

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.138 OF 2015.

Mr. Imtiyaz Hussain, S/o Abdul Qaiyum, 35 years of age, married And residing at House No.26, 'Ayesha Manzil', Shadi ST, District Bhatkal, State Karnataka Represented herein by his Brother in law, Mohammed Mubeen Durga 46 years of age, Indian National, and residing at Residing at 'Majid Villa' , Shaukat Ali Road, Bhatkal-Karnataka.

..... Petitioner.

Versus

1. The Central Government Secretary, Government of India, Ministry of Finance Department of Revenue Central Economic Intelligence Bureau, 6th Floor, "B" Wing, Janpath Bhawan, Janpath, New Delhi 110 001.

2. ~~Harmeet S. Singh~~, The Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, 6th Floor, Janpath Bhawan, Janpath, New Delhi-110 001.

..... Deleted as per order dated 21.10.2015.

3. The Commissioner of Custom, Air Intelligence Unit of Customs at Dabolim Airport.

4. The Superintendent of
Modern Central Jail,
Colvale Bardez, Taluka,
North Goa. Respondents.

Ms. A. N. Ansari, Advocate for the petitioner.

Shri M. Amonkar, Central Government Standing Counsel for the
respondent nos.1 and 2.

Shri C. A. Ferreira, Advocate for the respondent nos.3.

**Coram:-F. M. REIS,
NUTAN D. SARDESSAI, JJ.**

Reserved on:-6th June, 2016.

Pronounced on:-22nd June, 2016.

JUDGMENT (Per Nutan D. Sardessai, J)

The petitioner herein has challenged the order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1976 ("COFEPOSA Act" for short hereinafter).

2. The detention order dated 31.3.2015 was issued by the respondent no.2 against him under Section 3(1) of the COFEPOSA Act, with a view to preventing him in future from acting in any manner prejudicial to the smuggling of gold and allied object. The detention order was served on him on 3.8.2015 and he was taken in detention. He was served with a copy of the detention order with the grounds of detention and the list of documents were purported to have been placed before

the Detaining Authority and purported to have been referred to and relied upon by the Detaining Authority. The impugned order of detention was also served on him on 28.7.2015.

3. In the brief facts, on 7.7.2014, the officer of the Customs seized 19.491 kgs of gold from the possession of three international passengers including the petitioner who arrived at the Dabolim Airport Goa from Doha and were placed under arrest. The petitioner assailed the detention order dated 31.3.2015 as being belatedly served on him on 28.7.2015 i.e after a lapse of four months. It was incumbent upon the Detaining Authority to disclose to this Court as to whether the action under Section 7 of COFEPOSA Act was taken which was mandatory in nature. It was incumbent upon the Detaining Authority to disclose to this Hon'ble Court whether during the interregnum period between the detention order and that of its execution on 28.7.2015, whether the detinue had indulged in prejudicial activities and/or if had come to the adverse notice of the Sponsoring Authority or any other authorities.

4. The belated service of the detention order had impaired the subjective satisfaction arrived at by the Detaining Authority and therefore, the detention order was malafide, null and void. It was also urged on behalf of the petitioner that

there was innumerable pages in the relied upon documents which were illegible and it was incumbent upon the Detaining Authority to call for the legible copies of the vital documents from the Sponsoring Authority and give legible copies to the petitioner alongwith the grounds of detention. In case the Detaining Authority had considered the illegible documents before arriving at its subjective satisfaction, then the satisfaction so arrived at by the authority was sham and unreal and the detention order suffered from a non-application of mind on the part of the Detaining Authority. The right of the petitioner under Article 22(5) of the Constitution of India was thus infringed and therefore, the impugned order of detention was malafide, null and void.

5. Assuming that the petitioner was detained by the Officer of CISF of Dabolim Airport on 7.7.2014 and there was a seizure of gold, his statement was recorded on 7.7.2014, 15.7.2014, 1.8.2014 and 23.9.2014 unlike the detention order which was issued belatedly on 31.3.2015 after a lapse of 9 months from the investigation in the matter there was inordinate and inexcusable delay of 9 months in issuing the detention order particularly when the show cause notice was issued to him on 1.1.2015. In the entire process the live link had snapped and the credible chain, if any, had been broken. It was incumbent

upon the Detaining Authority to disclose to this Court when the proposal for detention of the petitioner was received by the Detaining Authority and the time taken for scanning the material consisting of 3219 pages and formulating the grounds of detention and thereafter issuing the order of detention. This Court had to peruse the proposal of the Sponsoring Authority, compare it with the grounds of detention and in case it was found that the proposal had been adopted by the Detaining Authority, the impugned order of detention would be vitiated on the ground of non-application of mind on the part of the Detaining Authority and therefore, null and void.

