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

+ **WP (CRL) 615/2015**

% Reserved on : 25th May, 2015
Date of decision : 29th May, 2015

DAVINDER SINGH CHADHA Petitioner
Through: Mr. Pradeep Jain, Mr. Shubhankar
Jha and Mr. Ashish Batra, Advocates.

versus

UOI & ANR Respondent
Through: Mr. Sanjay Jain, ASG with Mr.
Vivek Goyal, CGSC, Ms. Shreya Sinha, Ms.
Bani Dikshit and Ms. Rahul Jain, Advocates
for UOI.
Mr. S.K. Dubey and Ms. Sushma Yadav,
Advocates for DRI.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J:

Appellant Davinder Singh Chadha has challenged preventive detention of his son Rupinder Singh Chadha. The impugned order dated 16th April, 2014, was passed by the Government of India under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA') with a view to prevent Rupinder Singh Chadha (detenue, for short) from abetting smuggling activities. The detenue had earlier challenged the said order at pre-detenu stage in WP(Crl.) No. 1630/2014, but the petition was

withdrawn as per order dated 13th August, 2014. The detainee was detained on 26th February, 2015. The grounds of detention and relied-upon documents were thereafter served upon him.

2. As per the respondents, Directorate of Revenue Intelligence (CDRI, for short), on the basis of information received, had inspected a consignment of A-4 copier paper imported vide bill of entry No. 9865457 dated 16th April, 2013 by M/s. AMP Enterprises, WZ-25D/2, Shop No.3, Ground Floor, Krishna Park, Tilak Nagar, New Delhi-110018. M/s. Prahlad Singh, Custom House Agent (CHA), had applied for clearance and had filed the bill of entry online through the office computer of the CHA. On examination, 1504 cylinders of 13.6 kgs each of refrigerant gas (HC-22), were found concealed behind the cartons of copier papers. The gas cylinders along with the copier papers were seized under Section 110 of the Customs Act, 1962, (Act, for short) vide punchnama dated 20th April, 2013. During investigation, statements of Dinesh Kumar Badopalia, CHA, Manish Jalhotra and the detainee were recorded under Section 108 of the Act. Manish Jalhotra, it is alleged, is the pivot who is indulging in smuggling of R-22 refrigerant gases into India. Investigation had led to the recovery of CCTV footage from the McDonalds restaurant at Kamla Nagar, in which Dinesh Kumar Badopalia, Manish Jalhotra and the detainee could be seen together. The CCTV footage is dated 12th

April, 2013 and does not have audio or voice recording. One Sandip Kumar Moria was also present in the said meeting. It is alleged that Manish Jalhotra, in collusion with the detainee, had introduced and impersonated as Vikas to Dinesh Kumar Badopalia. The detainee, himself a CHA licence holder, had kept himself out and had remained in the background. The detainee and Manish Jalhotra had intentionally and deliberately hired services of CHA Dinesh Kumar Badopalia to clear the said consignment, to avoid trouble and detection.

3. On 13th June, 2013, a search was conducted at the residential premises of the detainee at A-2, 36/52, West Punjabi Bagh, New Delhi. As per the *panchnama*, nothing incriminating was found. On the same date i.e. 13th June, 2013, the detainee had presented himself before the DRI officers at 11.00 A.M. and surrendered his mobile phones and laptop. The seizure memo records that the phones were required for forensic analysis of call logs, phone book, messages and files and to generate and take print-outs. One Mohit Kumar, cyber forensic expert was also present. The printed reports were signed on the same date by the detainee. The phones were thereafter put in a paper envelope, sealed and retained by the DRI. After about 1 ½ months, on 30th July, 2013, one phone was de-sealed in presence of the detainee and all types of data were copied in four DVDs along with their hash values. Three DVDs were sealed in three separate envelopes and one DVD was kept

open for investigation purposes. Two audio files marked Audio-1 and Audio-2 found in the phone, were downloaded and copied in another set of four CDs. Three CDs with audio files 1 and 2 were kept and sealed in separate envelopes and one CD was kept open for investigation. The phone was thereafter re-sealed.

4. The respondents rely upon the audio file-2, which it is claimed, contains audio recording of a conversation between the detainee and Chandan Kumar Jain, Additional Commissioner of Customs, Tughlakabad, Delhi. The said Chandan Kumar Jain has been suspended and is facing departmental proceedings. However, the COFEPOSA has not been invoked against Chandan Kumar Jain. The respondents primarily rely on the recorded conversation in the audio file-2, purportedly retrieved from the mobile phone of the detainee, to prove and establish deep-rooted and inveterate involvement of the detainee in the smuggling of R-22 gas cylinders into India. The voice sample of the detainee as well as Shri Chandan Kumar Jain were recorded. Voice sample of the detainee were recorded on 5th August, 2013 and 7th August, 2013. In the statement recorded on 5th August, 2013, Rupinder Singh Chadha, after hearing the audio CD, had professed that he did not recognize voices of the persons in conversation. Subsequent statement of the detainee was recorded on

7th August, 2013. Thereafter, the detenue stopped appearing in response to the summons.

