns at Delhi were also searched/sealed. The goods found there were seized. Office of the detenu was also searched and incriminating documents, CPUs and Pen Drive were taken from there. Statements of Shri Rahul Goyal, Shri Vivek Agarwal and Shri Bijendre Prasad Mishra were recorded.

- (iii) On 17.10.2009, Shri Vikash Bajoria and Shri Chhaliya Srivastava were arrested and produced before the Learned CMM, Kolkata. Further remand was sought vide Remand Applications dated 23.10.2009 and 30.10.2009. The remand applications bring out in detail the same allegations which allegedly are the basis of alleged subjective satisfaction as recorded in the grounds of detention.
- (iv) On 24.10.2009, panchnama was drawn at Amit Oil Products, Dankuni and P.D.P. International, Jaijukurj Kolkata. On 28.10.2009 Shri Shyam Sunder Gupta stated that the premises of Kanika International (two godowns) had been given to Shri Vikash Bajoria who is engaged in imports and storage of different items.
- (v) Shri Vikash Bajoria and Shri Chhaliya Srivastava were released on bail on 30.10.2009. The detenu on 23.11.2009 filed the writ petition (Crl.) No. 93 of 2009 before the Supreme Court which was dismissed as withdrawn with leave to avail such remedies as may be available in law.
- (vi) Vide letter dated 09.12.2009 addressed to the adjudicating authority, the Commissioner of Customs (Port), Kolkata, the detenu waived the written show cause notice in respect of the entire case and requested for the provisional release of the seized goods and for adjudication of the case relating levy, assessment and collection of duty. After about 8 months the impugned detention order F.No.673/13/2010-CUS VIII dated 07.07.2010 was issued by respondent No.2.

- (vii) As per detenu, unaware of the detention order he appeared before the Learned Chief Metro Politian Magistrate, New Delhi in the matter of D.S. Kataria (Customs) Vs. B.K. Goyal with his advocate where SPP Shri Sunil Sharma for customs Department was also present. On this date also the detention order dated 07.07.2010 was not served upon him. On 13.09.2010 the detenu surrendered before the Trial Court in Kolkata.
- (viii) On 13.09.2010 the detenu voluntarily surrendered to the jurisdiction and custody of learned Trial Court in Kolkata. The petitioner filed a Writ Petition (Crl) No. 1398 of 2010 before this court challenging the impugned detention order at the pre-execution stage in which this court, on 14.09.2010 directed the respondents to file their counter affidavits within one week. On 22.09.2010 the impugned detention order along with grounds of detention was served upon the detenu. The documents referred to and the relied upon documents were served on 23.09.2010.
- (ix) Writ Petition (Crl) No.1398/2010 was heard for some time and the detenu was granted liberty to file a separate writ petition, if the need arises, raising other grounds in accordance with law.
- (x) On 29.09.2010 the detenu sent the preliminary representation to the Jail Authorities for forwarding it to the Detaining Authority in which he sought for the documents, if any, relied upon for arriving at satisfaction regarding 'harbouring persons engaged in smuggling of goods, and also informed about other contradictions which had

created confusion in the mind of the detenu. But, vide its communication dated 08.10.2010 the Detaining Authority rejected the said preliminary representation of the detenu.

(xi) On 03.11.2010, the detenu was granted bail by the High Court of Kolkata.

(xii) Thereafter, the detenu made a representation before the Advisory Board and placed the following documents:

- (1) Judgment dated 07.08.2006 of this Court in the case of **Shashi Goyal v. UOI & Ors: 132 (2006) DLT 530 (DB)**, whereby the earlier detention order dated 19.11.2004 was quashed and set aside.
- (2) Order dated 08.03.2007 passed by the Hon'ble Supreme Court dismissing the SLP against the said judgment dated 07.08.2006 filed by the respondents.
- (3) Orders dated 11.03.2008 and 02.04.2009 of Hon'ble Supreme Court in SLP filed by Shashi Goyal, wife of the detenu, challenging the liberty granted by this Court while quashing the second detention order issued against the detenu, to issue a fresh detention order on the same facts on which the detention order under consideration was based.
- (4) Order dated 04.03.2008 of the Tribunal granting conditional stay against order in original dated 19.01.2007.

(5) Order dated 25.01.2010 of the Tribunal setting aside the order in original dated 31.07.2009.

(6) Revocation order passed by the Central Government in the matter of Gurbax Biryani.

