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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(Crl.)No.911/2012 and Crl.M.A.No.13856/2012**

% Date of decision: 26th September, 2012

ANKIT GULATI

..... Petitioner

Through : Mr. Pradeep Jain, Mr.
Harish Kohli, Mr. Rohit and
Mr. Shubhankar, Advs.

versus

UOI & ANR.

..... Respondents

Through : Mr. Jatan Singh, CGSC and
Mr. Tushar Singh, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J. (Oral)

1. The instant petition seeking issuance of writ of habeas corpus has been filed by Ankit Gulati who is a son of Shri Ram Mohan Gulati who has been detained pursuant to an order dated 7th April, 2008 under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA).

2. Detailed arguments were made by learned counsel for both the sides in the matter on several dates. Having given our considered thought to the matter, we were of the view that the challenge by the detenu to his preventive detention pursuant to the

order dated 7th April, 2008 was well founded. In view of the inability to complete the reasons for our order on 26th September, 2012, we had passed the following order:-

“1. We have heard the writ petition at great length and commenced dictation of the order in court. However, it is now 4:20 pm and it is not possible to conclude the dictation of the order and its finalization before rising of the court today.

2. In view of the above, it is directed that the order bearing F.No.673/02/2008-Cus.VIII dated 7th April, 2008 is hereby quashed. The respondents are directed to set the detenu at liberty forthwith. The writ petition stands allowed. There shall be no orders as to costs.

Reasons to follow.

Dasti.”

We proceed to record the reasons for the above hereafter.

3. The writ petitioner assails his father – Ram Mohan Gulati’s detention by the order dated 7th April, 2008 issued by Ms. Rasheda Hussain, Joint Secretary (COFEPOSA) of the Government of India, Ministry of Finance Department and Revenue, New Delhi under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The writ petition has been filed by Mr. Ankit Gulati who is the son of the detenu Ram Mohan Gulati. The challenge to the order of detention is laid on the ground that the same is illegal, arbitrary, unjustified, unwarranted as well as on account of failure of the respondents to comply with the essential requirements of the service of the

complete documents which are relied upon by the respondents in support of the grounds of detention; unsubstantiated and unexplained delay between the alleged incident and the issuance of the detention order on 7th April, 2008; unexplained delay in taking the decision on the first representation dated 27th April, 2012 as well as the second representation dated 22nd June, 2012. The order of detention is assailed on the ground that the same suffers from the vice of non application of mind which is manifested from the fact that the respondents had undertaken certain foreign inquiries which were pending on the date when the detention order was issued. It is urged that the order therefore falls foul of Article 22(5) of the Constitution of India and is liable to be quashed.

4. The instant case relates to an incident of 27th February, 2007 at the Inland Container Depot, Tuglaqabad in which two trucks bearing registration No.HR 46A-2355 and HR 69-2387 were stopped by officers of the Customs Preventive Commissioner, Delhi near the exit gates of the depot. It has been claimed that the customs authorities were acting upon specific intelligence that old and used complete garments (restricted items under Exim policy 2004-09) were being claimed by misdeclaring the same as “old original completely pre-mutilated woolen rags and synthetic rags” without presenting the same to custom authorities for examination. The item “worn clothing” was freely importable between 2nd March, 2001 to 26th October, 2004 as per notification No.2(RE-2001)/1997-2002 dated 31st March, 2001. The import of the item “worn clothing and other worn articles” classifiable under customs

tariff heading (CTH) 63090000 of the Customs Tariff Act, 1975, was restricted under DGFT notification bearing NOFT 7/2004-09 dated 27th October, 2004 issued in para 2.1 of [FTP 2004-2009](#). This restriction does not exist in respect of the item “completely pre-mutilated cotton/woolen/synthetic rags” classifiable under CTH 6310. On inquiry, it was found that the trucks which were loaded with the bales did not have valid documents establishing the clearance of goods through proper channels. As such, these trucks were kept in the custody of M/s Concor under the surveillance of the CISF.

5. The respondents allege that during the course of inquiries, it was inter alia ascertained that a bill of entry No.573667 dated 22nd February, 2007 was filed by M/s Chirag Textiles, Panipat, a firm of Shri Deepak Jain in which the container No.00LU5670553 was sought to be cleared by M/s P.D. Eeswaran, a CHA firm. Further inquiries and searches were effected inter alia at the office premises of M/s Chirag Textiles at Panipat wherein information was received that imports of 30 containers of such old and used woollen synthetic rags had been effected which had been sold to local yarn manufacturing mills. Further imports were effected in the names of firms of which his wife is a proprietor. Examination of the goods loaded on the said trucks revealed that the same included complete worn items which were seized under Section 110 of the Customs Act, 1962.

6. Based on statements and information given by the two truck drivers, the premises of the detenu Shri Ram Mohan Gulati and his

brother Shri Ram Nath Gulati in Azad Market were also searched. It is alleged that it was found that petitioner's father Shri Ram Mohan Gulati ('the detenu' herein), his brother Shri Ram Nath Gulati and sons were operating in the name of six different firms from the same premises. On 2nd March, 2007, the customs authorities seized several documents as well as two CPUs available in the premises under a panchnama of the same date. The list of the documents which were seized as well as CPUs was detailed in Annexure 'A' to the panchnama . Stock taking of the imported goods lying in the premises is claimed to have been conducted and 150 bales of intact garments lying in the premises were also detained. Other godowns belonging to the detenu were also visited and his son was joined in the proceedings. Further proceedings including stock taking, recording of statements, searches carried on at different premises, etc. Opportunity is claimed to have been given to the detenu for production of the documents relating to the import of the garments as well as copy of adjudication orders in respect of the imports, if any, on 9th March, 2007, 13th March, 2007 and 15th March, 2007. Thereafter complete worn garments stored in several godowns of the detenu are claimed to have been seized vide seizure memo dated 15th March, 2007 and 16th March, 2007. The detenu contended that during the searches conducted at his godowns including his residence, even though substantial goods were duly custom cleared goods, they were wrongfully seized by the customs authorities under a belief that the same were liable for confiscation. The respondents also recorded statements under

Section 108 of the Customs Act of the employees of the custom house agents.

7. Simultaneously, an inquiry into the affairs of Shri Deepak Jain, proprietor of Chirag Textiles were being effected and the statement is alleged to have been recorded on 12th March, 2007. Shri Deepak Jain had claimed that he was persuaded by the present petitioner to import old and used clothes in the guise of rags as the profit margin was very high and that he was lured by the offer made by the detenu of a net share of profit for imports effected by either of them with mutual consent in the name of M/s Chirag Textiles, Panipat with payment thereof rooted from the account of these firm.

8. It is further alleged that the detenu was required to pay in cash for overseas remittance of payment of the imported goods and payments would be made to the supplier through Chirag Textile's accounts. Shri Deepak Jain in fact has alleged to have dumped the entire responsibility for the transactions on the detenu. Shri Deepak Jain was arrested by the respondents on 13th March, 2007 for violation of Section 135 of the Customs Act and was enlarged on bail after having remained in judicial custody for over 63 days under Section 104 of the Customs Act.

9. Upon completion of fresh inquiries and investigation, the respondents issued a notice to show cause within thirty days under Section 124 of the Customs Act, 1962 dated 27th August, 2007 to detenu, and, amongst others, his sons; Shri Deepak Jain; M/s

Chirag Textiles; M/s Ankur Textiles and the CHAs as well as the drivers.