5. The detention order records that the detenue was involved and was deliberately abetting smuggling to commit fraud and for personal gains. Considering the nature and gravity of the offence and the planned manner in which the detenue had engaged himself, there was a potential and propensity that he would engage himself in prejudicial activity of abetment in smuggling in future also, unless he was checked. Thus, an order of detention was justified. As noticed above, the detention order is dated 16th April, 2014 and was served on the detenue on 26th February, 2015. It does appear that the detenue avoided service of the said order.

6. The petitioner has raised the following contentions challenging the detention order:-

(i) There is inexplicable and enigmatic long delay in passing of the detention order. The consignment was seized in April, 2013 and premises of the detenue were searched on 13th June, 2013. The order of detention was passed after 10 months on 16th April, 2014.

(ii) Detenue has not been supplied CD of the CCTV video footage of the McDonalds restaurant, Kamla Nagar.

(iii) The forensic experts have not confirmed that the detenue could be heard in the incriminating and inculpatory conversation in audio file 2.

(iv) Voice samples of the detainee and Chandan Kumar Jain do not form part of the relied-upon documents. Without examining the voice samples, the detaining authority should not have passed the detention order.

(v) Detainee has not been supplied the audio file/CD relied upon by the detaining authority. In spite of written request of the detainee, the audio file has not been made available and played.

(vi) The detention order is bad for the detaining authority's subjective satisfaction is vitiated and erroneous factually. Further, the detaining authority has failed to notice that violation of provisions of the Act i.e. the Customs Act, is a bailable offence.

(vii) There has been violation of Section 3 of COFEPOSA and Article 22 (5) of the Constitution of India, as the respondents have failed to supply page nos. 102 to 111 and pages 158 to 279 of the relied-upon documents. Similarly, page No.83 and internal page Nos. 16 to 19 and 46 to 55 have not been supplied.

7. We record that the grounds (ii), (vi) and (vii) are not meritorious and do not require detailed discussion. There is due application of mind by the detaining authority. Factual matrix and the conclusion reached are a matter of subjective satisfaction and not directly a matter for the writ court to re-examine and adjudicate. Relevant snap-shots of the CCTV footage have been provided. Failure to furnish CD of the

CCTV footage has not caused or resulted in prejudice. Ground (vii) does not have any substance as relied-upon documents have been supplied. It is not shown or indicated that the pages referred, though not relied upon, are relevant and material.

8. However, ground (i) and grounds (iii) to (iv) (collectively) are a matter of concern and require detailed adjudication. Thus, the two aspects which require consideration are; (i) whether there is an unreasonable and unexplained delay in passing of the detention order, which breaks the live-link between the illegal activities and the detention order to prevent the detainee from indulging in illegal activities in the immediate future, (ii) the second issue relates to the failure of the respondents to provide audio recording of the alleged conversation between the detainee and Chandan Kumar Jain.

9. On the first contention, undisputedly the consignment was seized on 20th April, 2013. But in the facts of the present case, the date of seizure of consignment, in our opinion, should not be treated as the starting point. In the present case, the detainee had remained in the background. Subsequent investigation as per the respondents, revealed his involvement. Search was conducted at the residential premises of the detainee on 13th June, 2013 and on the same day, his phone was also seized. The respondents learnt and became luminously aware of

the detainee's involvement after the audio file No. 2 was purportedly downloaded on 30th July, 2013. The detention order, as noticed above, is dated 16th April, 2014. There is a time-gap of about 8 ½ months between 30th July, 2013 and the detention order dated 16th April, 2014.

10. The legal position is and mandates that the detention order should not be passed relying upon stale acts having no live link at present. This would, in terms, have reference to the progress of investigation unearthing the act(s), involvement of the person and the live-link and connection between the “act(s)”, the person and the order of preventive detention. Undue delay, when established, would snap the live-link between the order of detention and prejudicial activity. Delay would also throw a considerable doubt on the genuineness of the subjective satisfaction of the detaining authority, leading to a legitimate inference that the detaining authority was not really and genuinely satisfied regarding the necessity to detain the person, with a view to prevent him from acting in a prejudicial manner. However, to show and establish involvement, material and evidence has to be collected before a detention order is passed. Preventive detention order cannot be passed in haste and hurry and without cogent and reliable material, for otherwise, the detention order would be questioned on the ground that the investigation was incomplete or inchoate to implicate

and condemn the detenue. Further, the detaining authority must have sufficient and adequate time to examine the evidence and statements, have response to their queries and apply their mind. There have been cases, where a delay of 11 months in passing the detention order, it has been held, would not vitiate the detention order.

11. Authorities on the issue opine that if the delay is satisfactorily explained, the detention order should not be quashed, but where the delay is unexplained, opposite consequences would follow (See *Licil Antony v. State of Kerala and Anr.*, (2014) 11 SCC 326). In *Abdul Nasar Adam Ismail v. State of Maharashtra and Ors.* (2013) 4 SCC 435, it was observed that a detaining authority is required to state what steps were taken and how the proposal submitted by the sponsoring authority was processed till the detention order was passed. Reasonable time is not inflexible time and all the factors including any attempt to prevent and stall passing of the said orders, must be taken into account. Reference can also be made to the decisions of the Supreme Court in *Abdul Salam @ Thiyyan v. Union of India and Ors.* AIR 1990 SC 1446; *Rajendra Kumar Natvarlal Shah v. State of Gujarat & Ors.* [1988] 3 SCC 153 and *Hemlata Kantilal Shah v. State of Maharashtra and Anr.* AIR 1982 SC 8.