6. Assuming without admitting that the Detaining Authority had himself scanned all the documents and the entire material and formulated the grounds of detention, it was enjoined upon the Detaining Authority to disclose to this Court whether it had considered all the documents and the entire material together at one and the same time. It was incumbent upon the Sponsoring Authority to place before the Detaining Authority a copy of the retraction bearing No. Cri. Misc. Appl. No.475/2014/A dated 4.8.2014 filed before the CJM, South Goa, Margao which was a vital document that would have influenced the mind of the Detaining Authority one way or other. Non-consideration of the said vital documents by the Detaining

Authority showed non application of mind and a causal exercise of the powers in issuing the detention order. The petitioner was thus deprived of his right guaranteed under Article 22(5) of the Constitution of India and therefore, the detention order was malafide, null and void.

7. The case of the Detaining Authority as per the grounds of detention was that the petitioner, an NRI had come from Dubai carrying 2.999 gold bars, foreign currency and Indian currency equivalent to ₹7,32,806/-. The Detaining Authority had considered during the search that there was cash declaration report of the Dubai customs. As such, bringing of gold as well as the foreign currency was not an offence under the Customs Act and moreover assuming that the gold has not been declared it could be given back to him on payment of the redemption fine and personal penalty and the preventive detention action could have been taken as a last resort. Moreover, after his detention, he was released on bail and his passport was returned to him. He had travelled abroad four times which aspect had not been considered by the Detaining Authority before arriving at the subjective satisfaction and therefore, displaying the non-application of mind and the casual exercise of powers in issuing the detention order. The petitioner on such and similar grounds thus prayed for the issue of a writ of Habeas corpus or any other

appropriate Writ, order or direction to quash and set aside the order of detention and a direction that the petitioner be set at liberty.

8. The respondent in reply had set out in detail the material which had to be first collected in the investigation to ascertain the involvement of different persons in the smuggling of gold. The persons involved had to be identified, evidence collated and as per the respondents it took time as the statements had to be recorded and facts too had to be verified. Besides each stage required the application of mind and a detailed examination and detention order could not be passed in haste and hurry without evidence justifying such action. The detention order would not become stale because of the time gap between the occurrence which becomes the substratum of the detention order, if the authorities could explain the reason and cause for the period in question. The respondents had explained the delay between 31.3.2015 to 5.5.2015 as more than 3000 papers had to be photocopied besides the CD's and other electronic evidence had to be prepared moreover 10 detenues had to be served and it was time consuming process.

9. Ms. A. N. Ansari, learned Advocate for the petitioner submitted that there was a delay of 9 months in the issuance of

the detention order dated 31.3.2015 considering that the alleged incident took place on 7.7.2014 and that their statements were recorded from that date till lastly on 6.9.2014. All their statements were available before the Sponsoring Authority on 6.9.2014 apart from the necessary material while the proposal for detention was sent only on 23.12.2014 as per the time chart relied upon by the respondents and hence there was very little time for the Detaining Authority to apply its mind to the material running into 3219 pages and preparing the grounds of detention and issuing the order of detention not only against the petitioner but also against 9 other detainees involved in the same transaction.

10. Ms. A. N. Ansari, learned Advocate for the petitioner submitted that the grounds of detention moreover were running into 3219 pages and a question arose whether the separate proposals were sent in respect of the 10 detainees or it was a joint proposal. She relied in **Mushiruddin Khatahsab Bepari Vs. The State of Maharashtra [Criminal Writ Petition No. 539 of 2008]**. She also raised a point that the live link was broken on account of the delay. She further relied in **Umesh Chandra Verma Vs. Union of India and anr. [Criminal Appeal No. 578 of 1986]**, **Kirti Sujit Satam Vs. State of Maharashtra [2008 ALL MR(cri) 774]**, **Ajay Bajaj Vs. State**

of Maharashtra [2011 All Mr.(Cri) 726], S. K. Nizmuddin Vs. State of West Bengal[Air 1974 Sc. 2353], Saeed Zakir Hussain Malik Vs. State of Maharashtra [(2012) 8 SCC 233], Adishware Jain Vs. Union of India[(2006)11 SCC 339, Ahmad Nassar Vs. State of Tamil Nadu[(1999)8 SCC 473, Vishal Tamhanekar Vs State of Maharashtra[Writ Petition No. 3129 of 2015].

