

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

Reserved on: 29th October, 2013
Pronounced on: 13th November, 2013

+ **W. P. (CRL.) 1136/2013**

SAHIL JAIN

..... Petitioner

Through: Mr. R.K. Handoo, Advocate with
Mr. Yoginder Handoo, Advocate,
Mr. Manish Shukla,
Mr. Aditya Chaudhary,
Mr. Yogesh Sharma,
Mr. Parth Mallick &
Ms. Tina Singh, Advocates

versus

UOI & ORS.

..... Respondents

Through: Mr. Jatan Singh, CGSC with Mr. Soayib
Qureshi, Advocate for UOI.
Mr. S.K. Dubey, Advocate with Mr. Raj
Mangal Kumar, Advocate, Ms. Anandi
Mishra, Advocate for R-3.
Mr. Rajesh Mahajan, ASC for R-5.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G. P. MITTAL J.

1. Petitioner Sahil Jain has approached this Court for issuance of a writ of *habeas corpus* for release of his father Komal Jain, who has been ordered to be detained and kept in custody in the Central Jail, Tihar by an order dated 11.06.2013 issued under Section 3 (1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) by the Joint Secretary to the Govt. of India. According to the order dated 11.06.2013, the Joint Secretary was satisfied that the

detention of Komal Jain (the Detenue) was necessary with a view to prevent him from smuggling the goods in future.

2. Along with detention order, the Detenue was served with the grounds of detention. Before advertng to the challenge laid by the Petitioner, it will be appropriate to have an insight into the grounds which led to the detention of Komal Jain. According to the Detaining Authority, there was a specific information with the officers of the Directorate of Revenue Intelligence (DRI) that the Detenue, who was holding Indian passport No.K 7271778 issued at Delhi on 14.09.2012, was involved in the smuggling of gold/gold articles and is arranging visits of a national of United Arab Emirates, namely Mr. Mana Saleh Sultan Alsuwaidi, (MSSA), holding diplomatic passport no. P ARE 0025401 issued on 16.03.2010 at Abu Dhabi by the Minister of Foreign Affairs, United Arab Emirates, (UAE). Said MSSA was presently posted as Commercial Attache in UAE Embassy in Delhi. The DRI had specific information that the Detenue would be arriving on 11.03.2013 from Singapore by Flight No.SQ 406 at IGI Airport, New Delhi and would be smuggling in gold/gold articles of foreign origin from Singapore either by himself or carrying the same in the baggage of earlier said MSSA with his consent and knowledge with the intention to misuse the diplomatic immunity available to MSSA.
3. In pursuance of the specific information, the DRI arranged two independent witnesses near the exit gate of the customs arrival hall. On 11.03.2013 at about 6:00 a.m., the DRI officers intercepted the Detenue while he had crossed the green channel in the arrival hall. The Detenue was confronted with the specific information. On conducting Detenue's

personal search, certain documents including an unsigned printed invoice no.54840 dated 09.03.2013 (torn at the bottom) towards the sale of assorted gold jewellery weighing 536.63 gms. (purity 18 Ct.) and 32028.70 gms. (purity 22 Ct.), total gross weight 32565.33 gms., total pure weight 29960.10 gms., valued at US\$ 1,581,556.47 issued by M/s. Aspire International Trading LLC, 1001, City Tower 2, Near Crown Plaza Hotel, Sheikh Zayed Road, P.O. Box 118583, Dubai-UAE were found. Thereafter, the DRI officers intercepted another person, namely, MSSA, who was accompanied by a lady passenger Ms. Bahareh Salmani. MSSA was told about the specific information available with the DRI officers. The DRI officers then requested MSSA that in view of the specific intelligence they would like to search his baggage and that MSSA had a legal right to get his baggage examined before a Magistrate or a Gazetted officer of Customs/DRI. MSSA refused to allow the examination of his baggage and claimed diplomatic immunity. Ms. Bahareh Salmani was also requested by the DRI officers to declare the goods being carried by her. She also refused to declare the goods being carried by her in her baggage. Ms. Bahareh Salmani informed the DRI officers that the two baggages being carried by her contained the personal belongings of MSSA. MSSA agreed that the baggages carried by Ms. Bahareh Salmani belonged to him. The DRI officers informed the concerned officers in the Ministry of External Affairs. At about 10:15 a.m. two officers from MEA, namely, Shri Rakesh Adlakha, Deputy Chief of Protocol and Shri Jaladhi Mukherjee, Protocol Officer reached the arrival hall of IGI Airport. Mr. Mansour Mohamed Alijuwaied, Second Secretary from UAE Embassy at New Delhi also reached there. The earlier said three officers spoke to MSSA and persuaded him to allow

examination of his baggage in view of the specific information available with the DRI officers. A notice under Section 102 of the Customs Act, 1962 was served upon MSSA, who agreed for examination of his baggage. MSSA gave his willingness to examine the baggage in presence of the Gazetted Officers of the DRI. The examination of the two brown coloured bags (one hand bag and one stroller bag) carried by MSSA resulted in recovery of assorted gold jewellery/gold articles weighing 36565.33 gms. valued at ₹ 9,79,77,154/- as per Annexure 'A' and 'B' to the *Panchnama* dated 11.03.2013, assayed by Jewellery Appraiser present at the spot. Another laminated Jute bag of Emirates (Beige coloured) containing personal effects purportedly of Shri Komal Jain (*i.e.* Detenue) as detailed in Annexure 'C' to the *Panchnama* dated 11.03.2013 was also searched. The DRI officers introduced the Detenue with MSSA in presence of the *panchas*. The DRI officers then asked MSSA and the Detenue whether they knew each other, to which both replied in negative. The Detenue was shown the gold jewellery/gold articles as detailed in Annexure 'A' and 'B' to the *Panchnama* dated 11.03.2013 and asked whether the said gold jewellery/articles recovered from the baggage of MSSA belonged to the Detenue, but the Detenue denied having any connection with the said recovered gold jewellery/articles. Thereafter, in presence of the *panchas* and all the above persons, the DRI officers showed a message to the Detenue, sent to e-mail id: mana.alsuwaidi@gmail.com, which was available in the Apple i-phone Mobile No.9811051500, IMEI no.013053002632267 carried by the Detenue. The e-mail message read as under:

“OUT (to – mana.alsuwaidi@gmail.com): sir, when will you reach airport.

Sent at 10.03.2013; 9:13 PM

IN: I will message you when I reach, please finish the Custom formalities will see you at the gate. Thanks.