12. In the counter-affidavit filed by the respondents dated 20th April, 2015, no attempt or efforts were made to explain when the

investigation against the detainee was completed, when the proposal was sent and how the said proposal was dealt with by the detaining authority. Case-law on the subject has been relied upon. On 21th May, 2015, our attention was drawn to a table (Annexure R-1) enclosed with the affidavit. We do not approve and cannot accept that this is a valid and good way to explain “live link”, when allegations are made contending unreasonable and unexplained delay. Such contentions when made and when factually there is a time-gap, the assertion should be replied and answered on oath in an affidavit, by stating the relevant facts.

13. In these circumstances, we had adjourned the writ petition, to enable the respondents to file an affidavit. The respondents have placed on record an additional affidavit dated 25th May, 2015. The said affidavit on the question of delay reads:-

“3. I say that the explanations on the issues are as under:

(i) That on 18.11.2013, the proposal for the detention of the petitioner’s son, Shri Rupinder Singh Chadha, and one more person was initiated by the sponsoring authority i.e. DRI Headquarters. The said proposal was received in the Central Economic Intelligence Bureau on 19.11.2013.

(ii) That on 26.11.2013, the Central Screening Committee held its meeting at New Delhi for the consideration of the proposal for preventive detention. In this meeting, Central Screening Committee considered two proposals including the present which concerns Sh. Rupinder Singh Chadha. The voluminous records were considered by the Screening Committee.

(iii) That the Screening Committee had asked for certain relevant documents in respect of both these proposals.

(iv) The aforesaid documents were collected from the sponsoring authority and were placed before the Members of the Screening Committee.

(v) That on 09.12.2013, the Screening Committee granted approval to the proposals for the preventive detention which included Sh. Rupinder Singh Chadha under the COFEPOSA Act.

(vi) In the meantime, a letter dated 05.12.2013 addressed to the Hon'ble Finance Minister with a copy of the Joint Secretary (COFEPOSA) was received in the office of Central Economic Intelligence Bureau on 09.12.2013.

(vii) The Joint Secretary (COFEPOSA) received the Minutes of the Screening Committee with regard to the approval of the proposal for the preventive detention of Sh. Rupinder Singh Chadha.

(viii) That on 09.12.2013, the COFEPOSA unit informed the Sponsoring Authority in respect of the grant of approval of the proposal by the Screening Committee.

(ix) That on 10.12.2013, the Joint Secretary (COFEPOSA) asked for the detailed comments on the representation dated 05.12.2013 (received on 09.12.2013) of Sh. Rupinder Singh Chadha.

(x) That Joint Secretary (COFEPOSA) in the meantime was also occupied in processing other proposals for preventive detention and issued three (03) detention orders on 10.12.2013.

(xi) In the meantime, the Joint Secretary (COFEPOSA) started examining the proposal and documents in respect of the detention proposal of Sh. Rupinder Singh Chadha and whereas the additional documents in respect to the proposal for detention called for from the Sponsoring Authority were sent on the same day i.e. on 17.12.2013.

(xii) On scrutiny of the documents, it was felt that certain more documents are required from the Sponsoring Authority and therefore, vide E-mail dated 24.12.2013, certain clarifications/ documents were called for from the Sponsoring Authority.

(xiii) In response to the letter dated 10.12.2013, the Sponsoring Authority sent the detailed comments on the representation dated 05.12.2013 (received on 09.12.2013) on 26.12.2013.

(xiv) That in response to the E-mail dated 24.12.2013, the Sponsoring Authority submitted the full details vide letter dated 31.12.2013. The Joint Secretary (COFEPOSA) examined the said documents and vide letter dated 07.01.2014, called further details from the Sponsoring Authority.

(xv) That since Sh. Rupinder Singh Chadha had submitted an additional representation dated 01.01.2014 was received on 06.01.2014 in the COFEPOSA Unit, the Joint Secretary (COFEPOSA) asked the comments on the said representation from the Sponsoring Authority.

(xvi) That the Sponsoring Authority furnished its comments on the aforesaid second representation addressed to Joint Secretary (COFEPOSA) vide letter dated 13.01.2014 received in the COFEPOSA Unit on 15.01.2014.

(xvii) Since the proposal contained various documents relating to the court proceedings, therefore, the Joint Secretary

(COFEPOSA) asked for the further development in regard to the court proceedings subsequent to the proposal.

(xviii) The sponsoring Authority furnished the up-to-date record of the Court proceedings on 27.01.2014. During this period, the Joint Secretary (COFEPOSA) has six more proposals for consideration (duly approved by the Screening Committee) for preventive detention. Therefore, the Joint Secretary had in her hand six other proposals for the detention order containing voluminous records. The Detaining Authority has completed her scrutiny in respect of the other three detention orders and have issued detention order in all three proposals for preventive detention 04.02.2014 and three others on 18.02.2014. The Joint Secretary (COFEPOSA) upon scrutiny of those documents (received in the proposal of Sh. Rupinder Singh Chadha & one other) asked for further details from the Sponsoring Authority vide letter dated 19.02.2014. The Sponsoring Authority forwarded the details sought for on the same day to the Joint Secretary (COFEPOSA).