10. In para 54(b) of the said show cause notice, the customs authorities had required the detenu as proprietor of M/s Kamal Traders and karta of M/s Ram Mohan and sons HUF; his brother Ram Nath Gulati as proprietor of M/s Venus Traders and karta of M/s Ram Nath and sons HUF; Shri Ankit Gulati as proprietor of M/s Pacific International and Shri Ankit Gulati as proprietor of M/s Pearl Impex to show cause as to why (a) the goods i.e. worn clothings totally weighing 5,98,320 kgs stored in seven godowns belonging to above said six firms of Shri Ram Mohan Gulati (detenu) and his family members located at Gali No.22, Libaspur, Delhi collectively valued at Rs.4,48,05,690/- should not be confiscated under Section 111(d) & (m) of the Customs Act, 1962. (b) why the goods i.e. worn clothings totally weighing 9,760 kgs stored in his office cum godon located at 701/4, Shivaji Road, Azad Market, Delhi collectively valued at Rs.8,39,360/- should not be confiscated under Section 111(d) & (m) of the Customs Act, 1962. (c) penalty should not be imposed on them under Section 112 (a) & (b) and 114 AA of the Customs Act, 1962 for their various acts of commission and omission in the fraudulent import as discussed above.

It is evident from the above that the respondents had therefore, crystallized their case against the detenu and even quantified the extent of the claimed liability.

11. Mr. Pradeep Jain, learned counsel representing the petitioner before us has submitted that the subject matter of para 54(b) were goods which were found stored in the godowns of the detenu or his relatives who were carrying on business. It has been urged that the goods detailed in para 54(b) of the show cause notice as noticed above, were such goods in respect of which the customs duty was stood duly paid.

12. It is pointed out that the respondents had not issued any notice to the detenu with regard to the live consignment of the seven containers seized at ICD, Tuglaqabad on 27th February, 2007.

It is also pointed out by Mr. Pradeep Jain, learned counsel that differential duty was sought to be demanded by the authorities only from M/s Chirag Textiles owned by Shri Deepak Jain and another firm named M/s Ankur Textiles which was owned by Smt. Sushma Jain wife of Shri Deepak Jain as would be evident from reading of para 54A of the said notice to show cause which reads as follows:-

“54A. Now, therefore, M/s Chirag Textiles, Panipat and Shri Deepak Jain, its proprietor are called upon to show cause to the Commissioner of Customs (Preventive), Delhi Customs Preventive Commissioner, New Customs House, New Delhi within 30 days from the receipt of this notice as to why:

(i) Worn clothing seized from the 7 containers (para) at ICD, TKD collectively valued at Rs.113 lacs should not be confiscated under Section 111(d), (j) and (m) of the CA’62.

(ii) Why the worn clothing fraudulently imported in the 51 containers by way of mis declaration should not be confiscated under section 111(d) & (m) of CA, 1962.

(iii) Differential duty of Rs.37,88,829/- in respect of 51 containers imported & cleared by way of mis declaration in past (worksheet in Annexure-II) should not be demanded & recovered from them under Proviso to Section 28(1) of the Customs Act, 1962.

(iv) The interest payable on the aforesaid duty should not be demanded under section 28AB of the Customs Act, 1962.

(v) Penalty should not be imposed on Shri Deepak Jain under Sections 112, 114A & 114AA of the Customs act, 1962 for his various acts of commission and omission in the fraudulent import as discussed in paras 44.2 & 45 in respect of M/s Chirag Textiles & M/s Ankur Textiles.”

(Emphasis supplied)

The submission is that it was therefore, the case of the customs also that the detenu had no concern with the consignment seized at the ICD, Tuglaqabad, New Delhi.

13. Apprehending the arrest, the detenu is stated to have approached the court for grant of anticipatory bail.

14. The detenu also approached the customs authorities by an application dated 22nd August, 2007 for compounding of the alleged offences made to the Chief Commissioner, Customs.

15. Before the Sessions Court hearing the anticipatory bail petition, on 1st September, 2007, Shri Mahender Kapoor, the Investigating Officer in the case made the following statement:-

“Statement of “Shri Mahender Kapoor, Seizing Officer on SA:

Petitioner Ram Mohan Gulati son of Ishwar Dass Gulati, AK-8, Shalimar Bagh, Delhi is no longer required to be arrested for the purpose of investigation. In the present matter, at this stage show cause notice to him has already been issued and application for compounding of offences filed by applicant is already pending before the Chief Commissioner, Customs for consideration.”

(Underlining by us)

16. In view of the statement of the Investigating Officer, the learned Judge hearing the application for anticipatory bail noted in the order recorded on the 1st of September 2007 that the above statement had been recorded in the presence of the Special Public Prosecutor for the Customs Department and that the petitioner was no longer required to be arrested and the application for anticipatory bail had become infructuous. The Court also issued a direction that in case the complainant i.e. customs authorities, wanted to arrest the applicant, seven days advance notice would be given before his arrest.

17. Almost one year after the incident on 27th February, 2007, the customs authorities as sponsoring authorities, submitted a proposal on 29th of January 2008 to the detaining authority for detention of the petitioner under the COFEPOSA Act. This proposal culminated in the passing of an order on 7th April, 2008 of

preventive detention against the detenu - Shri Ram Mohan Gulati as well as Shri Deepak Jain.

18. The detenu thereafter took several steps to assail the proposed action against him. W.P.(CrI)No.588/2008 was filed on 30th April, 2008. No interim stay was granted to the petitioner in this petition which on 21st July, 2010 was withdrawn.

19. On 20th September, 2010, a second writ petition being W.P.(CrI.)No.1506/2010 was filed as the detenu came to be arrested on 3rd April, 2012. This writ petition was withdrawn on 26th April, 2012 as in view of the subsequent developments, the petitioner wished to avail his available remedy. While dismissing the writ petition on 26th April, 2012 as withdrawn, the court had expressly reserved all rights available to the petitioner.

20. The respondents served the order dated 7th April, 2008 upon the detenu on 4th April, 2008 after his arrest. It is also an undisputed position that on 7th April, 2012, the respondents served the relied upon documents upon the detenu.

21. The petitioner made two representations against the detention order to the respondents. The first representation dated 27th April, 2012 was rejected on 18th May, 2012. A second representation dated 19th June, 2012 was submitted whereby the petitioner sought the copy of Annexure 'A' to the panchnama dated 2nd March, 2007. It is contended that the panchnama was a relied upon document while Annexure 'A' was mentioned therein.

This request was rejected by an order dated 7th July, 2012.

22. Pursuant to the order of detention, Shri Deepak Jain was arrested in the month of June, 2008. However, by a communication dated 19th August, 2008 issued by the Central Government on the advice of the Advisory Board that there is no sufficient cause for his detention, Shri Deepak Jain was ordered to be released.

23. It is pointed out that the detention order dated 7th April, 2008 has been passed substantially on the same allegations which were the basis of the notice to show cause dated 27th August, 2007. The submission is that the allegations against Deepak Jain and the detenu Ram Mohan Gulati were identical.