OUT (to-mana.alsuwaidi@gmail.com): OK thanks.”

4. Subsequently, on 11.03.2013 itself, the residential premises of the Detenue at 134, Jain Colony, Veer Nagar, Gur Mandi, Delhi were also searched but nothing incriminating was found from there. The search of the work premises of the Detenue at M/s. Grimus Exports Pvt. Ltd., 3319, Second Floor, Bank Street, Karol Bagh, New Delhi on 11.03.2013 led to the recovery of two invoices bearing No.Gold/2013/02/009 and No.Gold/2013/02/010, both dated 10.02.2013 issued by M/s. Aspire International Trading LLC, Dubai, in favour of buyer Mr. Mana Alsuwaidi, Dubai, for sale of British Gold Sovereigns-Gold Bullion coins and gold jewellery.
5. Consequently, the Detenue was arrested on 12.03.2013. According to the DRI, the Detenue knew the foreign diplomat and had arranged tickets for his journey through Shri Sai Travels at least on three occasions. Statement of Ms. Meenakshi Anand, owner of Shri Sai Travels was also recorded on 12.03.2013 wherein she informed the DRI officers that the Detenue had booked the air tickets of MSSA in March, 2013 for travel to Singapore and also return tickets along with Detenue for 11.03.2013. Ms. Meenakshi Anand also informed that she was yet to receive the payment for the tickets from M/s. Grimus Exports Pvt. Ltd, Karol Bagh, Delhi. Since the offence was bailable, the Detenue was required to furnish personal bond with certain sureties, which is not much relevant for the purpose of the present proceedings.
6. The DRI placed all these facts before the Detaining Authority, which ultimately led to the passing of a detention order.

7. This order of the detention is challenged by the Petitioner on the ground that the same is illegal and arbitrary and passed in derogation of laws and regulations without any application of mind. The Detaining Authority had not been apprised of any proceedings conducted and / or initiated against the foreign diplomat from whose baggage the recovery was effected. It is submitted that the foreign diplomat was declared as *persona non-grata* and he ceased to be a diplomat. The reports submitted by the Sponsoring Authority and the responses received in regard to the alleged activities of the foreign diplomat and action taken against him were important and relevant information and documents and should have been placed and considered by the Detaining Authority and the absence of having placed on record any statement recorded from MSSA and non-supply of such statements alongwith the grounds of detention to the Detenue would make the detention order liable to be quashed, as it vitiates the satisfaction of the Detaining Authority.
8. It is further submitted that non-placement of record of reports and investigations conducted by the officials of Ministry of External Affairs and the correspondence exchanged with the Ministry of External Affairs in this regard which was essential in view of the fact that *panchnama* dated 11.03.2013 had not been signed by either the diplomat or the Detenue, nor copies of *Panchnama* were given to them, shows that the Detaining Authority has failed to focus its attention to relevant facts and material and has passed the detention order mechanically.
9. It is also contended that the Detaining Authority has at page 7 of grounds of detention stated that the e-mail was sent from Apple i-phone No: 9811051500, IMEI No: 013053002632267 at 09:13 p.m., while at page 14 the same message is timed at 19.13 p.m.

10. It is urged that this message and the proceedings of seizure/sealing of the phones of the Detenue were conducted belatedly after 8.00 p.m. on 12.03.2013 after taking into custody his phones in the early hours of 11.03.2013 on his arrival and all the messages and e-mails retrieved from the phone through forensic experts were essential documents to be placed before Detaining Authority and were to be supplied alongwith grounds of detention. Non-supply of such essential and relevant documents along with grounds of detention have deprived the Detenue of his right to make purposeful representation. Non-supply thereof renders the satisfaction sham and the detention order void *ab-initio*.
11. It is further stated that after repatriating the diplomat as *persona non-grata*, there was no compelling necessity to clamp COFEPOSA order against the Detenue. Respondent No. 4 was duty bound to disclose to this Court, to the Detaining Authority and to the Detenue all the material of declaring the foreign diplomat as *persona non-grata*.
12. It is also submitted that there was no recovery / seizure of any goods from the Detenue; and the fault of the diplomat could not have been attributed to the Detenue and could not be an activity to be prevented by preventive detention of the Detenue.
13. It is also further submitted that as the Detaining Authority has not focused its attention to the fact that *inter-se* calls alleged to be between the Detenue and the foreign diplomat were of zero duration showing no actual communication between the two, it renders the satisfaction void *ab-initio*.
14. It is further submitted that because the Detaining Authority has erroneously relied upon in para 20 of the grounds of detention upon the provisions of Foreign Privileged Persons (Regulation of Customs

Privileges) Rules, 1957, which appear to be applicable to foreigners only and which have also not been provided to the Detenue along with grounds of detention or within 5 days of the service of the grounds of detention handicapping him to make effective representation, the same renders the detention order null and void.

15. It is also pleaded that the Detaining Authority failed to appreciate that Section 123 of the Customs Act has no application whatsoever to the Detenue as he was neither in possession of the allegedly seized gold jewellery / gold articles nor had he claimed himself to be the owner of the said goods.
16. It is also submitted that the Detaining Authority in para 21 of the grounds of detention had erroneously concluded that the Detenue was actively engaged/involved in the smuggling of gold jewellery/gold articles while there existed not even a single instance to make such conclusion. Neither in the instant case the articles were seized from the Detenue nor was there proof of any such established or proved past event placed before the Detaining Authority to conclude the propensity of activity. In fact, material before the Detaining Authority was that the earlier proceedings against the Detenue had been dropped.
17. It is contended that there was no relevant material placed before Detaining Authority to conclude that the Detenue utilised the services of the diplomat to evade law and avoid detection of smuggling of gold jewellery/gold articles, allegedly involving customs duty of more than ₹3 crores without any computation. Also, liability to pay customs duty is on the person who clears the goods from the Customs Area, *i.e.* in the present case upon the diplomat and not the Detenue, and thus it shows

that the detention order has been passed mechanically against the Detenue without application of mind.