11. Shri C.A. Ferreira, learned Advocate for the respondent no.3 relied in **Haradhan Saha Vs. The State of West Bengal and others, [(1975) 3 SCC 198]** which culled out the principles in the matter of preventive detention, adverted to the grounds of detention and the reply to buttress a plea that no interference was called for with the order under challenge. He relied in **Union of India and others Vs. Arvind Shergill and another, [(2000) 7 SCC 601], Harpal Singh Vs. Union of India,[WP(CrI) 1386 of 2015], Bhawani Verma Vs Union of India and others, [WP(CrI)1214/2015]** distinguished that in Ahmed Nassar (supra) apart from those in Umesh Chandra, Kirti Satam, Ajay Bajaj, Adishwar Jain, Shabbirbhai Bookwala Vs The State of Maharashtra [Cri. WP no.764/2011], Dropti Devi and anr. Vs. Union of India and others,[(2012) 7 SCC 499] and further relied in Smt. Icchu Devi Choraria Vs. Union of

India, [(1980) 4 SCC 532. Shri M. Amonkar, learned Central Government Standing Counsel for the respondent nos.1 and 2 too was heard in the matter.

12. **Haradhan**(supra) spelt out essentially the concept of preventive detention being the detention of a person was not to punish him for something he had done but to prevent him from doing it and that the power of preventive detention was qualitatively different from the punitive detention. The power of preventive detention was a precautionary power exercised in a reasonable apprehension. It may or may not relate to any offence.

13. In **Ichu Devi** (supra), an order of detention dated 27.5.1980 was served on Mahendra Choraria i.e the detenu on 4.6.1980 and he was taken under detention. The order of detention recited that the Governor of Maharashtra was satisfied with respect to the detenu that, with a view to preventing him from smuggling goods and abetting the smuggling of goods, it was necessary to make an order directing him to be detained and by an order of detention the Governor of Maharashtra in exercise of the powers conferred under sub-section(1) of Section 3 of the COFEPOSA Act directed that the detenu be detained under the Act. Simultaneously, another order was issued by the

Governor directing that the detenue be detained in the Nasik Road Central Prison. When the petitioner was arrested and taken under detention he was also served with the documents dated 25.5.1980 containing the grounds of detention as required by sub-section (3) of the COFEPOSA Act read with clause(5) of Article 22 of the Constitution of India. The grounds of detention referred to the several documents and statements including two tape-recorded conversations, one between the detenue and one Ahluwalia and the other between the detenue, Ahluwalia, and an advocate named Mehta.

14. In **Ichhu Devi** (supra), the detenue addressed a letter dated 6.6.1980 to the Deputy Secretary to the Government of Maharashtra requesting at the earliest to send all the statements, documents and material to enable him to make an effective representation against his detention and also to send his representation dated 9.6.1980 to the Deputy Secretary requesting him to supply immediately the documents, statements and material relied upon in the grounds of detention so that he could make an effective representation and also specifically calling upon the Deputy Secretary to furnish the transcripts of the tapes as also the original tapes for his inspection so that he could prove that the voice recorded on the tapes was not his. The representation was admittedly received

by the Deputy Secretary on 14.6.1980 followed by another communication to the Deputy Secretary at the instance of detainee requesting him to supply one accurate copy of the tapes so that they could have them played and decide that the voice on the tapes was not his and to know on whose final satisfaction the order of detention was made.

15. In **Ichhu Devi** (supra), The Hon'ble Apex Court referred to one ground which in their opinion was fatal to the continue detention of the detainee in custody even though there were several grounds on which the detention was challenged in the petition. Their Lordships of the Apex Court were not unmindful of the fact that the COFEPOSA Act has been enacted for the purpose of eradicating the evil of smuggling which is eating into the vitals of the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the Court releasing a person detained under the Act, it is quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. At the same time, it was observed that they could not forget the power of preventive detention was a draconian power justified only in the interest of public security and order and it was tolerated in a free society

only as a necessary evil. The power to detain without trial was an extraordinary power constituting encroachment on the personal liberty and it was the solemn duty of the Courts to ensure that this power was exercised strictly in accordance with the requirements of the Constitution and the law. The Courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind.

16. In **Icchu Devi** (supra), Their Lordships considered Clause (5) of Article 22 of the Constitution which reads as below:-

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

Thereafter their Lordships considered sub-section 3 of Section 3 of the COFEPOSA Act which provides as below: -

"For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order, on

the grounds on which the order has been made shall be made, as soon as may be, after the detention, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days from the date of detention."

17. In **Icchu Devi** (supra), Their Lordships found that the grounds of detention were served on the detainee on 4.6.1980 but the grounds which were served upon him did not include the documents, statements and other material relied upon in the grounds and forming part of them precipitating a representation at his instance to the Deputy Secretary seeking such statements, documents and material to ask an effective representation against his detention. However, copies of these documents, statements and other material were not supplied to the detainee till 11.7.1980 and the copies of the tapes were furnished to him even later on 20.7.1980. It was clear from the discussion that under Clause(5) of Article 22 of the Constitution of India read with Section 3, sub-section (3) of the COFEPOSA Act, the Detaining Authority was bound to supply the copies of the documents, statements and other material relied upon in the grounds of detention to the detainee within 5 days from the date of the detention i.e on or before 9.6.1980 and in any event

assuming that there were exceptional circumstances and the reasons for not supplying such copies within 5 days were recorded in writing, such copies should have been supplied to the detainee not later than 15 days from the date of detention i.e on or before 19.6.1980.