As per the statement of detenu, no independent consideration was given by the Detaining Authority and the Central Government to the said representation.

(xiii) Thereafter, the detenu on 14.12.2010 withdrew the earlier W.P. (Crl) No.1398/2010 which was filed at pre-execution stage. The present petition has been filed after execution of the detention order dated 07.07.2010.

4. The material facts as emerging from the grounds of detention show that the case of the detaining authority against the detenu is that he, in a well planned manner, has engaged himself in illegal activities which reflects his high potentiality and propensity to indulge in such activities in future, therefore, there is a need to prevent him from indulging in such illegal activities in future by detention under sub-section (i), (ii), (iii), (iv) and (v) of Section 3(1) of the COFEPOSA Act, 1974.

5. The detention order dated 07.07.2010 has been challenged by the detenu on several grounds as mentioned in the petition however, at the time of hearing of the case, the challenge has been confined mainly to the following grounds:

(a) The Detention Order has been issued, inter alia, for preventing the detenu from 'harbouring the persons engaged

in smuggling of goods', without providing particulars of any person whatsoever who was engaged in smuggling of goods and was also harboured by the detenu.

- (b) In paras 46, 47 and 57.3 of the grounds of detention, the detaining authority referred to an earlier case which was adjudicated vide order in original dated 19.01.2007 whereby penalty of Rs.15 lakhs was imposed on the detenu and order in original dated 31.07.2009 whereby penalty of Rs.50 lakh was imposed upon the detenu whereas against the order dated 19.01.2007 a conditional stay had been granted vide order dated 04.03.2008 and other order in original dated 31.07.2009 has already been set-aside by CESTAT vide order dated 04.02.2010 and the matter was remanded for *de-novo* adjudication. The challenge of the detenu is that the sponsoring authority has failed to place on record these vital information/documents for consideration of the Detaining Authority. Thus, it shows non-application of mind by the Detaining Authority on these vital documents and non-supply of the same to the detenu would infringe the rights guaranteed under Article 22(5) of the Constitution of India for making an effective representation against the impugned order.
- (c) In Para 45(B), the Detaining Authority relies on seizure of inter alia "2 incriminating CPUs" and other "incriminating

documents” vide Annexure — A to the Panchnama dt. 15.10.2009. The use of words ‘incriminating’ pre-supposes that the documents and contents of CPU were considered by the Detaining Authority, and thus respondent No.2 was bound to supply the copies of these documents and the incriminating contents of the CPU to the detenu *pari passu* along with the Grounds of Detention.

- (d) The Detaining Authority relied upon pending prosecution proceedings in para 64 of the grounds for arriving at the subjective satisfaction, but copies of the documents concerning prosecution proceeding were not supplied.

6. In support of first ground (a) as referred in preceeding para, the case of the detenu is that the final satisfaction given by the Detaining Authority regarding the need to prevent the detenu from engaging in harbouring of persons involved in smuggling of goods was without support of any material. The detenu in his representation requested the Detaining Authority for supply of the documents, if any, relied upon for arriving at satisfaction regarding the harbouring of persons engaged in smuggling of goods by the detenu. The representation of the detenu was admittedly rejected by the respondent without assigning any reason.

7. In the counter affidavit, the explanation given by the respondent is that the detenu had indulged in prejudicial activities and he has the potential and propensity to indulge in such prejudicial activities in future. Therefore, it was necessary to pass detention order against the detenu thereby preventing

him from engaging in smuggling, abetting the smuggling of goods in future. The contention of the respondents is that the Detaining Authority has, therefore, applied its mind while coming to the said conclusion against the detenu for preventing him from harbouring the persons engaged in the smuggling of goods amongst others. Learned counsel for the respondents has also referred to paras 59, 61 and 64 of the grounds of detention in support of his submission. However, it is not disputed by the respondents that pursuant to the representation made by the detenu dated 29.09.2010 before the Detaining Authority, no documents or material was supplied to the detenu and it is also admitted by the respondents that the representation was rejected.

8. The meaning of harbouring as appeared in the Black's Law Dictionary, 8th Edition, is:- "The act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien." It is undisputed fact that in the grounds of detention, no such material was discussed or produced by the sponsoring authority whatsoever in this regard in order to show that the detenu was in any way harbouring anyone by providing boarding or lodging with a view to smuggle the goods. Thus, in the absence of any material, it cannot be said that the detenu had been harbouring the persons engaged in smuggling goods or in abetting the smuggling of goods.