(xix) It is worthwhile to mention that the Assistant Director General (ADG), COFEPOSA, attending to the proposal was required to attend day-to-day hearing in another matter in the Hon'ble High Court of Punjab & Haryana at Chandigarh from 25th February, 2014 to 27.02.2014 and then after on 11/12th March 2014.

(xx) That the Joint Secretary (COFEPOSA) has considered the entire material and sought for additional details on 12.03.2014.

(xxi) That vide E-mail dated 19.03.2014 additional details were called from the Sponsoring Authority.

(xxii) That in response to E-mail dated 19.03.2012, the details were submitted by the Sponsoring Authority on 03.04.2014

(xxiii) The Joint Secretary (COFEPOSA) has considered those documents received on 03.04.2014 and had asked additional details on 09.04.2014' and 11.04.2014 in view of the information emerged from those new set of documents received from the Sponsoring Authority.

(xxiv) In response to the said communications dated 09.04.2014 & 11.04.2014, the Sponsoring Authority furnished the details which were received in the COFEPOSA Unit on 15.04.2014. The Detaining Authority considered those materials afresh on 14.04.2014, the detention order against Shri Rupinder Singh Chadha was issued."

14. A reading of the aforesaid paragraphs would indicate that the sponsoring authority had sent their proposal on 18th November, 2013. For the period prior to 18th November, 2013, no explanation has been given. The audio file was downloaded on 30th July, 2013, voice

samples were also taken on 5th and 7th August, 2013. The respondents state that the detainee had failed to appear in the proceedings inspite of service of notice in response to the summons, on or after 12th September, 2013. The central forensic laboratory, by letter dated 26th September, 2013, had opined and expressed their inability to ascertain and submit a report, since the specimen voice sample was not of the same text as the questioned voice recording. The respondents obtained the voice sample of Chandan Kumar Jain on 29th November, 2013. The detainee failed to respond to the summons and therefore, did not provide his voice sample of the same text. We have noted these facts to observe that the delay can be explained, as the investigating agency was hoping that the detainee would cooperate and furnish his voice sample in the same text. However, it had become clear by November, 2013, that the detainee was not ready and willing to give voice samples of the same text for the purposes of comparison. Delay post 18th November, 2013 has been explained with reference to correspondence exchanged and over-burden on account of work. The central screening committee had asked for specific documents, which were furnished on 26th November, 2013. The screening committee approved the proposal on 9th December, 2013. Thereafter, the Joint Secretary, COFEPOSA asked for comments on a representation made on behalf of the detainee vide letter dated 10th December, 2013. Detaining authority vide e-mail

dated 24th December, 2013, had asked for documents from the sponsoring authority. Clarifications were also sought. Clarifications and response to the representation dated 10th December, 2013 were furnished after more than 15 days on 26th December, 2013. Response to the e-mail was furnished on 31st December, 2013. These were examined by the Joint Secretary of COFEPOSA on 7th January, 2014. In the meanwhile, the detainee had made an additional representation dated 1st January, 2014, which was received in the COFEPOSA unit on 6th January, 2014, and comments were asked for and received on 15th January, 2014. Up-to-date court proceeding record was submitted to the detaining authority on 27th January, 2014. Thereafter, the file in question was not examined till 12th March, 2014. There is thus, a gap of nearly 55 days from 15th January to 12th March, 2014. The reason given is pre-occupation and over-burden, as the detaining authority had to examine six other cases, in which orders were passed on 4th February, 2014 and 18th February, 2014. Secondly, court proceedings in another case were fixed from 25th February, 2014 to 27th February, 2014. We do not think that the time-gap has been adequately and properly explained, but the time gap is not unduly long and prolonged. Thereafter, the Joint Secretary, COFEPOSA felt that more material and details were required as per the noting dated 12th March, 2014. E-mail in this regard was written after a delay of 7 days on 19th March, 2014.

The details were submitted after about 14 days on 3rd April, 2014. Additional details were asked for vide two letters dated 9th April, 2014 and 11th April, 2014. These were furnished on 15th April, 2014 and, thereafter, the detention order was passed on 16th April, 2014.

15. A reading of the aforesaid dates, indicates and reflects that the urgency and promptness required was somewhat missing and absent. The proposal was processed and dealt indolently with languid approach. However, in light of the pronouncements and legal ratiocination and the time-gap, if we exclude the period for which there is an adequate explanation, the petitioner would not succeed on this ground. It is difficult to hold that the live link had broken and had come apart. It is the second issue, which tilts the balance.