24. In a recent pronouncement of Supreme Court reported at (2011) 5 SCC 244, *Rekha v. State of Tamil Nadu Thr. Secretary to Government & Anr.*, the court has observed that preventive detention under Article 22(3)(b) of the Constitution of India is only an exception to Article 21 of the Constitution and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. The Supreme Court concluded that therefore, the power of preventive detention must be confined to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will become nugatory.

25. The petitioner was never arrested during the ongoing investigation. He was apprehended only on 3rd April, 2012 and the ground of detention was served upon him on 4th April, 2012. The petitioner has challenged the detention order dated 7th April, 2008

on several grounds which, for the purposes of convenience, summed up hereafter:-

- (i) Inordinate delay, which is unsatisfactorily explained, in passing the detention order dated 7th April, 2008 resulting in snapping of any live nexus between the alleged incident and the preventive measures.
- (ii) Non-supply of relied upon documents along with the grounds of detention.
- (iii) Pendency of the overseas inquiry at the time of issuance of the detention order.
- (iv) Unexplained delay in consideration of the representations of the detenu.

These grounds are considered in seriatum hereafter.

I. Inordinate delay, which is unsatisfactorily explained, in passing the detention order dated 7th April, 2008 resulting in snapping of live nexus between the alleged incident and the preventive measures.

26. The above narration would show that according to the respondents, the case was detected on 27th February, 2007. The detention order dated 7th April, 2008 was passed almost 13 months after the event. The investigation in the matter stood completed which is manifested from the issuance of the notice to show cause dated 27th August, 2007 issued by the Commissioner of Customs. The detenu was available during the entire period while the investigation was ongoing but he was never arrested. Thereafter the respondents issued a one page corrigendum to the show cause

notice on 4th October, 2007 making six corrections in some figures alone.

27. Mr. Pradeep Jain, learned counsel for the petitioner has drawn our attention to the specific pleading in the writ petition on this aspect and the respondents response. The above objection has been set out as part of ground 'E'. The respondents have rendered the following explanation for the time taken in issuing the detention order:-

“**Ground E** : That in reply to this Ground, it is humbly submitted that the case was detected on 27-02-2007 followed by search and seizure at the concerned premises. This case involving a commercial fraud on a massive scale was investigated in detail including recording of statements of the concerned persons. After the issue of show cause notice on 27-8-2007, anticipatory bail application and compounding application had to be dealt with, and even though the later application had not been decided, the proposal for COFEPOSA was made to take preventive measure. Thus there is a live link between the date of incident and date of issue of the detention order on 7-4-2008 and there was no unexplained delay in processing of the case at different stages. True copy of the time chart showing the different stages in the case is annexed herewith as **Annexure R4**.”

28. In support of the submissions made before this court, on the issue of delay, Mr. Pradeep Jain, learned counsel for the petitioner has placed reliance on the pronouncements of the Supreme Court reported at (1989) 4 SCC 741, T.A. Abdul Rehman v. State of Kerala & Ors. (paras 3, 5, 10 & 11); (2006) 5 SCC (Cri.) 418, Rajender Arora v. Union of India & Ors. (paras 21 and 22) and

(2006) 11 SCC 339, Adishwaar Jain v. Union of India & Ors.

(paras 6, 7 and 8). Reliance has also been placed on paras 8 to 11 of the judgment dated 5th August, 2008 in W.P.(Crl.)No.680/2008, Raj Kumar v. Union of India.

29. In T.A. Abdul Rehman v. State of Kerala & Ors. (supra), the impugned detention order was passed after a lapse of 11 months from the date of seizure of 11 gold biscuits from the back courtyard of the house of the detenu. In para 6 of the judgment, the court noted the applicable principles as were laid down in the prior pronouncement reported at (1974) 4 SCC 534, Golam Hussain v. Commissioner of Police which was to the following effect:-

“No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the interval is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. We have to investigate whether the causal connection has been broken in the circumstances of each case.”

30. The Supreme Court also placed reliance on the ratio of proximity as laid down in (1975) 2 SCC 14 (2), Gora v. State of West Bengal wherein the principles were stated thus:-

“There is, therefore, no hard and fast rule that merely because there is a time lag of about six months between the 'offending acts' and the date of the order of

detention, the causal link must be taken to be broken and the satisfaction claimed to have been arrived at by the District Magistrate must be regarded as sham or unreal. Whether the acts of the detenu forming the basis for arriving at a subjective satisfaction are too remote in point of time to induce any reasonable person to reach such subjective satisfaction must depend on the facts and circumstances of each case. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the 'offending acts' and the order of detention. It is a subsidiary test evolved by the court for the purpose of determining the main question whether the past activities of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it subserves that purpose and it cannot be allowed to dominate or draw it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organised operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in the future.”

31. The principles on this issue are well settled. In (1981) 4 SCC 647, Hemlata Kanti Lal Shah v. State of Maharashtra, the court held thus:-

(para 16)

“Delay ipso facto in passing an order of detention after an incident is not fatal to the detention of a person,

for, in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily examined by the detaining authority.”

32. It is equally well settled that the order of detention cannot be mechanically struck down if passed after some delay. It is necessary to ascertain the circumstances in each case to find out as to whether the delay has been satisfactorily explained or not. In para 10 of the pronouncement in (1990) 1 SCR 209, T.A. Abdul Rehman v. State of Kerala & Ors., the principles were summarized in the following terms:-

“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.”

33. The court was considering the delay of about 10 months between the alleged illegal event and the detention order in (2006) 2 SCC (Cri) 418, Rajender Arora v. Union of India & Ors. No explanation was offered by the respondents as to why the order of detention had been issued after such a long time. This aspect was not examined by the detaining authorities before issuance of the detention order. This was one of the circumstances which had weighed with the Court in quashing the impugned order of detention.

34. A Division Bench of this Court considered the issue of delay between the illegal event and the passing of the order of detention in the decision dated 5th August, 2008 in W.P.(Crl.)No.680/2008, Raj Kumar v. Union of India & Ors. In this case, the impugned detention order had been passed two months after the initiation of the prosecution on 15th December, 2007 by the customs authorities, on which date the investigation must be deemed to have been completed. The issue in question was whether passage of two months thereafter would constitute delay as it would vitiate the impugned detention order? In para 10 of the judgment, it was observed by the court “it is trite that the decision to detain a citizen would not be sustainable if it does not manifest urgency and imminence since the vital links between an action of the detenu and the decision to detain him would almost invariably stand snapped”.

35. Mr. Jatan Singh, learned standing counsel for the respondents has contended that the respondents have adequately explained the circumstances in which delay was occasioned in the

instant case. Reliance has been placed on the pronouncement reported at **148 (2008) DLT 757, Rudra Pratap Singh v. Union of India & Ors.** The issue of delay has been considered in para 7 of this judicial precedent. The court has noticed that the case was one of commercial fraud involving disposal of goods imported on actual user licence, leading to evasion of large amounts of custom duty, the matter required thorough investigation by linking the events and roles of several persons in these clandestine and illegal operations. The respondents had explained the chronology of events which contained 50 dates uniformly spread over the period of 11 months disclosing the several actions taken as well as the investigations carried out and the summons issued by the respondents culminating in the passing of the impugned detention order on 11th April, 2002. The period of almost one year had lapsed between the event which occurred in May, 2001 and the passing of the detention order on 11th April, 2002. Given the nature of the clandestine activity which included importation of commodities for use in the manufacturing of goods earmarked for exports, it was observed that the same required “careful, intricate and extensive investigation which had to be steady and steadfast” to support the order of preventive detention.