9. In the matter of **Davubder Singh Dawar @ Goldie vs. UOI: 1997 Crl L.J. 3168**, this Court quashed the detention order as no person engaged in smuggling of goods harboured by the detenu could be shown by the Detaining Authority despite issuing detention order allegedly for preventing the detenu therein from harbouring persons engaged in smuggling of goods.

10. A similar situation has arisen in the present case. It appears that there was no material on record which may show the satisfaction to the effect that the detenu was engaged in harbouring persons involved in the smuggling of goods. In the absence of any material on record, the said findings are not correct. The order of detention passed on that basis has to be quashed.

11. In support of ground (b), the learned counsel for the petitioners has referred to paras 46 and 47, and 57.3 of the grounds of detention. The same read as under:

46. DRI, Kolkata obtained a Copy of Adjudication order No. 2/CUS/CC(P)/WB/2007 dated 19.01.2007 passed by the Commissioner of Customs (Preventive), WB, Kolkata in connection with seizure of 444504 Pcs of Ball Bearing of foreign origin, Room Air Conditioners, Car AC Compressors and Parts thereof, DVD Players etc. of foreign origin collectively valued at Rs. 1,45,30,020/-, imposing penalty of Rs. 15 Lakhs on you, Shri Bhimendra Kumar Goyal and penalties on other seven persons including Shri Shakil Ahmed from the office of the commissioner of Customs (Preventive), West Bengal. The said Adjudication Order arising out of the Seizure case No. 10/Imp/CI/P&I/WB/04 dated 28.04.2004 was in connection with seizure of the aforesaid goods from two containers intercepted at the domestic terminal of CONCOR and another two containers at ICD, Tughlakabad, New Delhi. Considering all the facts, statements of different persons and the pieces of evidence before him, the Adjudicating authority held Shri B.K. Goyal to have been involved in smuggling of the said impugned goods and also imposed a penalty of Rs. 15,00,000.00/- on him. In the said order a penalty of Rs. 1,00,000.00/- was also imposed on Shri Shakil Ahmed, who in the instant case had handled the clearing of the goods contained in containers No. CRXU-9161494 & HJCU-8351637 cleared from Haldia port using the licence of the CHA, M/s Orient Clearing and Forwarding Agency.

47. Copy of other order-in-original No. 16/Commr/ HKT/09 dated 31.07.09 passed by the Commissioner of Customs (Preventive), New Delhi was also obtained by DRI. The said order in original No. 16/Commr/HKT/09 dated 31.07.09, was in connection with a case of seizure of large quantity of consumer goods and bulk medicinal powders of foreign origin with estimated local market value of Rs. 22.00 crore from Container No. ILCU 502406(7), one godown at Badli and three godowns at Sanjay Gandhi Transport Nagar, New Delhi from 26.04.2004 to 14.05.2004 by DRI, Hqrs. It has been held in the said order that you, Shri. B.K. Goyal along with another notice were found to have acquired possession of and concerned in carrying, removing, depositing, harboring, concealing, selling or purchasing and dealing with the said goods. Besides confiscation of the offending goods, the order was passed for imposition of penalty of Rs. 50 lakh (Rupees fifty lakh) each upon you, Shri B.K. Goyal & Shri Subhash Bansal.

57.3 You, Shri Bhimendra Kumar Goyal were issued several Summons under Section 108 of the Customs Act, 1962 asking you to appear before DRI for the purpose of investigation, but you did not appear before DRI for the purpose of investigation, but you did not appear before the DRI to join the investigation. Such non appearance against repeated Summons suggests that you, Shri Bhimendra Kumar Goyal are willfully avoiding the investigation. However, from the statements of Shri Chhaliya Shrivastava and Shri Vikash Bajoria it is quite evident that the entire illegal operation of bringing the subject Nepal bound containers to the godown premises namely Kanika International Ltd. and Amit Oil Products Pvt. Ltd. both situated at Dankuni hired by Shri Vikash Bajoria, unloading the expensive misdeclared goods from there by breaking their seals, loading the said emptied containers with low value goods, then sealing them with spurious seals having same numbers as of the original seals and finally sending them for their Nepal destination was masterminded by you, Shri Bhimendra Kumar Goyal, Shri Vikash Bajoria and