16. On the second issue, we agree with the petitioner that the audio file is the edifice and the core of the detention order, as it implicates and connects the detainee with the consignment in question and to what extent and how the detainee had taken help of the said Chandan Kumar Jain. The said audio file was never furnished to the detainee. What has been furnished and given to the detainee is the free transcript of the recorded conversation. A copy of the free transcript was handed over to us by the Additional Solicitor General in the Court. It consists of about 40 pages. On a reading of the said conversation, it is apparent that it is an audio recording of a conversation between two persons

sitting in an office or a room. It does not appear to be a recording of a telephonic conversation. The transcript refers to earlier telephonic conversations, which the one of the voices claims were tapped. If there was any tapped conversation, the same has not been brought on record and has not been relied by the sponsoring or the detaining authority. The free transcript of the recorded conversation in the audio file is a relied upon document. The detaining authority in the detention order has stated:-

“30.1 Shri Rupinder Singh Chadha, i.e. you, was again summoned vide summon dated 25.07.2013 issued under Section 108 of the Customs Act, 1962 for your appearance on 29.07.2013. However, you appeared in the DRI office on 30.07.2013. Shri Rupinder Singh Chaddha, i.e. you, was issued a fresh summons dated 30.07.2013 and forensic examination of your mobile phone (i-phone 5), which was surrendered by you during your statement recorded on 13.06.2013, was conducted by a forensic expert, vide Record of Proceedings dated 30.07.2013. During record of proceedings dated 30.07.2013, Shri Rupinder Singh Chadha, i.e. you, was introduced to Shri Manish Kumar, Cyber forensic expert and was also explained about the proceedings of forensic examination to be conducted. Thereafter, the seal of the paper envelope in which the said i-phone-5 was sealed on 13.06.2013 was opened in the presence of Rupinder Singh Chadha, i.e. you and the said i-phone-5 was connected with the Forensic Work station by the Cyber expert and all types of data contained in the said phone were copied into four DVDs along with their hash values. Out of the said four DVDs, three DVD's were sealed in three separate paper envelopes on which Shri Rupinder Singh Chadha, i.e. you, DRI officer and Cyber expert put their dated signatures and one DVD was kept open for investigation purpose. Two audio files found in the said i-phone-5 were also separately copied (along with their hash values) in four sets of separate CDs each. The said two audio files, bearing nos. 20130511095056 and 20130521002100, were named and marked as Audio 1 and Audio 2 respectively. Out of the said four sets of CDs of the said audio files, three sets of CDs containing copied data were sealed in three sets of separate paper envelopes on which Shri Rupinder Singh Chadha, i.e. you, DRI officer and Cyber expert put their dated signature and one set of each CD was kept open for

investigation purpose. The i-phone 5 was then re-sealed in a paper envelope in the presence of Shri Rupinder Singh, i.e. you, DRI officer and Cyber expert who put their dated signature on the same.

30.2 Shri Rupinder Singh Chadha, i.e. you, was again summoned in the DRI office vide summons dated 30.07.2013 for appearance on 01.08.2013. However, you did not appear and sent a letter dated 31.07.2013 stating therein that you had appeared on 30.07.2013 to tender your statement despite your indifferent health; that the tension had further aggravated your illness and as such you had been advised rest for one week. You requested for postponement of your appearance to some other date after one week.

45. The aforesaid voice samples of Shri Rupinder Singh Chadha, i.e. you, taken on 05.08.2013 and those of Shri Chandan Kumar Jain @ C. K. Jain taken on 07.08.2013 and 05.09.2013 were sent to CFSL, Chandigarh for forensic examination vide letter DRI F.No. 50D/28/2013-CI dated 20.09.2013. However, CFSL, Chandigarh vide letter no. CFSL/4445 dated 26.09.2013 informed that the case could not be accepted since the specimen voice sample was not in the same text of the questioned voice sample and that the case would be accepted after fulfilling the said deficiency. Subsequently Shri Rupinder Singh Chadha, i.e. you, did not join investigation therefore, your voice sample could not be taken again for sending to CFSL, Chandigarh. For non-honoring of summons a complaint was filed against Shri Rupinder Singh Chadha, i.e. you, in the Patiala House Court, for which next date of hearing is fixed as 19.04.2014.

46.1 DRI vide letter DRI F.No. 50D/28/2013-CI dated 23.10.2013, requested Import & General Commissionerate, New Custom House, New Delhi to direct Shri Chandan Kumar Jain @ C. K. Jain to appear before DRI on 29.10.2013. However, Shri Chandan Kumar Jain @ C. K. Jain did not appear on the said date. Vide letter dated 28.10.2013, Shri Chandan Kumar Jain @ C. K. Jain requested for the outcome of his voice samples given on earlier occasions and also asked for the provisions of law under which he was being directed to give his voice samples. In this regard, DRI replied to the Import & General Commissionerate, New Custom House, New Delhi vide letter DRI F.No. 50D/28/2013-CI dated 04.11.2013 and further requested for the presence of Shri Chandan Kumar Jain @ C. K. Jain before DRI on 12.11.2013. Additional Commissioner of Customs at Office of Commissioner (I&G) vide C. No. VIII(Vig.)I&G/30/08/2013 dated 05.11.2013 directed Shri Chandan Kumar Jain @ C. K. Jain to appear before DRI on 12.11.2013. Vide letter dated 11.11.2013, Shri Chandan Kumar Jain @ C. K. Jain submitted that he had been suffering from cough and cold which may prove an impediment in giving voice sample and requested to call him after 15 days for the purpose of giving voice sample. Accordingly, DRI vide letter DRI F.No.