36. In this background, in **Rudra Pratap Singh** (supra), the court held that the events narrated by the respondents manifested the depth and detail of the investigation which was undertaken and also that there was no lull or break in activity such as would indicate that the eventual order had become stale or unnecessary.

37. It is not so in the present case. As noticed above, the culmination of investigation resulted in the issuance of notice to show cause dated 27th August, 2007. The respondents have failed to point out a single event or incident of investigation carried out thereafter. Only reference is made to the pendency of the application for anticipatory bail; an application made by the customs authorities for modification of the order passed on the bail application and nothing thereafter. The respondents did not even venture to render an explanation for failing to arrest the detenu at any point of time till the passing of the detention order.

38. During the course of hearing, Mr. Jatan Singh, learned standing counsel for the respondents has handed over a photocopy of the note sheets of the file of Central Economic Intelligence Bureau (COFEPOSA unit) in which the proposal for preventive detention of the detenu was being processed and considered. We find that in the noting dated 26th February, 2008 made by the Deputy Secretary (COFEPOSA), it is noticed that the documents furnished with the proposal to the detaining authority were incomplete as they did not contain the application filed by the accused persons for seeking bail; replies filed by the customs to the bail applications and the court's order thereon. Reply to the show cause notice dated 27th August, 2007, the status of adjudication as well as present status of the prosecution proceedings had also not been furnished.

39. The file was forwarded to the Joint Secretary (COFEPOSA) who examined the proposal and, as back as on 27th February, 2008,

has specifically recorded on the file that the “time lag between the date of the incident and the details of the proposal needs to be explained with justification for the sake of continuity. Action taken/investigation carried out after the last statement was taken on 17th August, 2007 is also required to establish nexus between the date of incident/completion of investigation and the D.O.” The Joint Secretary had further directed calling of the chronology of the up to date position of sequence of events from the sponsoring authorities to process the case.

40. It appears that the Commissioner of Custom (Preventive) issued a communication dated 10th March, 2008 to the detaining authority wherein also no incident of investigation is pointed out after the last statement of the detenu in August, 2007. Again reference is made only to the anticipatory bail proceedings as well as the application dated 24th August, 2007 made by the detenu before the Chief Commissioner of Customs (Preventive), Delhi for compounding of offence. In the letter dated 10th March, 2008, the Commissioner of Customs (Preventive) had informed the detaining authority that this application for compounding was still pending consideration and that launching of the prosecution proceedings under the Customs Act, 1962 would be taken up after decision was taken by the Chief Commissioner on this application. The lack of urgency and dispatch is manifest from these facts.

41. A perusal of the time chart (Annexure R-4 to the counter affidavit) filed by the respondents before this court purporting to show the chronological sequence of the events from the date of

incident till the date of passing of the detention order sets out that after the incident on 27th February, 2007, the respondents were investigating the matter; recording statement of various persons, effecting searches at godowns, etc. between 28th February, 2007 to 8th August, 2007. It is stated that the last statement of Shri Ram Mohan Gulati – the detenu herein, was recorded under Section 108 of the Customs Act, 1962 on 27th August, 2007 while the last statement of Shri Deepak Jain was recorded on 22nd August, 2007. The investigation stood completed and resulted in issuance of the notice to show cause on 27th August, 2007. The corrigendum dated 4th October, 2007 to the notice to show cause was issued by the customs. Even between 4th October, 2007 (the date of issuance of the corrigendum) till 29th January, 2008 - when the proposal for preventive detention was moved, there is a gap of four months for which no explanation at all has been tendered. The application dated 24th of August 2007 for compounding of offence was rejected only on 7th April, 2008 by the Chief Commissioner of Customs. Thereafter, reference has been made only to communications between detaining authority and the customs authorities on the proposals.

42. On 19th March, 2008, the detaining authority had called for five additional documents from the sponsoring authority. On 24th March, 2008, twenty one additional documents were found missing from the proposal by the detaining authorities. Certain clarifications were sought from the sponsoring authority.

43. So far as the anticipatory bail proceedings are concerned, as noticed above, it was the stand of the customs authorities before the learned Sessions Judge that the detenu was not required to be arrested on 1st September, 2007 for the purposes of investigation. There is no additional material as set out in the notice to show cause or incident relied upon by the authorities which thereafter could support the preventive detention of the petitioner.

44. Consequently the application for anticipatory bail was held to be infructuous. The Sessions Court had ordered that seven days notice had to be given in case the detenu was required to be arrested. The authorities at no point of time served any notice of arrest upon the detenu who remained available during the whole time.

45. The customs authorities at no point of time issued a notice to the detenu in terms of the above order that they required his arrest for any purpose.

46. On 16th November, 2007, application for modification of the order dated 1st September, 2007 was filed almost two and a half months. This application came to be dismissed by the order passed on 25th January, 2008 of the learned Sessions Judge. No notice of arrest was served upon the detenu even during this period.

47. It is noteworthy that the dismissal of application for modification did not preclude the customs authorities from issuing a notice in terms of the order dated 1st September, 2007 for arrest of the detenu. Still no such notice was given. It is submitted on behalf of the detenu that this was because the custom authorities

did not entertain any apprehension from the detenu of either absconding from justice or indulging in illegal activities.

48. In the pronouncement of the Supreme Court reported at (1990) 1SCR 209, M. Ahamedkutti v. Union of India & Anr., the court explained the rule as to unexplained delay in taking action as follows:-

“It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Mere delay in making of an order of detention under a law like the COFEPOSA Act enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence, have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of the delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are stale or illusory or that there was no real nexus between the grounds and the impugned order of detention.

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In appropriate cases it could be assumed that the link was snapped if there was a long and unexplained delay between the date of order of detention and the arrest of the detenu and in such a case the order of detention could be struck down unless the grounds indicated a fresh application of mind of the detaining authority to the new situation and the changed circumstances.”

49. It has been pointed out that the detenu was not arrested at any point of time after 27th February, 2007 till 3rd April, 2012 when he was arrested pursuant to the detention order which was subsequently passed by the (COFEPOSA) of the Government of India, Ministry of Finance Department and Revenue, New Delhi under Section 3(1) of the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

50. It is an admitted position that no other foreign transaction or import was effected by the petitioner while the matter has remained pending.

51. It has been urged before the court that having failed to arrest the detenu, the proposal dated 29th January, 2008 for detention of the petitioner under COFEPOSA was initiated in order to secure the custody of the detenu by way of preventive measures which culminated in the passing of the detention order on 7th April, 2008. The detention order dated 7th April, 2008 has been passed after the expiry of 13 months from the date of the incident of the 27th of February 2007 when the case was discovered.

52. It is noteworthy that the application of the detenu dated 24th of August 2007 for compounding of the offence was rejected eight months after its filing only on the 7th of April 2008 by the Chief Commissioner of Customs. The events set out in the clarifications sent to the detaining authority in the communication dated 10th March, 2008 and the above narration clearly manifest the lack of urgency and expedition in the case.

53. The communication dated the 10th of March 2008 also states that so far as show cause notice dated 27th August, 2007 was concerned, a letter dated 22nd October, 2007 had been received from the advocate of the detenu and three other notices from his family seeking additional documents including copies of bills of entry, bills of lading having list of dates, memos and other documents and that, even at the time of issuing the letter on 10th March, 2008, were only being arranged and supplied to the advocate.