18. In **Ichhu Devi** (supra), Their Lordships observed that it was not the case of the Detaining Authority that the reasons for not supplying the copies of the documents and the statements and other material within 5 days were recorded in writing nor were such reasons produced before the Court but even if such reasons were recorded in writing, the Detaining Authority could not delay the supply of the copies of the documents, statements and other material to the detainee beyond 19.6.1980. Therefore, there was no doubt in the case at large that continuance of the detention of the detainee after 19.6.1980 was unconstitutional and it was not open to the Detaining Authority to seek to justify the continued detention on the ground that there were sufficiently compelling reasons which prevented it from supplying the copies of the documents, statements and other materials to the detainee until 11.7.1980 and copies of the tapes till 20.7.1980. This judgment is clearly distinguishable in the fact of the case where Their Lordships found it necessary to allow the petition and directed the

immediate release of the detainee from the detention.

19. In **Union of India** (supra), the respondent husband was arrested on 3.8.1998 by the Custom Authority on the suspicion that he was in possession of foreign currency, US dollar 66,217 at Sahar International Airport. He was granted bail on 14.8.1998 and the application for the cancellation of bail was dismissed on 17.11.1998. The appellant no.2 on the same day passed an order directing the detention of the respondent husband alongwith the grounds of detention indicating that the same was under Section 3(1) of the COFEPOSA Act on the basis that it was necessary to make the order with a view to preventing him from smuggling of goods in future. In the grounds it was stated that though he was found indulging in a solitary incident, the organised manner in which he had indulged in such activities reflected his potentialities and propensity to continue to indulge in such activities in future and therefore, it was necessary to detain him so as to prevent him from smuggling goods. This detention order was challenged by his wife in the Writ Petition filed before the High Court.

20. In **Union of India** (supra), two preliminary objections were raised in the High Court, one as to its jurisdiction and the other that it was pre-detention case and the

Court should not interfere with the same. The High Court held against the appellant on both the points giving rise to the appeal before the Supreme Court. It held that the High Court had virtually decided the matter as if it was sitting in appeal on the order passed by the Detaining Authority. The action by way of the preventive detention was largely based on the suspicion and the Court was not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person.

21. **Subhash Popatlal Dave Vs. Union of India and another[(2014)1 SCC 280** held as follows:-

"It is the settled position of law declared by this Court in a number of cases that absence of live nexus between material forming the basis and the satisfaction (opinion) of the State that it is necessary to preventively detain a person is definitely fatal to the preventive detention order. All those cases where the Courts have quashed the orders of preventive detention on the theory of lack of 'live nexus' are cases where the detention orders were executed but not cases of non execution of the detention orders for a long lapse of time after such orders came to be

passed.”

22. It was contended on behalf of the petitioner that on account of 9 months delay, the live link had snapped and such delay was fatal to the detention order and therefore the order deserved to be quashed.

23. **Vinod Chawla** (supra), challenged in appeal by Special leave the judgment and order passed by the High Court of Delhi by which his Writ Petition challenging the detention order against him under Section 3(1) of the COFEPOSA Act was dismissed. The detention order was passed on 12.2.1997 but the same could be served upon him after more than a year on 12.3.1998 when he was taken into custody since he was absconding. The appellant had undergone the period of detention but was pursuing the appeal as he was threatened with the proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. The grounds of detention make a reference to a statement made by his son before the officer of DRI on 7.1.1997 and 8.1.1997, however he was produced before the ACMM, New Delhi on 8.1.1997 and he specifically retracted the statement lastly made by him before the officer of DRI.

24. In **Vinod Chawla** (supra), it was however not placed by the Sponsoring Authority before the Detaining Authority and therefore, according to the learned Counsel for the appellant a vital document which would affect the opinion of the detaining authority one way or other was suppressed and was not placed before him and the detention order passed against the appellant was illegal. The Hon'ble Apex Court however, rejected the contention and held that the detention order was not at all based on the statement of the detainee's son nor any support was taken by the Detaining Authority to come to the conclusion that the appellant was the owner of the firms which placed orders for the import of various items and invoices whereof were deliberately grossly undervalued in order to evade customs duty and huge sum of money was remitted through illegal channels. The detention order was not based upon the statement of detainee's son but only a passing reference was made to it. Had the appellant retracted from his statement and the said retraction was not placed before the Detaining Authority the position may have been different as in such a case it could be urged that the formation of the opinion by the Detaining Authority and subjective satisfaction in that regard had been affected but such was not the case here. The retraction of the statement by the detainee's son had no bearing as it in no way could affect the formation of the opinion and the subjective

satisfaction of the Detaining Authority.