50D/28/2013-CI dated 25.11.2013, requested Import & General Commissionerate, New Custom House, New Delhi, to direct Shri Chandan Kumar Jain @ C.K. Jain to appear before DRI on 29.11.2013.

46.2 Shri Chandan Kumar Jain @ C. K. Jain appeared before DR: on 29.11.2013 and his voice sample was taken by the forensic expert under Record of Proceedings dated 29.11.2013 and were sent to CFSL, Chandigarh for forensic examination vide DRI F. No. 50D/28/2013 —CI dated 30.12.2013. However, as informed vide enquiry report dated 19.03.2014 of IO, DM (Hqrs.), the matter is still under examination at CFSL.

46.3 Statement of Shri Chandan Kumar Jain @ C. K. Jain was again recorded under section 108 of the Customs Act, 1962 on 02.04.2014 in which he inter-alia stated that he knows Shri Deepak Jain-owner of M/s Arihant Logistics as he (Deepak Jain) is from his native place and have no other relation with him; that he does not recall person with name Shri Rakesh Kumar ('H'-card holder of M/s Arihant Logistics). On being shown mobile call records in respect of his mobile no. (9716488325), where there was call interaction with mobile no. 93128765754 (of Shri Rakesh Kumar), he stated that this was a solitary call of 8-seconds and he does not remember having spoken to Shri Rakesh on any issue; that he knows Shri Vipin Jain as he hails from his nearby _village and happened to be actively involved in Shri Digambar Jain Mandir Samiti, Jarkhi (U.P.); that the conversation with him is in connection with the temple committee; that however he did not discuss any official matter with him (Shri Vipin Jain); that mobile no. 9716488325 had been borrowed by him from his sister for usage as his mobile had signaling issue and it was returned back to his sister. On being shown the statement dated 08.08.2013 of Shri Rakesh Kumar and asked to give comments on the same, he stated that Rakesh Kumar's entire statement concerning him is false and blatant lie and thus denied.

47. Meanwhile, the stipulated time limit of six months for issuance of Show Cause Notice in respect of goods seized by DRI on 20.04.2013 (unless extended further by the competent authority in terms of provisions of Section 110 (2) of the Customs Act, 1962) from the date of seizure/detention of the goods was getting over on 20.10.2013. Therefore, as per provisions of Section 110 of Customs Act, 1962, a Show Cause Notice bearing DRI F. No. 50D/28/2013-CI dated 04.10.2013 was issued to M/s AMP Enterprises and its proprietor Sh. Gulshan Singh, Shri Manish Jalhotra, Shri Rupinder Singh Chadha, i.e. you, Shri Sandeep Kumar, Shri Prahlad Singh and Shri Dinesh Kumar Badopalia, proposing therein as to why, in terms of the proviso to Sub-section (2) of Section 110 of the Customs Act, 1962, the time limit for issuance of Show Cause Notice in respect of goods seized by DRI on 20.04.2013 should not be extended for a further period of 6 months i.e. upto 19.04.2014. Extension of time period by six months for issuance

of show cause notice in respect of goods seized by DRI office on 20.04.2013 was granted by the Commissioner of Customs, ICD, TKD vide Order in Original No. 14/2013 issued vide C. No. III/ICD/TKD/ 5/SIIB/AMP Ent./88/2013/57539 dated 17.10.2013. On perusal of this Order-in-Original, it is seen that neither Shri Manish Jalhotra nor Shri Rupinder Singh Chadha, i.e. you, nor any other noticees represented their case on the dates of hearing (on 10th Oct 2013 & on 15th Oct 2013). Also no reply to the Show Cause Notice was filed by any of the noticees (Para-26 of the Order in Original No. 14/2013 issued vide C. No. VIII/ICD/TKD/5/SIIB/AMP Ent./88/2013/57539 dated 17.10.2013).”

17. In the counter-affidavit dated 20th April, 2015, it is observed that various other evidences and statements have been placed before the detaining authority, which proves the complicity of the detainee in the offence. Forensic examination was sought to be done only to nail the factually incorrect statements made by the detainee and to further buttress the whole body of incriminating evidence against him. The said audio file was recovered from his phone and he could not escape from its consequence merely by claiming that he did not recognize the voices in the same. The grounds of evidence bring out the role of the detainee and are not limited to the audio file. Further all documents relied upon while passing the said detention order and framing the grounds of detention were supplied. Therefore, the contention lacks merit and deserves rejection. Reliance is placed upon a decision of the Supreme Court in *Radhakrishnan Prabhakaran v. State of T.N.* 2009 SCC 170 to the effect that there is no legal requirement of every document mentioned in the detention order, should invariably be

supplied to the detainee . What is important is that the copies of only such documents as has been relied upon by the detaining authority for reaching the satisfaction have to be supplied. In *J. Abdul Hakeem v. State of Tamil Nadu* (2005) 7 SCC 70, the Supreme Court referred to several earlier judgments and has held that the detainee has a right to receive documents taken into consideration by the detaining authority while formulating the terms of detention and non-supply of each and every document does not provide a ground for setting aside the detention order. The detainee, therefore, has a right to be supplied with material documents, on which reliance is placed and not a document referred to in the order, which is not relied upon for forming the opinion or made the basis of passing of the detention order. The crux of the matter lies in whether the detainee's right in making the representation against the order of detention is hampered with. The last sentence, it is apparent to us, is the principle or test to be applied. The answer could vary from case to case, and accordingly, the final outcome.