Shri Chhaliya Shrivastava both have stated in their respective statements under Section 108 of the Customs Act, 1962 that they were working for material gain as per the instruction from you, Shri Bhimendra Kumar Goyal. You, (Shri Goyal) was also found guilty in two seizures of goods of foreign origin – one at Kolkata vide Seizure case No. 10/Imp/CI/P&I/WB/04 dated 28.04.2004 and Adjudication order No. 2/CUS/CC(P)/WB/2007 dated 19.01.2007 passed by the Commissioner of customs (Preventive), WB, Kolkata wherein a penalty of Rs. 15 Lakhs was imposed upon you, (Shri Goyal) and other at Delhi vide Adjudication Order No. 16/Commr/HKT/09 dated 31.07.09 passed by the Commissioner of Customs (Preventive), New Delhi in connection with a case of seizure of large quantity of consumer goods and bulk medicinal powders of foreign origin with estimated local market value of Rs. 22.00 crore wherein a penalty of Rs. 50 lakh was imposed upon you.

All these appear to indicate that you are a habitual offender in connection with smuggling of goods and dealing with the same. You, are thus found to be involved in smuggling, abetting the smuggling of the goods, engaging in transporting, concealing, keeping smuggled goods, dealing in smuggled goods, harboring persons engaged in smuggling goods or otherwise in respect of the deflected Nepal bound goods intercepted from two Nepal bound containers No. CRXU 9161494 (40 ft) and HJCU-8351637 (20ft) and from the godowns at Kanika International Ltd, Dankuni, Amit Oil Products Pvt. Ltd., Dankuni and the godown at Kona Expressway Godown (N.H.6, Bombay Road, Salap More, Liluah, Near Kona Express Way, P.O. Bankra, P.S. Domjur, Dt. Howrah, West Bengal).

12. The contention of the petitioner is that the Detaining Authority has placed reliance on the detention order dated 19.11.2004 relating to seizure of goods against the detenu in paras 47 and 57.3 of the grounds of detention as

well as another detention order No.673/07/2007 CUS VIII dated 27.12.2007 in order to come to the conclusion that the detenu was habitual offender.

13. It is submitted that the detention order dated 19.11.2004 was quashed and set aside by the Division Bench of this Court vide order dated 07.08.2006 on the ground that the documents relied upon were not served *pari passu* along with the grounds of detention. Similarly, the detention order dated 27.12.2007, which was relied upon by the Detaining Authority, was also quashed vide order dated 26.02.2008 on the same grounds while granting liberty to issue fresh detention order and undisputedly the Supreme Court by order dated 11.03.2008 stayed the direction issued by this Court to the effect that the liberty is granted to the respondent to pass a fresh detention order and the said SLP is still pending. However, in the grounds of detention, no such details are mentioned or discussed while coming to the final satisfaction by the Detaining Authority.

14. It is stated in paras 46, 47 and 57.3 of the grounds of detention, that the Detaining Authority referred to the case of earlier detention order dated 19.11.2004 which was adjudicated vide order in original dated 19.01.2007 wherein penalty of Rs.15 lakhs was imposed on the detenu and order in original dated 31.07.2009 wherein penalty of Rs.50 lakh was imposed upon the detenu. But the Detaining Authority has failed to mention or discuss about the factual position of the matter that against the order dated 19.01.2007 a conditional stay had been granted vide order dated 04.03.2008 and the order in original dated 31.07.2009 has already been set-aside by CESTAT vide order dated 04.02.2010 and the matter was remanded for *de-*

novo adjudication. Thus, it appears that the sponsoring authority did not place on record these vital information/orders for consideration before the Detaining Authority.

15. In the counter affidavit, merely a statement was made by the respondents that the detention order has been issued based on record placed before the Detaining Authority. It appears from the material available on record that the respondents 1 and 2 have not given the specific answer in the counter affidavit to the point raised by the petitioner in this regard.

16. In the case of **Suresh Mahato v. District Magistrate, Burdwan:** (1975) 3 SCC 554, it was observed by the Supreme Court:

“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.”

17. Since the sponsoring authority has failed to place vital information and documents for consideration of the detaining authority who has also not considered the fact that against the order dated 19.01.2007 a conditional stay had been granted vide order dated 04.03.2008 and the order in original dated

31.07.2009 has already been set-aside by CESTAT vide order dated 04.02.2010, thus, it appears to us that it amounts to non-consideration of the earlier detention order in paras 46, 47 and 57.3 of the grounds relied on the same. We are of the view that had these vital pieces of information or documents been made available to the detaining authority, she might have come to a different conclusion in the grounds of detention. The non-consideration of this fact is clearly fatal to the case of the respondents.