54. On 13th March, 2008, the Deputy Secretary (COFEPOSA) after examining the documents submitted by the sponsoring authority has noted on the file that “after 24th August, 2007, no concrete investigation was done in this case and, therefore, the delay in sponsoring the proposal for preventive detention to the ministry does not appear to be justified”. This aspect of the matter has completely escaped the notice of the detaining authority who directed processing of the matter for formulation of the draft grounds of detention against the petitioner as well as Shri Deepak Jain resulting in issuance of the detention order without considering the important issue of unexplained delay in moving the proposal only in 29th of January 2008 even though the same has been noticed. Mr. Jatan Singh, learned Standing Counsel is unable to point out any consideration of this issue even in the original record.

55. The above narration would show that in the instant case, the respondents have hopelessly failed to explain the delay which has

been occasioned between the date of alleged incident on 27th February, 2007 and the issuance of the order of detention on 7th April, 2008. The proposal was moved on 29th January, 2008 almost one year after the incident on 27th February, 2007. Even assuming that the investigation was ongoing till the issuance of the notice to show cause on 27th August, 2007 justifying the non-issuance of the impugned order, we find the detention order has been issued more than eight months thereafter. In the light of the aforementioned legal principles, it has to be held that there is inordinate delay which has not been satisfactorily explained in passing the detention order on 7th of April 2008 resulting in snapping of any live and proximate link between the alleged incident and the preventive detention. The present writ petition would deserve to succeed on this short ground alone.

II. Non-supply of relied upon documents along with grounds of detention.

56. In the search at the business premises of the detenu, on 2nd March, 2007, the respondents seized several documents vide panchnama dated 2nd March, 2007. The panchnama only records the act of seizure whereas the details of the documents are contained in Annexure 'A' to the panchnama.

57. The petitioner was served with the list of relied upon documents along with the grounds of detention. At Sr.No.15 of the list of relied upon documents, the respondents have mentioned the panchnama dated 2nd March, 2007 drawn at the office premises of the petitioner (placed at page nos.39-42 of the relied upon

documents). It is a submission of the petitioner that this Annexure 'A' is an intergral part of the panchnama and without Annexure 'A', the panchnama is incomplete. Annexure 'A' contains the details of the documents seized as well as two CPUs which were seized from the premises.

58. Mr. Pradeep Jain, learned counsel for the petitioner has at some length urged that even before the making of the representations to the detaining authorities, the petitioner had made requests to the custom authorities during the adjudication proceedings for copies of the documents. In this regard, our attention is drawn to a letter dated 4th March, 2009 to the customs authorities.

59. It has been contended at some length before us that the petitioner needed the list of documents seized in the search mentioned in the panchnama for the reason as it would have enabled the detenu to take a firm stand and to have shown to the detaining authority from the seized documents that the goods which had been seized stood duly accounted for and duty as well as penalty had been paid off. It is argued that Annexure 'A' to the panchnama is an integral part of the document inasmuch as the panchnama only records that the documents mentioned in Annexure 'A' had been seized. The submission is that the placing of the panchnama without the annexure therefore tantamounts to failure to place the complete document before the detaining authority, even though the panchnama is admittedly a relied upon document by the authorities.

60. The detenu had specifically asked for this document by the representation made on 19th June, 2012. However, this request was rejected by a communication dated 6th July, 2012.

61. It is pointed out that the respondents have relied upon the show cause notice dated 27th August, 2007 which has page nos.566 to 632 of the documents. It is further pointed out that the respondents have failed to furnish page nos.2 and 22 of the show cause notice which has been mentioned at Sr.No.130 of the relied upon documents.

62. Given the objection taken by the petitioner, we had called upon the respondents to place the office copy of the documents served upon the detenu which bore his receipt. The same were compared with the set of documents which were claimed by the detenu as having been served upon him.

63. The complete show cause notice dated 27th August, 2007 is of 69 pages. Therefore, its internal page no.1 of the notice corresponds to page 566; its last page being internal page no.632 should correspond with the running page no.634 of the documents.

64. We find the office copy of the respondents tallies with the set of documents claimed as having been received by the detenu. The pagination of both sets were in seriatum and complete. The notice however begins at page no.566 and ends at 632. Examination of the document show that internal page nos.2 and 22 of the show cause notice were missing from both sets. Therefore, the sponsoring authority has placed a copy of the show cause

notice without page nos.2 and 22 before the detaining authority. Such incomplete set has also been supplied to the petitioner.

65. A third objection of the detenu with regard to the documents which had been supplied to him has been made before us. It is pointed out that at serial no.73 of the list of relied upon documents, reliance is placed on three invoices. However, only two invoices at page nos.314 to 315 were placed in the set of documents served on the detenu. The invoice no.262 dated 19th January, 2007 though mentioned in the list of the relied upon documents, is missing from the set of documents served upon the detenu as well as from the office copy maintained by the respondents.

66. Furthermore a bill of entry bearing No.494315 dated 24th March, 2006 mentioned at serial no.82 of the relied upon documents has not been supplied to the detenu.

67. It is urged by learned counsel for the petitioner that non-supply of relied upon documents vitiates the preventive detention of the detenu and violates his constitutional rights. In support of this contention, reliance is placed on the pronouncement of the Supreme Court reported at (1991) SCR 209, M. Ahmeda Kutty v. Union of India & Anr. and (1980) 4 SCC 531, Icchu Devi Choriria v. Union of India & Ors. Reliance has also been placed on the pronouncement of this court reported at (2006) 92 DRJ 768, Ranu Bhandari v. Union of India.

68. In para 3 of Icchu Devi Choriria v. Union of India & Ors. (supra), the Court noticed that though several statements and documents were relied upon in the grounds of detention and

considerable reliance was placed on tape recorded conversation in the ground of detention. however, the detaining authority did not serve copy of these statements, documents and tapes on the detenu along with the grounds of detention and, therefore, it could be said that the grounds of detention were not duly served on the detenu as required by Sub-Section 3 of Section 3 of COFEPOSA Act and Clause 5 of Article 22 of the Constitution of India. Despite requests of the detenu, these documents were supplied to him much later. The observations of the Court which underlined the principles on which an objection as in the present case has to be adjudicated upon, deserve to be considered in extenso and read as follows:-