25. In **Ahmad Nassar**(supra), it was held by the Hon'ble Apex Court that non-placement of the material documents before the Detaining Authority and the representation of the detainee wherein he had retracted the earlier alleged confessional statement and offering to pay the duty of goods seized from him to the Detaining Authority after signing the detention order but before issuing the formal detention order, the non-placement of representation before the Detaining Authority vitiated the detention order.

26. In **Saeed Zakir Hussain Malik** (supra), the Hon'ble Apex Court while dealing with the appeal by the brother of the detainee against the judgment of the Bombay High Court held that the question whether the prejudicial activities of a person necessitating the order of passing of detention is proximate to the time when the order is made or the live link between the said prejudicial activities and the purpose of detention is snapped depends upon the facts and circumstances of each case. Though there is no hard and fast rule no exhaustive guidelines could be laid down in that behalf. It is the duty of the Court to investigate whether the causal connection has been broken in the circumstances of each case. However, when there

is undue and long delay between the prejudicial activities and the passing of the detention order, it is incumbent on the part of the Court to scrutinize whether the Detaining Authority had satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay had occasioned. At both the stages i.e. at the stage of passing of the detention order and at the stage of its execution thereof, the delay had to be explained and the Court was required to consider the question having regard to the overall picture. If the delay was sufficiently explained, the same would not be a ground for quashing an order of detention under the COFEPOSA Act. In the case at large the delay in passing the detention order was of 15 months and in the absence of any proper explanation vitiated the order itself and the same was liable to be quashed and set aside.

27. In **S K. Nizamuddin**(supra), the Criminal case in which he was arrested in connection with an incident of theft committed by him on 14.4.1973 was ultimately dropped as the witnesses were unwilling to depose against him and he was discharged. The order of detention was made on 10.9.1973 and the subjective satisfaction of the District Magistrate was based on that solitary incident of theft. The petitioner was thereafter detained on 23.11.1973 pursuant to the detention order. The

State failed to supply the information to the Court as to when the petitioner was discharged. No explanation for the delay in arresting the petitioner was given in the reply filed by the District Magistrate and in those set of circumstances it was held that it could not be said that the District Magistrate had applied his mind and arrived at a real and genuine satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner. The condition precedent for making the order of detention was not satisfied and consequently the order of detention could not be sustained.

28. **Umesh Chandra** (supra), was intercepted by the Officers of the Directorate of Revenue on the evening of 12.6.1985 and a large quantity of alleged contraband gold was recovered from him. He was interrogated on 13.6.1985, almost the whole day and thereafter he was formally placed under arrest at 6.00p.m under Section 104 of the Customs Act. On the same night a detention order was made by the Joint Secretary to the Government of India. It was contended on his behalf that the Detaining Authority could not have possibly applied its mind to the facts and circumstances of the case having regard to the fact that the documents on which the Detaining Authority purported to rely in making the order of detention had run to about 234 pages and the documents included the arrest memo

was prepared at 6.00 p.m on the same evening. To all intents and purposes, the documents and the proposal for detention must have been placed before the Detaining Authority sometime after 6.00 p.m in which case it would certainly be difficult but not impossible to make an order on the same night and in those circumstances concurred with the contention on behalf of the petitioner and quashed the order of detention. This judgment with respect is clearly distinguishable.

29. **Kirti Satam** (supra), the husband of the petitioner was detained under the provisions of the COFEPOSA Act by the order of Detaining Authority dated 26.12.2005. It was submitted that the order of detention could not be served on the detainee as he was not available who was ultimately arrested on 13.8.2007. The grounds of detention was very long documents and the material on the basis of which the grounds had been framed were 1712 pages comprising of 154 documents as found by Their Lordships. On perusing the file Their Lordships found that the file was placed before the Detaining Authority on 26.12.2005 for the first time and then it travelled back and forward and ultimately she signed the detention order and the detention order was issued on the same day. The Police went to arrest the detainee in the night but did not find him at the given address.

30. In **Kirti Satam** (supra), it was contended on behalf of the petitioner that it was physically not possible for the Detaining Authority to peruse 1712 pages comprising of 154 documents which found favour with the High Court on the premise that had the Detaining Authority stated that she was already aware of the facts and also of the grounds of detention that were drafted by her and she had found further generated documents to be relevant for the purpose of the grounds already framed but she undertook to say that she considered all the documents including the further generated documents which in their view was not possible within a short period and by placing reliance in **Umesh Chandra** (supra) held that the Detaining Authority did not even have 12 hours to go through about 1712 pages and for those reasons quashed the detention and directed the release of the detainee forthwith.