18. It is also submitted that the Detaining Authority has erred to conclude that since there was recovery of two invoices issued by M/s Aspire Trading Co., Dubai from the business premises of the Detenue, Komal Jain would indulge in smuggling activities in future. The Detenue in his statement had explained that he was working with M/s Grimus Exports, New Delhi and M/s. Aspire Trading Co. LLC, Dubai was also under the same management. Further, the perusal of the case clearly showed that Mr. Mana Saleh Sultan Alsuwaidi, the diplomat was known to the management of M/s Aspire Trading Co, Dubai under whom the Detenue was only an employee. This was sufficient to exonerate the Detenue of all allegations in regard to the two impounded invoices of smuggled articles.
19. It is further submitted that in para 21 of the grounds of detention, the Detaining Authority had concluded that the Detenue had been involved in smuggling of gold jewellery /gold articles in an organised and planned manner across international borders and that he was misusing the services of diplomatic immunity available to the foreign diplomat. The Detenue submits that there was no material to make such unbridled inferences. Neither the diplomat claimed that he was misused nor was any such material shown by the Sponsoring Authority.
20. It is claimed that the Sponsoring Authority ought to have placed before the Detaining Authority the fact that the Detenue was pivoted to the conditions of bail granted by the High Court in an earlier case cited by it and that Detenue had even sought permission to go abroad from the Ld. ACMM, New Delhi. These were essential documents and could have waived the satisfaction of the Detaining Authority one-way or the other.

21. It is contended that the Sponsoring Authority did not place before the Detaining Authority the replies to the show cause notices filed by the Detenue and by the others. On the basis of these replies, SCN No. DRI F. No: 333/VI/3/2009-GI.Pt., the proceedings before the Commissioner of Customs were adjourned *sine die* till further instructions. These replies, hearing records and cross examinations ought to have been placed before the Detaining Authority and supplied to the Detenue along with grounds of detention, especially when in one of the SCNs, proceedings had been dropped against the Detenue and in the other it was declared that the Detenue had not committed any offence.
22. It is also submitted that the Detaining Authority has erroneously concluded that the unsigned printed invoice no: 54840 dated 09.03.2013 towards sale of assorted gold jewellery total weighing 32565.33 gms valued at US\$.1,581,556.47 issued by M/s Mahesh & Co. PTE Ltd., 36 Cuff Road, Singapore in favour of M/s Aspire international Trading LLC, Dubai found from the personal search of the Detenue, tallied with the gold jewellery/gold articles allegedly seized from the foreign diplomat. It is submitted that the very *panchnama* relied upon by the Detaining Authority showed that the examination of baggages allegedly carried by foreign diplomat resulted into recovery of assorted gold jewellery/articles weighing 36565.33 gms. valued at ₹9,7977,154.00. The conclusion of the Detaining Authority that the assorted gold jewellery/articles allegedly seized from the diplomat tallied with the invoice is not germane to the material on record and shows complete non-application of mind on part of the Detaining Authority, rendering the order null and void.

23. It is pleaded that the Detaining Authority has not supplied the following documents to the Detenue despite request, which has handicapped the Detenue from making purposeful and meaningful representation: -
- I. The documents seized from the business premises of M/s. Grimus Exports Pvt. Ltd. at 3319, 2nd Floor, Bank Street, Karol Bagh, New Delhi as per the *Panchnama* dated 11.03.2013, mentioned in Annexure 'A' & 'B' of the said *Panchnama*;
 - II. Copy of "marked page No: 1 to 15" as mentioned in para 2 at page 3 of the detention grounds;
 - III. Copy of "photocopies of 2 pages of passport of Mr. Mana Saleh Sultan Alsuwaidi" as mentioned in para 6 at page 8 of the detention grounds;
 - IV. Copy of all the pages of passport of Mr. Mana Saleh Sultan Alsuwaidi have not been provided to the Detenue. This is a vital document which does not appear to have been placed before the Detaining Authority and vitiates detention order;
 - V. Mobiles phones of the Detenue were taken into custody by the DRI officers on 11.03.2013 and Resume Sheets in respect of seizure of the mobile phones of the Detenue were made by the DRI officers at 8.45 p.m. on 12.03.2013 and till then, the mobile phones of the Detenue were in the custody of DRI officers. The Resume Sheets drawn on 12.03.2013 have not been placed before the Detaining Authority and have not been made a part of relied upon documents;
 - VI. Page 50 of the relied upon documents mentions about a search authorisation letter dated 11.03.2013. This search authorisation letter

has not been supplied to the Detenue and may be supplied at the earliest;

- VII. Copy of the statement of Shri Sanjiv Bhardwaj on the basis of which the Detaining Authority has reached to the satisfaction that the address 2127/28,3rd Floor, 58, Naiwala Gurudwara Road, Karol Bagh, New Delhi-110005 was previously owned by M/s Vee Ess Jewellers;
- VIII. 98 pages submitted by Ms. Meenakshi Anand of Shri Sai Travels, New Delhi under Section 108 of the Customs Act mentioned at page 131 of the list of relied upon documents. Only few pages which are at page nos. 132 to 140 of the relied upon documents have been supplied out of the 98 pages and 2 of these pages *i.e.* Page No. 134 and 140 are unsigned;
- IX. The *panchnama* of the search of Ms. Meenakshi Anand's residence has not been placed before the Detaining Authority by the Sponsoring Authority;
- X. Files/documents seized from the residence of the Detenue at 134, Jain Colony, Veer Nagar, Gur Mandi, New Delhi as mentioned in the relevant *Panchnama*;
- XI. Endorsement of execution of the search warrants for aforesaid searches conducted in the case;
- XII. Copies of the telegrams sent to DG, DRI and the Commissioner of Customs, IGI Airport, New Delhi on 11.03.2013 and notings made thereon by different officials of DRI and Commissioner of Customs, IGI Airport and disposal of these telegrams. These telegrams have not all been placed before the Detaining Authority;

- XIII. In the grounds of detention at page 6, the Detaining Authority has written IMEI No: 013053002632267, which is not the IMEI No. for Phone No: 9811051500. The call details obtained from the service provider also do not support this IMEI number and the basis for relating connection between Phone No: 9811051500 with IMEI No. 013053002632267 has not been supplied which has caused great prejudice to the Detenue in making effective representation;
- XIV. The Idea Cellular Ltd., New Delhi vide its communication to the DRI has referred to 91 notices from DRI to which they have responded on 20.05.2013. Copy of these notices have not been supplied to the Detenue;
- XV. Replies to the SCNs filed by the Detenue with the Commissioner of Customs at IGI Airport, New Delhi and orders passed thereon on different dates of hearings by the Ld. Commissioner in the said Adjudication File. This is a vital document, non-placing of which vitiates detention;
- XVI. Copies of the correspondence exchanged between the said Commissioner of Customs, IGI Airport, New Delhi, adjudicating the said SCNs and DRI in regard to supply of deficient documents. The Ld. Commissioner on the last hearing had stated that she had instructed DRI to supply certain documents but the DRI had some difficulty and on instructions from DRI itself, the Ld. Adjudicating Authority refrained from adjudicating the SCNs thereafter. It is why the matter is pending adjudication since then;
- XVII. Copy of the cross examinations of different persons undertaken before the adjudicating authority in SCNs;