“3. There were several grounds on which the detention of the detenu was challenged in the petition. But it is not necessary to refer to all the grounds since there is one ground which is, in our opinion, fatal to the continued detention of the detenu and it will be sufficient if we confine our attention to that ground. The contention of the petitioner under the ground was that though several statements and documents were relied upon in the grounds of detention and considerable reliance was also placed on two tape recorded conversations in the grounds of detention, the detaining authority did not serve on the detenu along with the grounds of detention, copies of those statements, documents and tapes and it could not therefore be said that the grounds of detention were duly served on the detenu as required by Sub-section (3) of Section 3 of the COFEPOSA Act and Clause (5) of Article 22 of the Constitution. The petitioner urged that Sub-section (3) of Section 3 of the COFEPOSA Act and Clause (5) of Article 22 of the Constitution required that the detaining authority should as soon as may be,

communicate to the detenu the grounds on which the order of detention has been made and such grounds would comprise not merely a bare recital of the grounds of detention but also all statements and documents relied upon in the grounds of detention, because these latter would also form part of such grounds. It was also contended by the petitioner in the alternative that, in any event, the detaining authority was bound to give copies of the statements, documents and tapes relied upon in the grounds of detention to the detenu without any avoidable delay in order that the detenu should have the earliest opportunity of making an effective representation against the order of detention. The argument of the petitioner was that, in the present case, though the detenu asked for the copies of statements, documents and material relied upon in the grounds of detention as early as 6th June, 1980, the detaining authority did not supply copies of such statements, documents and materials until 11th July, 1980 and on that day also, what were supplied were merely copies of the statements and documents and not the copies of the tapes which were supplied only on 20th July 1980. This delay in supplying copies of the statements, documents and tapes was, in the submission of the petitioner wholly unjustified and the detenu was thus denied the earliest opportunity of making an effective representation and this infected the continued detention of the detenu with the vice of illegality. This ground of challenge urged on behalf of the petitioner appeared to us to be well founded and that is why, by an order dated 8th August 1980 made immediately on the conclusion of the arguments, we allowed the petition and directed that the detenu be set at liberty forthwith. We now proceed to give our reasons for making that Order. We may point out straightway that we are not at all happy at the thought that our order may have resulted in setting free a possible smuggler. We are not unmindful of the fact that the COFEPOSA Act has been enacted for the purpose of eradicating the evil of smuggling which is

eating into the vitals of the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the Court releasing a person detained under this Act, it is quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The Constitution has therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This Court has also through its judicial pronouncements created various legal bulwarks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a

smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This Court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention.”

(Emphasis supplied)

69. In **M. Ahmeda Kutty v. Union of India & Anr.** (supra), the Court held that non-supply of the essential documents to the detenu amounted to the denial of the detenu’s right to make an effective representation and it resulted in violation of Article 22(5) of the Constitution which rendered the continued detention of the detenu illegal and entitled the detenu to be set at liberty. On this aspect, the court ruled thus:-

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

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

“If in the instant case the bail order on condition of the detenu's reporting to the Customs authorities was not considered the detention order itself would have been affected. Therefore, it cannot be held that while passing the detention order the bail order was not relied on by the detaining authority. In *S. Gurdip Singh v. Union of India* : 1981CriLJ2 , following *Ichhu Devi Choraria v. Union of India*, (supra) and *Smt. Shalini Soni v. Union of India* : 1980CriLJ1487 , it was reiterated that if the documents which formed the basis of the order of detention were not served on the detenu along with the grounds of detention, in the eye of law there would be no service of the grounds of detention and that circumstances would vitiate his detention and make it void ab initio.”

70. In the pronouncement reported at *(1980) 4 SCC 499, Tushar Thaker v. Union of India & Ors.*, the Court reiterated the well settled position that the detenu has a constitutional right under Article 22(5) to be furnished with copies of all the materials relied upon or referred to in the grounds of detention with reasonable expedition. The delay tends to stultify the detenu's right to make an effective representation and to have it considered speedily by the authority concerned. In this case, despite request for supply of copies of the material documents, copies of all the documents were supplied after a delay of 32 days. It was held that even excluding

reasonable period of transit, the delay had not been satisfactorily explained and in the circumstances of the case, was clearly unreasonable thereby violating the detenu's constitutional right to make an effective representation and to have it speedily considered.

71. Our attention has also been drawn to the judgment reported at (2006) 92 DRJ 768, Ranu Bhandari v. Union of India wherein this court held as follows:-

“37. To contend that the representation dated 12.12.2005 is not relevant and, therefore, was not necessary to be reflected in the grounds of detention as the same was not the basis of the grounds of detention, is, to say the least, not tenable. The representation dated 12.12.2005 where the detenu, as already stated, has set down specifically his case against the order of detention, is, by no stretch of imagination, not a vital document. It was necessary that this vital document which, according to the detaining authority's affidavit, was placed and considered by the detaining authority, should have found mention in the relied upon document and the same supplied to the detenu to make an effective representation. The representation dated 12.12.2005 and its consideration should have been reflected in the grounds of detention. In the present case, we find that this vital document/material has not been relied upon nor does it find reflection in the grounds of detention nor copy thereof supplied to the detenu. This in itself is sufficient to vitiate the order of detention. Copy of the show cause notice bearing No.F.No.S/40-EPCG-456(A)(A)/03-04 JCH dated 22.7.2004, issued by the Customs Authorities to M/s History Logistics, which, the detaining authority says, was placed before the detaining authority for consideration and considered to draw the detaining authority's subjective satisfaction, does not find

part of the relied upon documents nor has the same been supplied to the detenu. Similarly, copies of documents comprised in the Panchnama dated 30.8.2005 have not been supplied to the detenu although the Panchnama finds mention in the grounds of detention but the documents seized along with the Panchnama have not been relied upon nor have they been supplied to the detenu. This too is sufficient to vitiate the order of detention. The Importer Exporter Code pertaining to the three proprietorship firms of the detenu, M/s History Logistics, M/s Rajmahal Bhinder and M/s V.K. Tours and Transport in the Denied Entry List was not placed before the detaining authority since, according to the counter affidavit, the modus operandi was such that this document would have had no effect. Material which may have bearing with the activities and the action taken by the authorities on that would certainly be relevant which required consideration by the detaining authority, its non-placement before the detaining authority would vitiate the detention order. We also find that the Writ Petition No.5431 of 2002, though mentioned as relied upon document, has not been supplied to the detenu, non-supply of material relied upon would vitiate the order as its non-supply would impair the detenu's right to file an effective representation.”

(Underlining by us)

72. Before us, a stand is taken by Mr. Jatan Singh, learned standing counsel for the respondents that Annexure ‘A’ of the panchnama was not a relied upon document and, therefore, there was no necessity to serve the same on the detenu. Placing reliance on the pronouncement of the Supreme Court reported at (2006) 7 SCC 337, Vinod K. Chawla v. Union of India and (1990) 1 SCC 81, Madan Lal Anand v. Union of India, it is urged that if the

documents are such that even in their absence subjective satisfaction of the detaining authority would not be affected, then the failure to place the documents before the detaining authority would be immaterial. It has been argued that the Supreme Court has held that only copies of the documents on which the order of detention is primarily based, are required to be supplied to the detenu and not each and every document.

73. In this regard, reliance is also placed by Mr. Jatan Singh, learned Standing Counsel on the pronouncement of the Supreme Court reported at (2006) 3 SCC 321, *Sunila Jain v. Union of India*. There can be no dispute to the principles laid down by the Supreme Court of India.

74. However, it is equally well settled that the principles have to be tested in the facts and circumstances of each case. The requirement of service of the documents which are relied upon by the detaining authority rests not only on the consideration by the detaining authority but also on the constitutional right of the detenu to make an effective representation. The petitioner has rested his objection on the failure of the detaining authority to serve the complete set of documents which are relied upon by the respondents on the ground that the same has impacted his right to make an effective representation. The same cannot be compromised in any manner at all given the authoritative judicial pronouncements which have been noticed herein. The judgments relied upon by the respondent also do not in any manner make any deviation from this position.