31. **Mushiruddin Bepari** (supra), had been detained under the provisions of the COFEPOSA Act by an order of the Detaining Authority dated 6.2.2008. He was arrested on 19.2.2008 and earlier to that he had been arrested in connection with a case on 5.4.2007. The detention order was passed on the basis of the material collected by the concerned authority with regard to the alleged smuggling activities and placed before the

Detaining Authority. According to the respondent, intelligence agency had gathered information that the goods imported at Nhava Sheva Port of certain Delhi-based firms, which were covered by a Bill of Entry for warehousing were being diverted and sold in the market, instead of being taken to the bounded warehouse stated to be located at Haryana and due to which the Government was losing huge amount of customs duty on such illegal diversion and sale.

32. In **Mushiruddin Bepari** (supra) the detainee was an officer of the Customs Department, and according to the intelligence report he had a hand in making the diversion possible. The grounds of detention were spread over more than 50 pages, admittedly the documents which were taken into consideration by the Detaining Authority comprised of 32,521 pages and the annexure to the grounds of detention gave the description of these documents which were supplied to the detainee alongwith the grounds of detention after being brought in a huge tin trunk before the Court. It was contended on his behalf that these documents could not have been considered by the Detaining Authority within a period of 11 days, as it was physically not possible to do so for any person. The Detaining Authority in their counter affidavit stated that after the receipt of proposal of the Sponsoring Authority on 16.10.2007, the

concerned Assistant prepared the detailed note on 29.10.2007 but the concerned Assistant forwarded the papers to the under Secretary who gave his endorsement on 30.10.2007 and forwarded the paper to the Deputy Secretary who after carefully going through the same gave his endorsement on the same and forwarded the papers to him on the same day. He had gone through the said proposal, decided to call the officers from the Sponsoring Authority and accordingly gave his endorsement on 5.11.2007.

33. In **Mushiruddin Bepari** (supra), Their Lordships found that these assertions made in the affidavit were untrue and not supported by any record. The record revealed that the proposal was received by the Detaining Authority on 16.10.2007 as stated by her in the affidavit. After scrutiny by the Assistant he had made certain observations and sent it to the Under-Secretary and Deputy Secretary on 30.10.2007 and went to the Detaining Authority on 5.11.2007. She did not merely endorse it as she had stated in her affidavit, but had said "Issue Detention Order". Therefore, the Detaining Authority had made up her mind to detain the detainee on 5.11.2007 itself obviously without any record pertaining to the case and only on the basis of the note prepared by her clerk, had she passed an order of detention within 5 days of the proposal having been received by

her office.

34. In **Mushiruddin Bepari** (supra), the Detaining Authority had also disclosed that the detainee had forwarded pre-detention representation dated 20.1.2007, received in the department on 21.11.2007 which was forwarded by the concerned Assistant to the Under Secretary who gave his endorsement on 26.11.2007 and who in turn gave his endorsement on the same day. Thereafter para wise comments were called for from the Sponsoring Authority. The concerned Assistant had thereafter prepared a detailed note on 8.1.2008 and forwarded to the under Secretary. During the said period, the detention order in respect of the 4 detainees was issued and the work of stamping the relied upon documents to the tune of 32,456 pages were also examined. The Under-Secretary after going thorough the same made his endorsement and forwarded the same to the Deputy Secretary on 8.1.2008 and forwarded the file before the Detaining Authority. She had accordingly rejected the representation of the detainee and formulated the draft grounds of detention and gave her endorsement on 10.1.2008. Their Lordships found that this statement was not borne out from the records.

35. In **Mushiruddin Bepari** (supra), Their Lordships

found on a consideration of the records that the whole file revealed that the application of mind was not made at all at any stage by the Detaining Authority. The order of detention as a matter of fact was passed on 5.11.2007 and only the order of detention was issued later in February 2008. From 5.11.2007 till 6.11.2008 there was nothing on record to show that the Detaining Authority reviewed her own earlier order, applied her mind to more than 30,000 pages of documents, and came to the subjective satisfaction that the detainee needed to be detained. The order passed on 5.11.2007 could lead to a presumption that there was no application of mind for two reasons, one that no satisfaction was recorded by the Detaining Authority as contemplated under Section 3 of the COFEPOSA Act and consequently it was physically not possible for anybody to read more than 30,000 pages within a period of 5 days and come to the conclusion that the detainee was needed to be arrested. In those set of circumstances was it held that the order of detention could not be sustained and set aside.