- XVIII. With regard to the document relied at Sl. No.46 of the list of relied upon documents, proof of service to the Detenue of the said application under Section 129D(4) of Customs Act, 1962 filed with CESTAT or any notice thereof issued by CESTAT to the Detenue along with orders of CESTAT;
- XIX. The Detaining Authority has made reference to provisions of Foreign Privileged Persons (Regulation of Customs Privileges) Rules, 1957, but the said provisions have not been supplied to the Detenue;
- XX. Complete Baggage Rules have also not been provided which has confused the Detenue and he is unable to make an effective representation.
24. It is also submitted that the Detaining Authority has considered irrelevant material for the purpose of ordering detention, wherein, the grounds of detention having noticed that the proceedings against the Detune were dropped in the SCN bearing F.No: DRI 333/VI/-3/2009/GI, the Detaining Authority has also considered the filing of the appeal before the CESTAT, New Delhi against the said order. Admittedly, no adverse order has been passed by the CESTAT against the Detenue disturbing the dropping of the proceedings and hence the detention order is passed without application of mind.
25. Respondents No.1 and 2 (Union of India and the Detaining Authority) filed a joint affidavit resisting the petition. Apart from reiterating the facts as mentioned in the grounds of detention, the Respondents took up the plea that the entire relevant material was placed before and was considered by the Detaining Authority. After due application of mind,

the Detaining Authority was satisfied that the Detenue was involved in smuggling activities and had also used a foreign national in his sinister design to avoid the detection. With regard to the specific grounds taken by the Petitioner, it is stated that there is a typographical error in mentioning the time of sending of the e-mail as 19:13 p.m. instead of 09:13 p.m. at page 14. It is stated that the sending of e-mail established the close proximity between the Detenue and the foreign diplomat, which is further supported by the purchase of air tickets of the diplomat also by the Detenue. Regarding non signing of the *Panchnama* by the Detenue and MSSA, the Respondents stated that since the diplomat as well as the Detenue refused to sign the *Panchnama*, their signatures could not be obtained.

26. It is admitted that the gold jewellery was actually not seized from the Detenue, but the seizure of an invoice from the Detenue of corresponding weight established that the jewellery carried by the foreign diplomat belonged to the Detenue. With regard to the seizure of the two mobile phones belonging to the Detenue, it was denied that the phones were taken into custody on 11.03.2013. It is stated that the Detenue's stand is belied from the fact that various calls were made by him from the said mobile phone on 11.03.2013. It is admitted that the gold articles are not 'prohibited goods' under Section 239 of the Customs Act. However, the Respondents referred to Notifications No. 12/2012 dated 17.03.2012 and No.26/2012 to the effect that the gold articles weighing upto one kg. can be brought into India, subject to payment of customs duty, provided the passenger is eligible to carry gold articles in terms of the notification. It is averred that the Detenue was not an eligible passenger in terms of the notification dated 17.03.2012. With respect to the *inter se* calls of zero

duration, the Respondents stated that the calls between the foreign diplomat and the Detenue lasted between 0-165 seconds. Zero duration calls were sending of signals to the diplomat. With regard to the Petitioner's plea that liability to pay customs duty was on the person who cleared the goods from the customs area and that the foreign diplomat and the lady had been apprehended at the customs area within the Airport itself, the Respondents' plea is that the foreign diplomat and the lady had been intercepted after they had crossed the green channel in arrival hall at IGI Airport. The Respondents denied that the jewellery recovered from the diplomat did not tally with the unsigned printed invoice no.54840 dated 09.03.2013 towards sale of gold jewellery allegedly recovered from the Detenue. The Respondents clarified that the weight difference was only due to the fact that there were additional 500 gms. *ginni* seized along with gold jewellery, which were not mentioned in the invoice.

27. The Respondents denied that the *Panchnama* with respect to the search at Karol Bagh and Krishna Nagar, on account of non-possibility of both the searches being conducted at the same time with the same witnesses, were forged and fabricated documents. The Respondents explained that initially the DRI officers visited Krishna Nagar office at 10:00 a.m. Since the address was found to be non-existent, the team reached Karol Bagh and searched the office at 10:30 a.m.
28. The Respondents admitted that the proceeding sheet containing the data retrieved from the mobile phone of the Detenue were not supplied to him as the same was not 'relied upon' by the Detaining Authority, and thus, there was no necessity to supply the same to the Detenue, and at the same time, the Respondents stated that the forensic examination of the mobile

phone was placed before the Detaining Authority. The Respondents admitted that the Bail Order dated 26.05.2009 and the replies to the three show cause notices issued to the Detenue were not placed before the Detaining Authority. The Respondents' plea with regard to the same was that the same were not relevant and vital material to be considered by the Detaining Authority.

29. It is well settled that the subjective satisfaction requisite on the part of the Detaining Authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the Detaining Authority one way or the other are ignored or not considered by the Detaining Authority before issuing the detention order. 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. (*Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat & Anr., (1979) 1 SCC 222*).

30. In the case of *Ahamed Nassar v. State of Tamil Nadu & Ors.* (1999) 8 SCC 473, the Supreme Court observed that every conceivable material which is relevant and vital which may have a bearing on the issue, should be placed before the Detaining Authority. The Sponsoring Authority should not keep it back. Para 20 of the said judgment is extracted hereunder:-

“20..... A man is to be detained in the prison based on the subjective satisfaction of the Detaining Authority. Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the Detaining Authority. The Sponsoring Authority should not keep it back, based on its interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the Sponsoring Authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the Detaining Authority which reasonably could affect its decision.”

31. The preventive detention law is based on suspicion. The Court does not sit in Appeal over the subjective satisfaction reached by the Detaining Authority except where the relevant and vital material has not been considered or extraneous material has been taken into consideration in passing the detention order or similar other matters. In *Subramanian v. State of Tamil Nadu & Anr.*, (2012) 4 SCC 699, the Hon’ble Supreme Court observed as under:-

“14. The court does not interfere with the subjective satisfaction reached by the Detaining Authority except on exceptional and extremely limited grounds. The court cannot substitute its own opinion for that of the Detaining Authority when the grounds of detention are precise, pertinent, proximate and relevant. That sufficiency of grounds is not for the court but for the Detaining Authority for the formation of subjective satisfaction that the detention of a person with a view to preventing him from

acting in any manner prejudicial to public order is required and that such satisfaction is subjective and not objective. The object of the law of preventive detention is not punitive but only preventive and further that the action of the executive in detaining a person being only precautionary, normally, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner. The satisfaction of the Detaining Authority, therefore, is considered to be of primary importance with certain latitude in the exercise of its discretion.”