18. In support of ground (c) pressed by the detenu, learned counsel has referred to para 45(B) of grounds of detention wherein the Detaining Authority relied on seizure of, inter alia, “two incriminating CPUs and other incriminating documents” vide Annexure A to the Panchnama dated 15.10.2009. The contention of the learned counsel for the detenu is that the use of the word ‘incriminating’ pre-supposes that the documents and contents of CPUs were considered by the Detaining Authority, thus, the respondents were bound to supply the copies of these documents and the incriminating contents of the CPUs to the detenu *pari passu* along with the grounds of detention.

19. The reply of the respondents is that it is not disputed that the Detaining Authority mentioned about the seizure of CPU and incriminating documents in the grounds of detention. However, the respondents tried to satisfy the Court that since there was a pre-detention development, there was only a reference in the grounds. The said two CPUs were seized and were kept sealed under the signature of Sh. Rahul Goyal and Sh. Vivek Aggarwal. But there was no discussion about the retrievals of the CPU as well as about

the incriminating documents, therefore, it was not necessary to supply the said documents. Otherwise all the relevant documents, which were relied upon at the time of consideration and arriving at the satisfaction of passing of the detention order, have been supplied to the detenu against receipt.

20. We have examined the copy of the Panchnama dated 15.10.2009.

Annexure A to the Panchnama prepared at the site reads as under:

Annexure A to the Panchnama Dated 15.10.2009
List of files resumed from the premises:

File Sl. No.	Subject	Page No.
1.	Import documents	01-164
2.	PTH Misc. file	01-63
3.	Misc. paper- M/s. Ashish Traders	01-37
4.	Royal Sundram Insurance	01-15
5	Bank statements	01-09
6	Import No. 4+5/42+43 HCH ICD TKD	01-36
7	Car Installment papers	01-06
8.	General file correspondence	01-26
9.	HCH Chennai (-sic-) File Import No. 1/33 (2009-10)	01-09
10.	Communication Exp. (Idea)	01-31
11.	Sales Bills (CST) PTH 2009-10	01-17
12.	Sales Bills (CST) A.T. 2009-10	01-22
13.	Office MCD	01-03
14.	No Brand ICD TKD	01-21
15.	Sales Bill (local) PTH 2009-10	01-15
16.	No Brand ICD TKD	01-23
17.	Bank statements PTH	01-06
18.	Import 6/41 HCH Chennai (non-excite)	01-52
19.	HCH ICD Tughlakabad 2009-10 Import No. 1/34	01-42

Details of CPU & Pen drive resumed-

1. Pen drive
2. CPU (Index cabinet) Sl. No. A 62715-001
3. CPU (Unbranded) Sl. No. 737620-003
4. Diary 2009 (Black) having written pages 01 to 20.

Admittedly, the documents seized and referred to in file Sl. Nos. 1 to 19 and copies of relevant pages of Diary 2009 of Annexure A to the Panchnama have not been supplied *pari passu* by the respondents which were

relied upon as incriminating documents at the time of arriving at satisfaction of passing the grounds of detention

21. On the same ground earlier detention order dated 19.11.2004 under COFEPOSA against the same detenu was quashed and set aside vide judgment dated 07.08.2006 in **Shashi Goyal** (supra) rendered by this Court which referred to several judgments of Hon'ble Supreme Court on this issue, including two judgments in **Virendra Singh v. State Maharashtra: (1981) 4 SCC 562** and **Kamla Kanyalal Khushalani v. State of Maharashtra: (1981) 1 SCC 748**, ratio of which was followed consistently thereafter by Hon'ble Supreme Court and High Courts.

In **M. Ahamedkutty v. Union of India and Another: (1990) 2 SCC 1**, after considering the judgments cited by the Respondents including **Ichhu Devi Choraria v. Union of India & Ors. : (1980) 4 SCC 531** and 3 judges judgment in **Ana Carolina D'souza v. Union of India: (1981) Suppl. SCC 53**, it was held that without relied upon documents the ground would be incomplete, it was a constitutional imperative and held that non supply of the same *pari passu* with the grounds was bad in law. The judgment in **M. Ahamedkutty** (supra) was followed by a three Judges bench in **P.U. Abdul Rahiman v. Union of India & Ors: (1991) Supp SCC 274**. In **Gautam Saikia and etc. v. District Magistrate, Sibsagar and others: 1984 Crl L.J. 597**, it was observed:

20. We are of the opinion that in view of the principles of law laid down by the Supreme Court in the cases above, the order of detention in both the cases is invalid being violative of Article 22(5)

of the Constitution. The mere fact that the grounds are elaborate and statements are concise, does not absolve the detaining authority from its constitutional obligation to supply the documents referred to above which form an integral part of ground of detention and which influenced the detaining authority in reaching the subjective satisfaction. In *Ganga Ramchand* (1980 Cri LJ 1263 at p. 1267) (*supra*) it was observed:

“The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu. In the instant case the grounds contain only the substance of the statements, while the detenu had asked for copies, of the full text of those statements.”