36. **Adishwar Jain** (supra) held that delay in passing the detention order must be sufficiently explained. Where the lapse of four months between the proposal for detention and the order of detention was not explained the detention order was liable to be quashed as passed under the COFEPOSA Act. Wasim

Sayyed (supra), challenged the detention order dated 10.7.2015 and the continued detention of Siraz who had been detained under Section 3(1) (ii) and 3(1)(iii) of the COFEPOSA Act to prevent him in future from abetting the smuggling of goods as well as from engaging in transporting of smuggled goods. The detention order was served on the detainee on 13.7.2015 and he was taken in custody. A communication was issued by the principal Secretary i.e the Detaining Authority containing the grounds of detention and list of documents were issued containing statements and other documents purported to have been referred to and relied upon by the Detaining Authority for issuing the detention order. It was contended on his behalf that the order of preventive detention could not have been made belatedly if the incident was serious enough to make an order of preventive detention which was more than 2 months after the date of arrest and 3 months of the detainee giving inculpatory statement.

37. In **Wasim Sayyed** (supra), it was further contended that the detaining order had referred to only 95 pages in the detaining order and therefore, it would demonstrate that the live link had been snapped and the credible chain, if any, had been broken. It was incumbent on the part of the Detaining Authority to disclose to the Court as to when he had considered

all the documents and the material whether they were received and considered piecemeal. Besides the Detaining Authority had to indicate the duties and the details as regard to the information sought from the Sponsoring Authority. The Detaining Authority was in possession of all the documents sought on 5.5.2015 itself and therefore it was impossible to suggest that there were any further documents.

38. In **Wasim Sayyed** (supra), the investigation had started on 08.4.2015 and the detainee was arrested on the same date while the proposal was drawn and submitted before the agency concerned for approval on 24.4.2015. After the approval was received, four brief sets and indexed relied upon documents were submitted to the office of the Detaining Authority while the affidavit revealed that further generated documents and information as called by the Detaining Authority were sent on 6.5.2015. It was therefore, contended that if all the statements and the documents were duly forwarded as indicated in the affidavit and were received in the office of the Detaining Authority, there was no justifiable explanation for having delayed the order of detention. It was contended on his behalf that there was no apparent inconsistency and contravention inasmuch as in the affidavit in reply filed by Shri Singh, the Detaining Authority it was stated that the Sponsoring Authority

had forwarded 31 documents running into 78 pages alongwith the proposal by the letter dated 30.4.2015 and further 8 documents were generated by the letter dated 15.6.2015 and 24.6.2015. It was therefore, contended that the Detaining Authority was now seeking to improve their version in the affidavit of the Sponsoring Authority and it was completely silent with regard to any further generated documents.

39. In **Wasim Sayyed** (supra), it was contended on his behalf that there was no justification why the documents were received on 30.4.2015 and the scrutiny of the proposal received from the Sponsoring Authority was not taken upto 13.5.2015. Their Lordships firstly considered the ground of delay and non-application of mind to deal with the petition. Insofar as the delay was concerned, it was found that the arrest of the detainee was on 8.4.2015 while the Sponsoring Authority had prepared the requisite proposal and despatched it to the Detaining Authority on 30.4.2015. The detention order was issued on 10.7.2015 i.e. after more than 2 months and 10 days. It was also noticed that in the affidavit in reply filed by the Sponsoring Authority, it took a plea that there was no delay and the proposal was purportedly drawn, got approved and despatched. It was further observed that the Deputy Secretary filed an affidavit in the matter of delay admittedly that there was a delay

of 2 months 10 days after the receipt of the proposal from the Sponsoring Authority. However, he tried to explain that the delay was bonafide because the Detaining Authority was required to consider the statement of the other persons relied in the case and the same were included in the relied upon documents served on the detainee.

40. In **Wasim Sayyed** (supra), Their Lordships found that the last statement recorded was on 15.6.2015 and forwarded to the Detaining Authority. It was observed that this statement did not indicate as to when the Sponsoring Authority forwarded it to the Detaining Authority, when it was received and whether the total proposal contained either 79 or 95 pages. It was therefore obvious that the Detaining Authority after receiving the proposal sat on it for months together. It first made the move on mid-May, 2015 after the initial procedural compliance as now sought to be explained and thereafter placing it before the Detaining Authority which process was completed on 29.5.2015. The Additional information raised on some points in the scrutiny note was called for by the letter dated 29th May, 2015. A note regarding a reminder was put up on 16.5.2015 and the Sponsoring Authority forwarded the information by a letter dated 15.6.2015. Thereafter asserting that this information went through a Section Officer and was placed before the

Deputy Secretary and the Detaining Authority issued the order on 10.7.2015. Their Lordships found that all these factors to their mind did not provide any explanation and and it was an attempt to improve upon the version which were placed before it. Their Lordships ultimately found favour with the contention on behalf of the petitioner that the order of detention was vitiated by delay in making the same and for that reason allowed the petition and ordered the detinue to be set at liberty forthwith, if not required in any other case.