32. Although, a large number of grounds were raised in the writ petition, however, at the time of hearing, Mr. R.K.Handoo, learned counsel for the Petitioner laid stress on the ground that the Bail Order dated 26.05.2009 passed by the Delhi High Court in the previous proceedings ought to have been placed before the Detaining Authority so as to apprise it as to the stringent conditions put by the High Court while allowing liberty to the Detenue. The learned counsel for the Petitioner urges that although the three show cause notices issued to the Petitioner were considered and relied upon by the Detaining Authority, yet replies to the same filed by the Detenue were neither considered nor placed before the Detaining Authority, nor even supplied to the Detenue despite his demands and thus, the full material in respect of three show cause notices escaped the attention of the Detaining Authority. Thus, argues the learned counsel, the detention order is vitiated. In support of his contention, the learned counsel places reliance on the following judgments:-

- (i) *Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat & Anr., (1979) 1 SCC 222;*
- (ii) *Khurjibhai Dhangjibhai Patel v. State of Gujarat & Ors., 1985 (1) SCALE 136;*

- (iii) *Union of India & Ors. v. Manohar Lal Narang*, (1987) 2 SCC 241;
- (iv) *Ahamed Nassar v. State of Tamil Nadu & Ors.* (1999) 8 SCC 473;
- (v) *Rushikesh Tanaji Bhoite v. State of Maharashtra & Ors.*, (2012) 2 SCC 72; and
- (vi) *A. Sowkath Ali v. UOI & Ors.*, (2000) 7 SCC 148.

33. Per contra, Mr. S.K.Dubey and Mr. Jatan Singh, learned counsels appearing on behalf of the Respondents state that in cases of preventive detention, satisfaction of the Detaining Authority has to be given primary importance. The Detaining Authority may act on any material and on any information that may be before it. Such material and information may merely afford basis for sufficiently strong suspicion to take action, but may not satisfy and stand the tests of legal proof. The maintenance of the public order may compel curtailment of the individual liberty. Mr. Dubey refers to *Union of India & Anr. v. Chaya Ghoshal & Anr.*, (2005) 10 SCC 97. In para 8 of the judgment, it was held as under:-

“8.....Preventive detention is an anticipatory measure and does not relate to an offence, while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects which are specified by the law concerned. The action of the executive in detaining a person being only precautionary, normally the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of conduct in an exhaustive manner, the failure to confirm to which should lead to detention. The satisfaction of the Detaining Authority, therefore, is considered to

be of primary importance, with great latitude in the exercise of its discretion. The Detaining Authority may act on any material and on any information that it may have before it. Such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens would lose all their meanings, provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestations of similar propensities on the part of the offender. This jurisdiction has at times been even called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment of individual liberty. "To lose our country by a scrupulous adherence to the written law", said Thomas Jefferson "would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the means." This, no doubt, is the theoretical jurisdictional justification for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by striking the right balance between individual liberty on the one hand and the needs of an orderly society on the other."

34. Relying on *Radhakrishnan Prabhakaran v. State of Tamil Nadu & Ors.*, (2000) 9 SCC 170, Mr. Dubey submits that there is no legal requirement that a copy of each and every document should be supplied to the Detenue. He urges that the copies of only those documents as have been 'relied upon' by the Detaining Authority for reaching satisfaction that preventive detention of the Detenue is necessary, are required to be supplied to him.

35. Referring to *Attorney General for India & Ors.. v. Amratlal Prajivandas & Ors. (1994) 5 SCC 54*, Mr. Dubey states that the detention order was primarily based on the basis of the incident of 11.03.2013 when the Detenue was apprehended after he had passed the green channel and on interception printed unsigned invoice No.54840 dated 09.03.2013 towards sale of assorted jewellery, total gross weight 32565.33 gms., was recovered from him. The foreign diplomat MSSA was also intercepted at that very time and later on jewellery as per the earlier said invoice was recovered from the diplomat. There were other material including certain e-mails sent by the Detenue to the diplomat and certain calls made to him, which sufficiently established the nexus between Detenue and the diplomat to show that the jewellery was being brought into India without payment of the customs duty thereon by the Detenue. Thus, non consideration of the replies to the three show cause notices in the earlier proceedings and the Bail Order dated 26.05.2009 in relation to the earlier criminal case were of no consequence. Relying on *Abdul Sathar Ibrahim Manik v. Union of India & Ors., (1992) 1 SCC 1*; *Vinod K. Chawla v. UOI & Ors., (2006) 7 SCC 337*; *Sanjay Dogra v. Union of India & Ors., 132 (2006) DLT 52 (DB)*; *Madan Lal Anand v. UOI & Ors., (1990) 1 SCC 81*; and *D. Anuradha v. Joint Secy. & Anr., (2006) 5 SCC 142*, Mr. Dubey urges that even otherwise non placement of the replies to the show cause notices and the Bail Order was not so material as to vitiate the detention order.
36. It goes without saying that as per Section 5A of the COFEPOSA Act, it has been laid down that where a person has been detained in pursuance of an order of detention under Section 3 (1), which has been made on two or more grounds, such order of detention shall be deemed to have been

made separately on each of such grounds and thus, on account of fiction such order shall not be deemed to be invalid or became inoperative merely because the detention order is liable to be set aside on one or some of the grounds. It has also been consistently held that in a given case, a single act may be held to be sufficient for passing an order of detention. In Para 48 of the judgment in *Attorney General for India* case, the Supreme Court observed as under:-

“48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. In Debu Mahato v. State of W.B. (1974) 4 SCC 135 it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in Anil Dey v. State of W.B. (1974) 4 SCC 514. It was a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in Israil SK v. District Magistrate of West Dinajpur (1975) 3 SCC 292 and Dharua Kanu v. State of W.B. (1975) 3 SCC 527 single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In Saraswathi Seshagiri v. State of Kerala (1982) 2 SCC 310, a case arising under COFEPOSA Act, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were

held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA Act is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention, that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.”