75. In para 23 of **Sunila Jain v. Union of India** (supra), the Supreme Court has categorically laid down that “what is important is that copies of only such of these documents as have been relied on by the detaining authority for reaching the necessary satisfaction that preventive detention of the detenu is to be supplied to him”. We find that in para 25, the Supreme Court has also specifically observed that the question as to whether the detenu was prejudiced by non-supply is irrelevant.

76. In **Vinod K. Chawla v. Union of India** (supra), relied upon by the respondents, a complaint was made by the detenu with regard to the statement recorded by the custom authorities of one Ashish Chawla which has been referred to in para 14. It was observed that this statement was not a relied upon document and a mere reference thereto in the detention order was inconsequential. In the instant case, the documents which have been furnished to the petitioner have been actually referred to in the list of relied upon documents. The complaint is that incomplete documents have been furnished to the detenu and also placed before the detaining authority.

77. In **Madan Lal Anand v. Union of India** (supra), also it was held that the objection does not relate to the relied upon documents. The challenge which was before the Court was with regard to the non-placement of certain documents before the detaining authority. It was observed as follows:-

“24. Although the Delhi High Court has referred to the above observation of this Court, it has not considered the

effect of such observation. The above observation lends support to the contention made on behalf of the respondents that only copies of documents on which the order of detention is primarily based should be supplied to the detenu and not any and every document. We must not, however, be understood to say that the detaining authority will not consider any other document. All that has to be shown is that any document which has bearing on the subjective satisfaction of the detaining authority but not relied upon by him was before the detaining authority at the time he passed the order of detention.”

Before us, the detenu has challenged the action of the respondents in failing to supply all the relied upon documents before the detaining authority as well as failing to supply the relied upon documents to the detenu.

78. It is not disputed that the documents pointed out by the detenu are mentioned in the list of relied upon documents. Our attention has been drawn by Mr. Jatan Singh, learned standing counsel for the respondents to the reference to these documents in paras 12, 61, 69, 70 and 100 of the detention order.

79. Before this Court, the respondents have argued that Annexure ‘A’ to the panchnama dated 2nd March, 2007 was not relied upon for the purposes of the making of the detention order. However, a perusal of the order dated 7th July, 2012 would show that the respondents did not take any such stand while rejecting the petitioner’s representation and request for the same.

80. The detention order makes no exception to any of the documents which have been mentioned in the list of relied upon documents. On the contrary, as noticed above, the same is

specifically referred to in the order of detention. The sponsoring authority has not placed the complete notice to show cause. All the invoices and the bills of entry mentioned in the list of relied upon documents have also not been placed before the detaining authority.

81. We also find the list of relied upon documents does not include the order dated 1st of September 2007 passed on the detenu's application for anticipatory bail which was a relevant document and ought to have put before the detaining authority.

82. In this background, we find substance in the objection that the respondents have failed to supply all the relied upon documents to the detenu and thereby denied him a fair opportunity to make an effective representation rendering their action illegal and unsustainable.

III. Pendency of the overseas inquiry at the time of issuance of the detention order.

83. We have noticed hereinbefore the response of the customs authorities to the detaining authority with regard to the pendency of their foreign inquiries.

84. In para 41 of the show cause notice dated 27th August, 2007 also, the respondents have categorically stated that certain overseas inquiries with regard to the transactions in question were still pending. The same position is to be found at Sr.No.130 of the relied upon documents of the detaining authority.

85. Mr. Pradeep Jain, learned counsel for the petitioner has urged at some length that the order of detention passed on the basis

of the incomplete inquiry and thus incomplete state of investigation shows that the detention order has been passed on perfunctory and inchoate material.

86. The respondents have stated that overseas inquiries were being made from the foreign suppliers regarding supply of material to the detenu. It is contended by Mr. Jatan Singh, learned standing counsel for the respondents that the pending overseas inquiry was in relation to the customs prosecution against the detenu which was sought to be used as piece of evidence by the sponsoring authority. However, enough evidence had already been gathered against the detenu and, therefore, the sponsoring authority did not deem it necessary to await the outcome of the overseas inquiry for the purposes of supporting the preventive detention of the detenu. It has been submitted that the detaining authority has not placed any reliance on the pending overseas inquiry and for this reason, the pronouncement of the Supreme Court relied upon by the petitioner in (2009) 5 SCC 296, Puja Batra v. Union of India & Anr. have no bearing on the present case.

87. Mr. Jatan Singh, learned standing counsel for the respondents has placed reliance on the pronouncement of the Supreme Court reported at AIR 1974 SC2154, Haradhan Saha v. State of Bengal & Ors. wherein it was held that the proceedings under COFEPOSA did not overlap with prosecution against the detenu and the pendency of prosecution is no bar to an order of preventive detention. There can be no dispute at all to this well settled legal position.

88. In the instant case, however, the customs authorities have themselves mentioned the pending overseas inquiry in the notice to show cause issue by them. The list of relied upon documents accompanying the grounds of detention at serial no.130 mentions the pending foreign inquiries. The show cause notice is also a relied upon document which accompanies the grounds of detention. It is an admitted position that the foreign inquiry is even on date not over. The explanation for an action or orders of the respondents has to be found from the record. Ingenuity of arguments or submissions of a counsel cannot replace the requirement that the answer to an objection of the other side must be founded from the record of the authority.

89. In (2009) 5 SCC 296, Puja Batra v. Union of India & Anr. (supra), the Court observed that the detaining authority had asserted that the detention order was passed “after taking into consideration the foregoing facts and materials on record” and concluded that it was “satisfied that you ought to be detained under the COFEPOSA Act, 1974 with a view to preventing you from smuggling goods in the future”.

In the present case, in para 71, the detaining authority has stated that “taking into consideration the foregoing facts and materials on record, I am reasonably satisfied that your activity amounts to smuggling as defined in Section 2(39) of the Customs Act. I am satisfied that you ought to be detained under the COFEPOSA Act, 1974 with a view to preventing you from smuggling goods in future”. This fact was mentioned in the notice

to show cause issued on 27th August, 2007. The pending inquiry was mentioned in the list of relied upon documents. Without anything more, there is nothing on record to show that the respondents had felt it unnecessary to await the outcome of these inquiries. It is not even suggested before us that the result of the inquiry was irrelevant. In the given circumstances, the objection of learned counsel for the petitioner appears to be well founded.

IV. Unexplained delay in consideration of the representation of the detenu.

90. Pursuant to the order of detention dated 7th April, 2008, the petitioner was detained on 3rd April, 2012. The detenu sent a representation on 27th April, 2012 from jail which was received on 30th April, 2012 by the detaining authority. We are informed that the detaining authority called for comments on the said representation from the sponsoring authority which were received on 14th May, 2012. This representation was rejected on 17th May, 2012. It is contended that there is an unexplained delay of 14 days in providing comments by the sponsoring authority which is fatal in the instant case.

91. An objection is also taken that the second representation was sent by the detenu on 19th June, 2012 which was received by the detaining authority on 22nd June, 2012. This representation was forwarded by the detaining authority on 22nd/25th June, 2012 to the sponsoring authority. Comments thereon were received on 5th July, 2012 and the same was rejected on 6th July, 2012 by the detaining authority.

92. Mr. Pradeep Jain, learned counsel for the petitioner has pointed out that by the second representation, the detenu had only made a request for providing some documents and that there is an unexplained delay of 10 days by the sponsoring authority in sending comments to the detaining authority.