41. In **Dropti Devi** (supra) the Hon'ble Apex Court held that there is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the State security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State. Strictly speaking, preventive detention is not regulation, it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventative detention arms the State

with precautionary action and must be seen as such. Of course, the safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the Court is called upon to examine the legality and validity of an order of preventive detention.

42. It is a matter of record that the detention order dated 31.3.2015 was running into almost 270 pages in which the Detaining Authority had considered almost all the relied upon documents i.e. the CCTV footage, bank transactions, income tax returns, call details and the call location amongst other documents including the statement made as such by all the suspects including the present detainee and thereafter arrived at a conclusion that the petitioner's acts of omission and commission indulged in smuggling activities apart from the nature and gravity of the offence, the well planned manner in which the detainee had engaged himself in prejudicial activities of smuggling activities and his propensity and potentiality to prevent to indulge in aforesaid prejudicial and smuggling activities in future being high, recorded its satisfaction that there was imminent need to detain the detainee from indulging in such prejudicial activities in future by his detention under Section 3(1)(i) of the COFEPOSA Act and recorded her satisfaction in issuing the detention order.

43. The Detaining Authority had recorded her subjective satisfaction whilst issuing such detention order. The Detaining Authority for that matter also, contrary to the contention of Ms. Ansari, learned Advocate for the petitioner had considered the statement retracted by the detainee and arrived at a subjective satisfaction that it was a fit case to issue the detention order. The Detaining Authority for that matter had made due reference to the list of documents and relied upon documents mentioned in the list and which had been served on the detainee at the time of serving the detention order. The time chart relied upon on behalf of the respondents shows that the proposal for the preventive detention under the COFEPOSA Act was submitted on 23.12.2014 and the Screening Committee recommended the proposal on 15.1.2015.

44. It is equally borne out that the additional information and documents were sought for by the Screening Committee simultaneously with the recommendation of the Screening Committee. On 16.2.2015 a reminder was issued to the Sponsoring Authority calling for the additional information and thereupon on 19.2.2015 a request was made for expediting the documents. Considering thus the time chart it cannot at all be heard on behalf of the petitioner that the Detaining Authority

had not appraised itself with the relied upon documents submitted alongwith the proposal for detention. There is thus no basis in the contention on behalf of the petitioner that the detention order was belatedly served on the detenue for it to be malafide, null and void inasmuch as it was not particularly in dispute that after his release on bail on 10.7.2015 the petitioner was not available, had travelled abroad four times and returned.

45. Besides it was the case of the respondents that the petitioner was not available and that it had even taken recourse to Section 7(1)(b) of the COFEPOSA Act whereby he was afforded an opportunity of hearing pursuant to the Gazette notification apart from the publication in the local daily. No grievance was made on behalf of the detenue when he was served with the detention order alongwith the accompanying documents that some of the documents were illegible and such a plea was taken now for the first time in the course of the petition filed still later and without a word or whisper in the representation made to the authority. Therefore, the claim on behalf of the petitioner that the documents relied upon by the Detaining Authority were illegible and therefore, the detention order was malafide, null and void is also without any basis. Even otherwise assuming at the highest that some of the referred to documents were illegible, no prejudice was shown to have been

caused to the detainee on account thereof.

46. At one time it was contended on behalf of the petitioner that the live link was snapped on account of the time span between the date of the incident and the order of the detention i.e the period of more than 9 months and at the other that the Detaining authority did not have considerable time to scan through all the relied upon documents before making an order of detention based on the subjective satisfaction. These arguments do not stand together. The respondents have shown from the material on record that the delay in service of the detention order was not deliberately belated and it was well accounted due to the non availability of the detainee till his arrest on 28.7.2015 and the service with the detention order on the same date.

We had otherwise called for the records from the respondent no.2 since an issue was raised on behalf of the petitioner that there was no proper explanation vis-a-vis receipt of the relied upon documents, proposal of the Sponsoring Authority and the examination of the records by the Detaining Authority to canvass that there was no application of mind in passing the detention order. On examination of these records showed that there was no basis in the contention raised on behalf of the petitioner and that premise to arguments of the

petitioner falls through.

47. There is therefore no justification in the contention on behalf of the petitioner that the Detaining Authority had not exercised care and caution while passing the order of detention. There is thus no basis in the challenge to the detention order at the instance of the petitioner and accordingly we pass the following:-

ORDER

The petition is dismissed. Rule stands discharged.

NUTAN D. SARDESSAI J.

F. M. REIS, J.

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