37. Thus, now the question for consideration is whether the detention order dated 11.06.2013 had been passed on several grounds or is a composite order where two or more facts have been taken into consideration. Although, the detention order runs into 31 paragraphs and refers to various materials including the past conduct of the Detenue, during the course of arguments, when para 23 of the detention order was put to the learned counsel for Respondents No.1 and 2, he fairly conceded that the detention order was a composite order and, therefore, the plea of application of Section 5A of the COFEPOSA Act will not be available to the Respondents.
38. Thereafter, now we are required to examine whether the Bail Order dated 26.05.2009 passed by the Delhi High Court in the previous criminal case and the replies to the three show cause notices filed by the Detenue, in view of the Detaining Authority having considered the three show cause

notices, were vital and important material, non-consideration of which would vitiate the order of detention. First of all, we shall refer to the Bail Order dated 26.05.2009. The Detenue was directed to be released on bail, subject to the conditions that (i) he will surrender his passport to the Trial Court, (ii) he will not leave India without the permission of the Trial Court, (iii) he will join investigation as and when directed by the DRI and (iv) he will co-operate in the investigation and if without reasonable cause he failed to appear before the DRI on any date, his bail was liable to be cancelled.

39. Thus, very stringent conditions were imposed for granting liberty to the Detenue. Although, the Bail Order in respect of the incident of 11.03.2013 was very much placed before the Detaining Authority, yet the Bail Order dated 26.05.2009 was not considered.
40. In *Union of India & Ors. v. Manohar Lal Narang*, (1987) 2 SCC 241, the Supreme Court had refused to stay the judgment of the Delhi High Court setting aside the detention order of Ram Lal (brother of the Respondent) and Ram Lal was allowed freedom of movement, subject to certain conditions. In a subsequent detention order against Ram Lal, a plea was raised that the earlier order of the Supreme Court, whereby freedom was allowed to Ram Lal, was not considered by the Detaining Authority. A plea was put forward by Union of India that this order (of the Supreme Court) was not a relevant material and was, therefore, not considered by the Detaining Authority. The Supreme Court extracted the reply of the Detaining Authority as under:-

“At any rate it is submitted that the contents pertain to the proceedings in the High Court and the Supreme Court and the

detention law does not contemplate that the Detaining Authority is required to take into account the different court proceedings whether independent proceedings, under the law not initiated, conducted, managed or looked after by the Detaining Authority. [It is well known that the different Ministries of the Government carry out different types of work in different ways and the Detaining Authority is not required under the law to take notice of work of the Ministries or court proceedings. The court proceedings and adjudication proceedings are initiated and conducted by different authorities which are not required under the law to submit their reports or communicate their actions to the Detaining Authority. The Detaining Authority, in turn, is not required under the law to carry out the process of collection of any material about any court proceeding or proceedings before other authorities for the purpose of issuance of a detention order. The contents of the paragraph refers to such proceedings which are not required to be collected by the Detaining Authority from such authorities or courts.]”

41. The Supreme Court made observations about the stand of the Union of India in Paras 10 and 11 of the judgment as under:-

“10. We are not very happy with the manner in which this important contention has been met in the counter-affidavit. An order of this Court is not an inconsequential matter. It cannot be assumed for a moment that the Detaining Authority or the Sponsoring Authority did not know, at the time the detention order was passed, that this Court had refused stay of the judgment of the Delhi High Court and that Ramlal was allowed freedom of movement subject to certain conditions. It is to be regretted that the portion extracted above from the counter-affidavit (shown in brackets) betrays an attitude, to put it mildly, that lacks grace. Be it understood that the bracketted portion was made to meet a case that there existed an order of this Court which was a relevant and vital material. We can use stronger language to express our displeasure at the manner in which reference was made indirectly to this Court's order but we desist from doing so. If the Sponsoring Authority and the Detaining Authority are to adopt such cavalier attitude towards orders of courts and of this Court in particular, their orders will meet with the same fate as the one under review.

11. If the Detaining Authority had considered the order of this Court, one cannot state with definiteness which way it's subjective satisfaction would have reacted. This order could have persuaded the Detaining Authority to desist from passing the order of detention since this Court had allowed freedom of movement. Detention is only a preventive act. This Court did not find it necessary to restrict the liberty of Ramlal when the order on the stay application was passed. It may also be that the Detaining Authority after considering the order of this Court carefully could still feel that an order of detention is necessary with reference to other materials which outweigh the effect of this Court's order. In all these cases, non-application of mind on a vital and relevant material need not necessarily lead to the conclusion that application of mind on such materials would always be in favour of the detenu. Application of mind in such cases is insisted upon to enable the Detaining Authority to consider one way or the other, as to what effect a relevant material could have, on the authority that decides the detention. In our view the absence of consideration of this important document amounts to non-application of mind on the part of the Detaining Authority rendering the detention order invalid."

42. Thus, the Supreme Court categorically held that the previous order granting freedom to the Detenu by any Court was a relevant material to affect the subjective satisfaction of the Detaining Authority one way or the other.
43. Similarly, in *Irfan Ibrahim Qadri v. Medha Gadgil & Ors.* 2013 CrL. L.J. 1455 (Bombay), a contention was raised before a Division Bench of the Bombay High Court that the previous offence in relation to which the bail was granted to the Detenu did not form part of the grounds of detention as the detention order was based on a subsequent incident of 26.08.2011 and subsequent prejudicial conduct of the Detenu. The contention that it was not at all necessary for the Sponsoring Authority to place the Bail Order of an earlier incident was negated holding as under:-

“11.....An order of preventive detention is always based on subjective satisfaction of the Detaining Authority. Every document which may affect the subjective satisfaction of the Detaining Authority one way or the other is a vital document and the said document should not be kept back from the Detaining Authority. This Court cannot go into the question as to what could have been the effect on the subjective satisfaction of the Detaining Authority on consideration of a vital and relevant document. This Court has to consider only the question whether a vital document which may have affected the subjective satisfaction is kept away from the Detaining Authority. The reason being that non-placement or non-consideration of a vital document affects the decision making process of the Detaining Authority of recording subjective satisfaction.....”