93. In support of this objection, reliance is placed on the judicial pronouncement in ***Icchu Devi Choriria v. Union of India & Ors.*** (supra) (para 10) and ***(1990) 3 SCC 148, Mahesh Kumar Chauhan @ Bunt v. Union of India*** (paras 16 to 20).

94. Mr. Jatan Singh, learned standing counsel for the respondents has placed reliance on the additional affidavit filed by the respondents and the averments made in the counter affidavit to explain the delay.

95. We find that reference is made to the examination of the representation and the comments in the COFEPOSA section of the ministry. There is however no explanation at all for the 14 days delay in sending the comments on the first representation by the sponsoring authority and 10/12 days delay in sending the comments on the second representation dated 19th June, 2012 by the sponsoring authority.

96. On this aspect, in para 10 of ***Icchu Devi Choriria v. Union of India & Ors.*** (supra), the Supreme Court had observed in para 10 that as it is now settled law that on a proper interpretation of Clause 5 of Article 22, the detaining authority is under a constitutional obligation to consider the representation of the detenu as early as possible, and if there is unreasonable delay in

considering such representation, it would have an effect of invalidating the detention of the detenu: vide *V.J. Jain v. Pradhan* (1979) 4 SCC 401 page 545.

97. In *Icchu Devi Choriria v. Union of India & Ors.* (supra), the Supreme Court found the period of seven days taken by the Mantaralaya for forwarding the copy of the representation as also the period of delay of seven days taken by the Assistant Collector of Customs for forwarding his remarks unexplainable and unreasonable. The court finally concluded in para 10 that “*it is difficult to resist the conclusion that the detaining authority was guilty of unreasonable delay in considering the two representations of the detenu, and particularly the representation dated 9th June, 1980. This ground is in our opinion sufficient to invalidate the continued detention of the detenu*”.

98. On the same issue, paras 16 to 20 in *Mahesh Kumar Chauhan @ Bunt v. Union of India* (supra), deserve to be considered in extenso and read as follows:-

“16. Now the unchallengeable legal proposition that emerges from a host of decisions, a few of which we have referred to above, is that a representation of a detenu whose liberty is in peril and deprived should be considered and disposed of as expeditiously as possible; otherwise the continued detention will render itself impermissible and invalid as being violative of the constitutional obligation enshrined in Article 22(5) of the Constitution and if any delay is occurred in the disposal of a representation, such delay should be explained by the appropriate authority to the satisfaction of the Court.

17. In spite of the weighty pronouncements, of this Court making the legal position clear, it is still disquieting to note that on many occasions the appropriate authorities cause considerable delay in considering and disposing of representations and also exhibit culpable indifference in explaining such delay. We feel that in case the appropriate authority is unable to explain personally the delay at various stages, then it will be desirable—indeed appropriate—for the concerned authority or authorities at whose hands the delay has occurred to individually explain such delay.

18. The next question is should or can the Court in the absence of any explanation wink at or skip over or ignore such an infringement of the constitutional mandate and uphold an order of detention merely on the ground that the enormity of allegations made in the grounds of detention is of very serious nature as in the present case? Our answer would be 'Not at all'.

19. In this connection, it will be relevant to make reference to the view expressed by Mathew, J. speaking for the majority in *Prabhu Dayal Deorah v. The District Magistrate, Kamrup*, 1974 CriLJ 286 which is as follows:

“We say and we think it is necessary to repeat, that the gravity of the evil to the community resulting from antisocial activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he

shall not be deprived of it except in accordance with the procedure established by law.”

20. Reverting to the facts of the present case as submitted by the learned Counsel, except merely mentioning that the representation was forwarded to the concerned sponsoring authority on 25.8.1989 and the comments from the sponsoring authority was received by the Department on 11.9.1989, there is absolutely no explanation as to why such a delay had occurred. Therefore, in the light of the proposition laid down in Rama Dhondur Borade's case (albeit), we have no other option except to allow this appeal on the ground that this undue and unexplained delay is in violation of the constitutional obligation enshrined in Article 22(5) of the Constitution of India rendering the impugned order invalid.”

(Emphasis Supplied)

99. The above discussion would show that in the present case, there is not even a wit of explanation for the time taken by the sponsoring authority in forwarding its comments on the representations of the detenu. The respondents did not even venture to suggest an explanation.

Conclusion:

100. In para 34 of the pronouncement in **Rekha v. State of Tamil Nadu Thr. Secretary to Government & Anr.** (supra), the court framed a question which the court must ask in deciding the legality of an order under the preventive detention law challenged before it thus; “was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal.” We have also found that the respondents have

failed to make available the relied upon documents to the detenu in order to enable him to make a fair representation to the detaining authority. The relevant documents have also not been placed before the detaining authority. The respondents on the contrary have placed incomplete documents and have not placed the complete documents mentioned in the list of relied upon documents to the detaining authority.

101. It has also been held that there is unexplained delay in dealing with the representation of the petitioner.

102. It has been held in several judicial precedents that there is no prohibition to the respondents taking action under criminal law as well as proceed for preventive detention in respect of a person. This principle was however, explained further in the pronouncement of the Supreme Court in **Rekha v. State of Tamil Nadu & Anr.** (supra) wherein the court was considering propriety of preventive detention as well as proceedings under the Indian Penal Code and the Drugs and Cosmetics Act against the detenu. The court had observed as follows:-

“37. This does not mean that the Constitution Bench laid down that in all cases the authorities can take recourse to both criminal proceedings as well as a preventive detention order even though in the view of the Court the former is sufficient to deal with the situation.

38. This point which we are emphasizing is of extreme importance, but seems to have been overlooked in the decisions of this Court.

39. No doubt it has been held in the Constitution Bench decision in Haradhan Saha's case (*supra*) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defense through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

40. Hence, the observation in para 34 in Haradhan Saha's case (*supra*) cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.”

103. In the instant case, as per the information given by the sponsoring authority to the detaining authority, prosecution under the Customs Act had not even been contemplated when the proposal for preventive detention was made on the 29th January 2008. The incident took place on the 27th February 2007. As late as on 1st September, 2007, the Investigating Officer had informed

the Sessions Court that the detenu was not required to be arrested for the purposes of investigation. No effort to seek his arrest was made at any time before moving the preventive detention proposal on 29th of January 2008. It was not the case of the respondents that the detenu evaded or avoided the process of law at any time before the passing of order of detention.

104. The Supreme Court has held that right to liberty means that before sending a person to prison, a trial should ordinarily be held giving him opportunity of placing his defence through a lawyer. It is only if the ordinary criminal law will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to. The above narration of facts would show that the respondents have failed to consider this important aspect before passing the order of detention. Therefore, in the light of the well settled principles laid down by the Supreme Court, we have no hesitation in holding that the continued detention of the detenu results in the violation of the rights of the detenu and the constitutional obligations enshrined in Article 22(5) of the Constitution of India rendering the detention order unsustainable.

In view of the discussion and the reasons aforementioned, the order bearing F.No.673/02/2008-Cus.VIII dated 7th April, 2008 has been set aside and quashed and the respondents are directed to set the detenu at liberty forthwith.

The writ petition stands allowed.

There shall be no orders as to costs.

GITA MITTAL, J

J.R. MIDHA, J

SEPTEMBER 26, 2012

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