22. Therefore, in view of the settled law, by non-supply of the documents to the detenu, the right of the detenu under Article 22(5) of the Constitution of India for making an effective representation stood negated.

23. The next ground for challenging the impugned order is that the Detaining Authority relied upon “*pending prosecution proceeding*” in para 64 of the Grounds for arriving at the subjective satisfaction. However, in absence of supply of documents concerning prosecution proceeding and sanction for the same under section 137(3) of the Customs Act, 1962, both the facets of Article 22(5) are violated.

24. In the counter affidavit, it is submitted by the respondents that the mentioning of pendency of prosecution proceedings and initiation of adjudication proceeding in future is only a reference by the Detaining Authority and all the documents pertaining to the remand of the detenu before

the concerned Magistrate under the Customs Act had been placed before the Detaining Authority at the time of placing reliance and subjective satisfaction in passing the detention order and as such the detention order on this ground cannot be vitiated. It is submitted that the documents concerning prosecution proceedings which forms the documents of remand and other related issues before the concerned Magistrate have been supplied to the detenu and the Detaining Authority mentioning “pending prosecution proceedings” in para 64 of the grounds for arriving at the subjective satisfaction is only a matter of reference and all documents relating to that issue have been considered and supplied.

25. It is pertinent to mention here that in the additional counter affidavit dated 27.01.2011 filed by the very same respondents which was allowed to be taken on record by order dated 28.01.2011, the respondents have changed their stand in para B(I) of the grounds which reads as under:

“B.(I) The Grounds as raised in para B(I) are wrong and misconceived and hence denied. It is respectfully submitted that the reference to ‘prosecution’ at Para 64 has only been made as a passing reference and has no bearing on the satisfaction of the detaining authority and there was no question of supplying any documents on which no reliance has been placed. It is submitted that all the relied upon documents have been supplied to the detenu.”

However, the fact remains that in para 64 of the grounds of detention, a specific reference has been made about the pending prosecution proceeding while coming to the satisfaction by the Detaining Authority.

26. It is argued by the learned counsel for the detenu that as per the knowledge of the detenu, no prosecution was filed in the case, however, the Detaining Authority relied on pendency of the prosecution proceedings, without supplying particulars thereof. Under these circumstances, we agree with the counsel for the detenu that the claim of the Detaining Authority regarding the pendency of prosecution in absence of either any sanction under Section 137(3) of the Customs Act, 1962, exhibits absolute casualness and serious lapse on the part of the Detaining Authority. In Somnath Kundu v. Union of India & Ors: 1987 (32) ELT 657 (Delhi), this Court was pleased to quash and set aside the detention order as the same was passed without knowing whether prosecution proceedings were pending against the detenu by relying on Sri Ram Goel v. Union of India, 1984 Crl L.J. 1048.

27. In our opinion there can be no two views about it that the pendency of prosecution is one of the most relevant circumstances which the Detaining Authority must consider carefully as the object of preventive detention being to intercept a person before he does something and to prevent him from doing and not to punish for having done something, it is imperative on the part of the Detaining Authority to be vigilant. An indifferent attitude on the part of the authority defeats the very purpose of the preventive action, which otherwise has serious consequences from the stand point of the person detained, for it deprives him of his personal liberty, which is impermissible except in accordance with the procedure established by law.

28. For the reasons stated above, we are of the opinion that the detention order is liable to be set aside.

29. Since we have accepted the four contentions of the learned counsel for the detenu, it is not necessary for us to deal with the other contentions mentioned in the grounds by the detenu and urged by him.

30. Consequently, we allow the writ-petition and quash further detention of the detenu under order dated 07.07.2010 and direct that he shall be released forthwith unless required to be detained in any other case.

31. No costs.

MANMOHAN SINGH, J

BADAR DURREZ AHMED, J

MARCH 01, 2011

dp/jk