12. Considering the drastic conditions imposed while granting bail, the order granting bail becomes relevant and vital document as the same would have influenced the subjective satisfaction of the Detaining Authority. We must note here that admittedly the Sponsoring Authority had placed a copy of the application for cancellation of the same bail order before the Detaining Authority. In the present case, there is no dispute that the bail order was not placed before the Detaining Authority and, therefore, was not considered by the Detaining Authority. As we have pointed out earlier, in Paragraph 7 of the grounds of detention, there is a specific reference to the arrest of the Detenue in the said case on 18th May, 2011. In the grounds of detention, reliance has been placed on the incident of 17th May, 2011 apart from the subsequent incident of 26th August, 2011. Therefore, the submission of the learned counsel appearing for the Petitioner that the bail order was a vital document will have to be accepted.”

44. Mr. Dubey, on the other hand, refers to the judgment of the Supreme Court in *Abdul Sathar Ibrahim Manik v. Union of India & Ors.*, (1992) 1 SCC 1 to contend that the Bail Order passed in the previous proceedings is not relevant and is therefore not required to be placed before the Detaining Authority.

45. We have gone through the judgment cited at the Bar. In fact, the bail had not been granted in *Abdul Sathar Ibrahim Manik* (supra) rather the bail application moved by the Detenue was rejected and while passing the detention order, the Detaining Authority had observed that there was a possibility of the Detenue being released on bail in the near future. The Supreme Court held that the order refusing bail even if not placed before the Detaining Authority will not amount suppression of relevant material. The Supreme Court further held that in case the Detenue had been released on bail and is at liberty at the time of passing of the order of detention, the Detaining Authority has to necessarily rely on the same. The relevant portion of the judgment in *Abdul Sathar Ibrahim Manik* is extracted hereunder:-

“12. The Constitution Bench in Rameshwar Shaw case (1964) 4 SCR 921 held thus: (SCR p. 929)

“... whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released.

Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case.”

Following the above principles, another bench of three Judges of this Court in N. Meera Rani v. Government of T.N. (1989) 4 SCC 418, after reviewing the various other decisions, it was observed that: “A review of the above decisions reaffirms the position which was settled by the decision of a Constitution Bench in Rameshwar Shaw case” and that “none of the observations made in any subsequent case can be construed at variance with the principle

indicated in Rameshwar Shaw case (1964) 4 SCR 921....” Having so observed the bench summarised the principle thus: (SCC p. 434, para 22)

“Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc., ordinarily it is not needed when the detenu is already in custody; the Detaining Authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the Detaining Authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us, to be the correct legal position.”

In Chelawat case (1990) 1 SCC 746 after examining the various decisions of this Court dealing with preventive detention of a person in custody, it is held thus: (SCC p. 754, para 21)

“The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the Detaining Authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression ‘compelling reasons’ in the context of making an order for detention of a person already in custody implies that there must be cogent material before the Detaining Authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.”

In Sanjay Kumar Aggarwal v. Union of India (1990) 3 SCC 309 after reviewing all the relevant cases including Chelawat case (1990) 1 SCC 746, this Court observed as under: (SCC p. 316, para 11)

“It could thus be seen that no decision of this Court has gone to the extent of holding that no order of detention can validly be passed against a person in custody under any circumstances. Therefore the facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention passed in the case of a detenu who is already in jail. We have already, in the instant case, referred to the grounds and the various circumstances noted by the Detaining Authority and we are satisfied that the detention order cannot be quashed on this ground.”

In a very recent judgment of this Court in Kamarunnissa v. Union of India (1991) 1 SCC 128 all the abovementioned decisions dealing with the detention of a person in custody have been reviewed and it is finally held as under: (SCC p. 140, para 13)

“From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording it’s satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition, to question it before a higher court.”

Having regard to the various above-cited decisions on the points often raised we find it appropriate to set down our conclusions as under:

(1)

(2)

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the Detaining Authority, it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the Detaining Authority was aware of the fact that the detenu was in actual custody.

(4)

(5)

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the Detaining Authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.” (emphasis supplied).

46. The judgment in *Abdul Sathar Ibrahim Manik*, thus supports the case of the Detenu rather than that of the Respondents.
47. In view of the above discussion, we have no hesitation to hold that the Bail Order dated 26.05.2009 passed by the Delhi High Court in the earlier case under the Customs Act was vital and relevant material to be considered by the Detaining Authority before passing the detention order. The Bail Order having not been considered, the detention order is vitiated and is liable to be set aside.
48. Now is the turn to refer to the other material, that is, replies to the three show cause notices not having been placed before the Detaining Authority.
49. We have already held above that the order of detention is a composite order. In other words, while passing the detention order, the Detaining Authority considered the previous conduct of the Detenu and assessed

the propensity of Detenue's conduct. As has been observed earlier, in some cases a single act may be sufficient to pass an order of detention. However, in this case, it will be relevant to refer to para 23 of the detention order where the Detaining Authority observed as under:-

“23. It is seen from the above that Shri Komal Jain i.e. you without having any regard to the legal requirements or the interest of the nation have been interested only in your personal gain even at the cost of Government Exchequer. The well planned manner in which you have been masterminded the smuggling to defraud the exchequer and in this case luring a foreign diplomat to assist in such nefarious smuggling activities, in such a way as to make it difficult to be easily detected but for the intelligence developed by DRI clearly establishes your continued propensity and inclination to indulge in acts of smuggling in an organised manner which, you knew or had reasons to believe that your actions are having a serious adverse effect on the economy and security of the country and that unless prevented you will continue to do so.....”

50. It is not in dispute that the replies to the show cause notices were not considered by the Detaining Authority. In fact, the same were not even placed before it. The stand of the Respondents is that the documents in regard to the proceedings before the Commissioner of Customs and replies to the show cause notices were not 'relied upon' while framing the grounds of detention by the Detaining Authority hence the same were not supplied to the Detenue. A perusal of the detention order falsifies the stand of the Respondents that the three show cause notices were not taken into consideration by the Detaining Authority while passing the order of detention. Para 22 of the detention order makes a reference not only to the three show cause notices but also to the adjudication order dated 31.01.2011 whereby the penalty proposed against the Detenue was ordered to be dropped. The Detaining Authority goes on to mention that the adjudication order in question had not attained finality as an appeal

had been preferred by the Commissioner of Customs before CESTAT, New Delhi. The replies to the three show cause notices have been placed on record by the Detenue. There were serious allegations of illegal import of high end gold jewellery and misuse of SEZ facility against the Detenue and others. Show cause notice is a charter of allegation and by replies to the notices, the Detenue claimed innocence and therefore, the replies to the show cause notices were vital, important and relevant material to be considered by the Detaining Authority. By considering only the show cause notices against the Detenue without considering these replies, there was a serious prejudice caused to the Detenue as we do not know how the Detaining Authority would have reacted on considering the replies.