18. The detainee, as apparent from the above, had asked for the audio recording of conversation allegedly between him and Chandan Kumar Jain, as he wanted to hear the said conversation for making effective representation. As is noted above, one of the aspect and issue raised and arises for consideration is whether the detainee is a

participant in the conversation. The detainee had furnished his voice samples but the CFSL report does not confirm that the audio file includes voice of the detainee. The detainee had earlier in his statement recorded on 5th August, 2013, recorded under Section 108 of the Act, stated that he did not recognize voices of the persons in the recorded conversation. The contention on behalf of the detainee is that the purported conversation in the audio file was not downloaded or noticed on 13th June, 2013. It was allegedly down-loaded only on 30th July, 2013 and the mobile phone had remained in the custody of the respondents, in this period, though in a sealed paper envelope. It was unlikely and irrational to expect and believe that the detainee would record his conversation with Chandan Kumar Jain, after the consignment had been seized. The recording served no purpose or benefitted the detainee. No other audio file except “*Gurbani*” was downloaded. These aspects, it is highlighted, could have been effectively raised and elucidated, if the audio file was made available. The free transcript cannot be equated with the audio file in the present case, in terms of the questions and issues arising for consideration.

19. The another question which would arise, it is submitted, relates to the downloading of data, which as noted above, was initially downloaded on 13th June, 2013, and then again after about 45 days on 30th July, 2013. It has been urged that the respondents or the technical

expert who was present on 13th June, 2013, would not have missed the said file, when the data was initially down-loaded. In this context, it is submitted that there was no reason and cause for the detainee to record a conversation, highlighting the conversation itself mentions that the telephone of the detainee and Chandan Kumar Jain was already tapped. These facts could have been ascertained and incongruities highlighted only on examining and hearing the audio file.

20. The detaining authority, it has been accepted by the respondents during the arguments, had heard the audio file and also the sample voice recording. It is therefore contended by the petitioner that contrary to the pleadings, in the counter-affidavit dated 20th April, 2015 and the assertion in the detention order, the detaining authority, for formation of opinion, had heard the two files to reach and form her conclusion that the detainee was one of the two persons in the said conversation. It is submitted that the assertion that the audio file and voice sample were not the primary evidence is wrong and incorrect. The audio files should have been provided.

21. We have referred to the said contentions on behalf of the detainee only to highlight the submission made that failure to supply the audio file of the conversation, in the facts of the present case, would cause prejudice and mere supply of the free translation was not sufficient for making weighty and effective representation. We find

merit in the said contention in the facts of the present case. The detainee should have been supplied the audio file No.2 in order to make an effective representation. This was possibly the most patent, crucial and decisive material and evidence against the detainee. He had the right to meet and challenge this evidence. That right and chance should not have been denied. This would be contrary to equity and law. The detainee has right to show and support his contention that there was tampering and/or the conversation did not have his voice. He should know what was heard by the detaining authority, before formulating her opinion. In this context, it was submitted by the petitioner that every recording on the phone need not have detainee's voice. Free translation text would lose its connection with the detainee, in case the detainee was not the person, who had conversed with Chandan Kumar Jain or if there was interpolation or tampering. We at this stage, note that as per the forensic report voice of Chandan Kumar Jain is present in the said audio file. The stand and stance of the detainee may be wrong, fallacious and farcical but the detainee has right to raise contentions and meet the assertions against him by referring to the evidence relied upon. Right to make representation is a precious and preserved right. Final decision is the conclusion and termination after examination of the representation.

22. Learned Additional Solicitor General has submitted that the audio file was heard by the detainee on 5th August, 2013, and, therefore, no prejudice is caused. We do not think this argument should be accepted, as at that time, preventive detention order had not been passed. The argument, in fact, accepts importance of the audio file and it's relevance. It is not the case of the respondents that a copy of the audio file was made available to the detainee at any time. Free translation, we note, is a secondary evidence and not primary evidence. The audio file is the primary evidence and in the facts of present case, the contention raised is not with regard to the free text provided but the question whether the free text is the true and correct and whether but the detainee is a participant in the recorded conversation.

23. Recorded conversations or tape records of speeches are documents as defined in Section 3 of the Evidence Act [see *Ziyouddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*, (1976) 2 SCC 17]. Audio and video tapes are considered and can be clinching and authoritative evidence. They could be the primary evidence about an event or any happening. In some cases, like the present case, they may turn out to be the most crucial piece of evidence. However, the Courts, before relying upon audio or video tapes, exercise caution as electronic evidence are susceptible to tampering and alterations by transposition, excision, etc. These may be difficult to detect and, therefore, care and

guardedness has to be exercised to rule out possibility of any kind of tampering, alterations, etc. Standard of proof about its authenticity and accuracy has to be more stringent as compared to documentary evidence. In *Tukaram S. Dighole Vs. Manikrao Shivaji Kokate*, (2010) 4 SCC 329, the Supreme Court while dealing with an election petition has referred to the following case law on the subject:-

“24. In *Yusufalli Esmail Nagree v. State of Maharashtra*, this Court observed that since the tape-records are prone to tampering, the time, place and accuracy of the recording must be proved by a competent witness. It is necessary that such evidence must be received with caution. The court must be satisfied, beyond reasonable doubt that the record has not been tampered with.

