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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment dated 2nd June, 2016**

+ W.P.(CRL) 1060/2016 & CrI.M.(B).708/2016

SMITHA GIREESH

..... Petitioner

Through : Mr.Pradeep Jain, Mr.Shubhankar Jha,
Mr.Tarun Chawla, Mr.Rahul Raheja,
Mr.Ashish Bansal, Mr.Ashish Batra
and Mr.Vikas Sareen, Advs.

versus

UOI & ORS.

..... Respondents

Through : Mr.Anurag Ahluwalia, CGSC,
Mr.Shreya Sinha and Ms.Srishti
Bannerjee, Advs. for respondents no.1
and 2.
Mr.Anshuman Srivastava, Adv. for
respondent no.3.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present writ petition has been filed under Article 226 of the Constitution of India for issuance of a writ in the nature of *certiorari* for quashing the detention order F.No.673/05/2015-CUS.VIII dated 31.03.2015 passed by respondent no.2 under Section 3(1)(ii) of the COFEPOSA Act, 1974. The present writ petition has been instituted by the wife of the detainee, (hereinafter referred to as the 'detenue').
2. Notice was issued in this matter. Pleadings are complete. With the consent of the parties, the writ petition is set down for final hearing and disposal. Rule DB.

3. Before the rival submissions of learned counsel for the parties can be considered, we deem it appropriate to notice some of the relevant facts which have given rise to the filing of the present writ petition.
4. As per the petition, during July 1993 detainee joined the Indian Navy as a Sailor and got promoted at various sensitive and important posts during the service and finally he retired as a Petty Officer in the year 2008. During his service there had been no adverse remarks and he received various certificates of his high performance. Thereafter, on 29.10.2008, detainee soon after his retirement from Indian Navy was selected and he joined Intelligence Bureau (IB).
5. As per the petition, the detainee was subsequently posted to Goa Airport as Assistant Central Intelligence Officer (ACIO-II) in the immigration department under the supervision of Intelligence Bureau. Further, detainee got promoted to the post of ACIO-I in the month of June, 2014.
6. On 07.07.2014 while the detainee was on duty as Wing In-charge in the immigration department, it was reported that an incident of arrest of four persons had taken place on the allegation of smuggling of gold by the Customs Department. Out of four persons, three of them were passengers of Flight No.QR522 of Qatar Airways which arrived from Doha and one person was working as a Ramp Supervisor employed by Air India. On 02.08.2014, detainee received a summon dated 1.8.2014 issued under section 108 of the Customs Act issued by the Superintendent of Customs (Preventive Department) for his appearance on 04.08.2014 before the said officer. As per the summon, the detainee had been called for and in connection with an enquiry initiated with regard to alleged seizure of 19.4 kgs of gold at Dabolim Airport, Goa on 7.7.2014. The detainee complied with the summon and duly appeared

before the customs officer on 4.8.2014 when his statement was recorded. Detenue stated that he had no knowledge with regard to the alleged offence of commission of smuggling of gold.

7. Another summon was issued by the Customs Department on 1.09.2014 for the appearance of the detenue on 4.9.2014. Since the detenu was on leave and as such he could not attend on the said date it was accordingly intimated by the detenue telephonically to the IO. In the said summon detenue had been asked to submit certain documents such as his posting order attendance register etc. which were exclusively in the possession of the department. However, detenue duly appeared on the next day, i.e, on 5.09.2014 and his statement was duly recorded by the IO. However, the said statement again continued on the next day, i.e., 6.09.2014 also. During the recording of the statement detenue made it clear that the documents asked for were already in the exclusive possession of the department and as such he was unable to submit the same.
8. As per the petition, on 28.11.2014 an order of transfer was issued to the detenue by the department and by the said order the detenue was transferred to SIB, Bhubaneswar, Orissa. Thereafter an office order No. BOM/BOI/358/2014 dated 10.12.2014 had been issued whereby the detenue has been relieved from his present post *w.e.f.* 15.12.2014 with instructions to report to DD, SIB, Bhubaneswar after availing admissible joining time.
9. From 31.12.2014, the detenue joined the SIB Bhubaneswar and started performing his duties as ACIO-I.
10. A Show Cause Notice dated 1.1.2015 issued by the Customs Department was served to the detenue on 4.2.2015 through his