51. The learned counsels for Respondents No.1 to 4 rely on *Vinod K. Chawla v. UOI & Ors.*, (2006) 7 SCC 337; *Sanjay Dogra v. Union of India & Ors.*, 132 (2006) DLT 52 (DB) and *Madan Lal Anand v. UOI & Ors.*, (1990) 1 SCC 81, to contend that the order of detention cannot be vitiated for non-consideration of the replies to the show cause notices by the Detaining Authority and their non-supply to the Detenue.
52. We are unable to be persuaded by the contention raised. In our opinion, the authorities relied upon by the learned counsels are not applicable to the facts of the present case. In *Vinod K. Chawla*, statement of Ashish Chawla, son of the Detenue was not supplied to him. The Supreme Court observed that there was no retraction of his own statement by the Detenue (the appellant). There was just a passing reference to the statement of Ashish Chawla, son of the appellant and thus, retraction of the statement

by Ashish Chawla had no bearing at all in formation of opinion and subjective satisfaction of the Detaining Authority.

53. In *Sanjay Dogra*, a Division Bench of this Court held the non-supply of the shipping bills to be of no significance as what was relied upon by the Detaining Authority were the details of the shipping bills, which had been duly supplied to the Detenu. The details of the shipping bills which were supplied contained all the relevant material particulars such as, shipping bill number, date, invoice number, invoice value, FOB value, port of lading, port of discharge, name of consignee, drawback/DEPB and the name of exporting firms. The Division Bench held that the entire details, which a shipping bill contains, were captured, encapsulated and summarised in the details of shipping bills, which were included as a 'relied upon' document. It was in these circumstances that non-supply of shipping bills was held to be inconsequential.
54. In *Madan Lal Anand v. UOI & Ors. (1990) 1 SCC 81*, the documents as mentioned in Para 18 of the report were not placed before the Detaining Authority and the same were found to be inconsequential in view of the fact that two firms had no factories and therefore, there was no question of them manufacturing readymade garments from the imported material and exporting them within a period of six months from the date of first clearance. It would be apposite to extract Paras 18 and 19 of the judgment hereunder:-

“18. Next it is urged on behalf of the detenu that certain documents/orders relating to the firm M/s Expo International, which could influence the subjective satisfaction of the Detaining Authority in favour of the detenu, were not placed before it at the

time it passed the order of detention. The said documents/orders are as follows:

(1) Abeyance Order No. 120/84-85/H dated March 27, 1985 issued by the Dy. Chief Controller of Imports & Exports to M/s Expo International under clause 8-D of the Imports (Control) Order, 1955 as amended, placing the firm under abeyance for a period of six months w.e.f. the date of the issue of the order (Annexure E to Cr. Writ 545/88);

(2) Order dated March 29, 1985 issued by the office of the Chief Controller of Imports & Exports, New Delhi, to M/s Expo International suspending the operation of the said five advance import licences granted to them (Annexure G to Cr. Writ 545/88);

(3) Show cause notice dated December 26, 1985 issued by the office of the Chief Controller of Imports & Exports to M/s Expo International under Section 4-L for action under Section 4-I of the Imports and Exports (Control) Act, 1947 as amended, and under clause 8 of the Imports (Control) Order, 1985 (as amended) (Annexure H to Cr. Writ 545/88);

(4) Show cause notice dated March 27, 1985 issued by the office of the Chief Controller of Imports & Exports to M/s Expo International under clause 10 for action under clauses 9(1)(a) & (d) of the Imports (Control) Order, 1955 as amended as to why the five import licences should not be cancelled and rendered ineffective (Annexure F to Cr. Writ 545/88);

19. Even assuming that the above documents/orders were not placed before the Detaining Authority, we fail to understand how the same could have influenced the subjective satisfaction of the Detaining Authority in favour of the detenu. As has been discussed above, the abeyance order was passed on the detenu when the authorities concerned found that the above two firms had no factories and, therefore, there was no question of their manufacturing readymade garments from the imported material and exporting them within a period of six months from the date of first clearance in accordance with the conditions under the advance licences. The show cause notices issued to the said firm, M/s Expo International, also would reveal that the detenu had failed to comply with the condition of the licences and, indeed,

there was no chance of the conditions being complied with inasmuch as there was no manufacturing devices of the said firms. We are of the view that even if the documents/orders had not been placed before the Detaining Authority that could not, in the least, affect the subjective satisfaction of the Detaining Authority.”

55. On the other hand, learned counsel for the Detenue relies on the case of *Khurjibhai Dhangjibhai Patel v. State of Gujarat & Ors., 1985 (1) SCALE 136*, where in similar circumstances the Supreme Court held that the show cause notices and particularly the Detenue’s replies thereof were the most relevant and essential material to be placed before the Detaining Authority before issuance of the detention order. The Supreme Court also expressed its sentiments that the Detenue had to be released because of sheer negligence on the part of Sponsoring Authority in not furnishing relevant material to the Detaining Authority before the latter proceeded to pass a detention order. Paras 6 and 8 of the report of the Supreme Court are extracted hereunder:-

“6. It cannot be disputed that the show cause notice and the detenu’s reply thereto, particularly the latter, though these documents formed part of adjudication proceedings constituted the most relevant material which was essential to be placed before the Detaining Authority before the issuance of the impugned order and admittedly this has not been done.

The relevant material, namely the Detenue’s reply dated 05.03.1984 certainly had a bearing and would have influenced the subjective satisfaction of the Detaining Authority one way or the other before issuing the detention order and such relevant material was not placed by the Sponsoring Authority before the Detaining Authority at the appropriate time.

8. It is unfortunate that the detenu who was found with contraband of the value of Rs. 20,23,000/- is required to be released by this Court but we must observe that such a force result is brought about by the sheer negligence on the part of the Sponsoring

Authority in not furnishing relevant material to the Detaining Authority before the latter proceeded to pass the detention order. This is a clear case of failure to observe procedural safeguards leading to the release of the detenu who might be really concerned in illicit activity. The result is that the appeal is allowed and the detention order is quashed and the detenu is directed to be released forthwith."

56. In view of the above discussion, there is no escape from the conclusion that all the relevant and vital material/documents were not placed before the Detaining Authority. The detention order is consequently vitiated; the same is accordingly set aside.
57. The Detenue be released forthwith.

(G.P. MITTAL)
JUDGE

(G.S. SISTANI)
JUDGE

NOVEMBER 13, 2013

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