25. In *R. v. Maqsd Ali*, it was said (QB p. 701 D-E) that it would be

“wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded [are] properly identified.... Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case.”

26. In *Ziyouddin Burhanuddin Bukhari*, relying on *R. v. Maqsd Ali*, a Bench of three Judges of this Court held that the tape-records of speeches were admissible in evidence on satisfying the following conditions:

“(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.”

Similar conditions for admissibility of a tape-recorded statement were reiterated in *Ram Singh v. Col. Ram Singh* and recently in *R.K. Anand v. Delhi High Court*.

27. Tested on the touchstone of the tests and safeguards enumerated above, we are of the opinion that in the instant case the appellant has miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the respondent. Admittedly, the appellant did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the respondent or his agent. On a careful consideration of the evidence and circumstances of the case, we are convinced that the appellant has failed to prove his case that the respondent was guilty of indulging in corrupt practices.”

24. In *R.K. Anand v. Delhi High Court*, (2009) 8 SCC 106, question of admissibility of electronically recorded and stored evidence used in contempt proceedings had come up for consideration. In the said decision, on the question of voice identification, reference was made to the decision of the Supreme Court in *Ram Singh Vs. Col. Ram Sing*, 1985 Supp SCC 61 and the following paragraph was quoted:-

“32. Thus, so far as this Court is concerned the conditions for admissibility of a tape-recorded statement may be stated as follows:

- (1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
- (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence—direct or circumstantial.
- (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
- (4) The statement must be relevant according to the rules of the Evidence Act.
- (5) The recorded cassette must be carefully sealed and kept in a safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”

The above said decision also refers to ***R.V. Stevenson*** (1971)

1 Al ER 678, wherein it has been observed:-

“... Just as in the case of photographs in a criminal trial, the original unretouched negatives have to be retained in strict custody so in my view should original tape recordings. However one looks at it, whether, as counsel for the Crown argues, all the prosecution have to do on this issue is to establish a prima facie case, or whether, as counsel for the defendant Stevenson in particular, and counsel for the defendant Hulse joining with him, argues for the defence, the burden of establishing an original document is a criminal burden of proof beyond reasonable doubt, in the circumstances of this case it seems to me that the prosecution have failed to establish this particular type of evidence. *Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original—is not the primary and best evidence—that seems to me to create a situation in which, whether on reasonable doubt or whether on a prima facie basis, the judge is left with no alternative but to reject the evidence.* In this case on the facts as I have heard them such doubt does arise. That means that no one can hear this evidence and it is inadmissible.”

25. In ***Vijay Ranglal Chorasaya v. State of Gujarat***, (2014) 12 SCC 400, the Supreme Court relied upon identification of voice in the tape recording machines set up by the police for surveillance. Reference in this regard can be also made to a recent decision of the Supreme Court in ***Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke***, (2015)

3 SCC 123, wherein it has been observed:

“16. It is to be noted that in the first complaint filed by the second respondent, the de facto complainant, there is no allegation for any demand for bribe by the appellant. The allegation of demand is specifically against Accused 2 only. That allegation against the appellant is raised only subsequently. Be that as it may, the only basis for supporting the allegation is

the conversation that is said to be recorded by the voice recorder. The Directorate of Forensic Science Laboratories, State of Maharashtra vide Annexure B Report has stated that the conversation is not in audible condition and, hence, the same is not considered for spectrographic analysis. The learned counsel for the respondents submit that the conversation has been translated and the same has been verified by the panch witnesses. **Admittedly, the panch witnesses have not heard the conversation, since they were not present in the room. As the voice recorder is itself not subjected to analysis, there is no point in placing reliance on the translated version. Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for an electronic evidence, as held by this Court in *Anvar P.V. v. P.K. Basheer* (2014) 10 SCC 473.”**

(emphasis supplied)

26. We have referred to these decisions which relate to contempt, election, civil or criminal proceedings, for the reasons that they set out and explain the importance of voice identification and prudence and caution which has to be exercised when electronic recording is the substratum of a case or a finding. We are not suggesting that the same principles would apply and have to be followed when the detaining authorities pass an order of preventive detention. The standards and requirements are different and would vary according to the facts. However, these judgments lucidly bring out the importance of voice identification, source and authenticity of electronic evidence, even when free translation is relied upon. It is not a substitute and does not negate the significance and importance of the audio or video recording.

27. In view of the aforesaid discussion, we hold that there has been a grave lapse and failure on the part of the respondents in not supplying

the audio recording of the conversation stated to be between the detainee and Chander Kumar Jain. The detainee had specifically asked and prayed that he wanted to hear the audio file. This failure has caused prejudice and curtailed and repudiated the right of the detainee to make effective representation. This being contrary to law, the writ petition must succeed. Accordingly, we allow the present writ petition and quash the detention of the detainee Rupinder Singh Chadha. In the facts of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

MAY 29th, 2015
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