department. It is the case of the petitioner that on reading the contents of the show cause notice it was noticed that the detenue has been placed as Noticee no.6 and the said show cause notice was issued in connection with the alleged incident of gold smuggling on 7.7.2014 at Goa Airport. The allegations made against the detenue in the show cause notice were that there had been exchange of phone calls between the detenue and one Sh. Javed Mohammad Sheikh who is Assistant Manager of Minar Travels, Goa during the alleged date of incident. The said Minar Travels used to arrange travel facilities like VISA, Tickets, intimation about arrival and departure timings helped in immigration services to their clients being passengers of the chartered flights. Airport entry pass to all the sections had been issued by the competent airport authority to said Javed Mohammad Sheikh for rendering the aforesaid services. Due to the nature of his job Sh. Javed became familiar and friendly with the officials of the airport and used to exchange calls with the officials of the airport. On 7.7.2014 there had been exchange of mobile calls between said Javed and the detenue who was on duty as I.B. officer at the said airport at Goa when the incident of smuggling of gold took place by three passengers who arrived by flight no QR522 from Doha. Though the said exchange of calls between detenue and Sh. Javed was in friendly manner however, the customs authority had given the color to the said friendly call to be as that the detenue was abetting in smuggling by providing 'real time information' through phone calls to Javed.

11. The detenue filed his reply to the above said show cause notice vide its reply dated 18.2.2015 which was delivered to the Dy. Commissioner, Customs on 26.2.2015. By the said reply detenue denied each and every allegation made therein. In the meanwhile, detenu received an order

dated 10.7.2015 from his department deputing him and another person to perform the duty of “Spotters” at Kumbh Mela-15 to be held at Nasik from 25.08.2015 to 25.09.2015. As per the petition, the detenue was working at SIB Bubneswar till 13.7.2015.

12. It is further the case of the petitioner that from 13.7.2015 detenue went on leave for 15 days 13.7.2015 to 27.07.2015 which was requested by the detenue vide letter dated 13.7.2015 and same was duly sanctioned by his office. Further request for extension of leave on medical ground was made by detenue.
13. On 4.8.2015, detenu came to know through his family members that some police officials came to his residence in Kerala on 4.8.2015 in connection with some case at Goa, while he was away for his medical treatment. Detenue thereafter contacted his friends in Goa who informed him that there has been some publication in the Times of India newspaper Goa addition, dated 13.7.2015 wherein his name also appeared in respect of some detention order. Thereafter the detenue got a copy of newspaper of that particular date through his friend in Goa. On reading of the said newspaper, the detenue came to know that a detention order as mentioned above had been issued by the Joint Secretary, Govt. of India against the detenue and by way of said publication the detenu has been directed to appear before the Director General of Police, Government of Goa Panaji.
14. Thereafter, the detenue filed a writ petition before the High Court of Delhi being WP(Crl) 1707/2015 to challenge the above detention order at a pre-execution stage. At the admission stage itself the petition was withdrawn with liberty to file the same at the appropriate stage. As per the petition, the detenue had filed another writ petition number before

the High Court of Kerala being WP (Crl) 400/2015 challenging the impugned detention order at the pre-execution stage. It is the case of the petitioner that the detaining authority had filed a detailed counter affidavit in the above writ petition. The High Court of Kerala dismissed the above writ petition with the observation that the appropriate stage to file the writ petition was after surrendering.

15. After the dismissal of the WP (Crl).400/2015, the detinue challenged the above order by way of filing a Special Leave Petition before the Supreme Court of India as SLP 10372/2015 and the Supreme Court of India dismissed the above SLP upholding the order in the writ petition filed before the High Court of Kerala. Thereafter, the detinue surrendered before the Goa police, at Vasco-police station, Vasco Goa on 28.12.2015.
16. The detinue is presently detained in Sub Jail, Sada, Goa since 28.12.2015. On 29.12.2015 the officials of the sponsoring authority (Superintendent of Customs) had served the ground of detention and relied upon documents to the detinue. At the time of acknowledging the relied upon documents, the detinue had submitted a written representation, stating that some of the relied upon documents are not legible and also requested the sponsoring authority that, the detinue may be provided with an opportunity to view the CD'S (12 in nos) supplied to the detinue along with the relied upon documents. Since the detinue's above request was not acceded by the authorities for the next three weeks, the detinue again on 21.1.2016 forwarded a written request through the Superintendent of Sub Jail, Sada, requesting the officials under the second respondent to immediately make arrangements to view the CD's in order to help the detinue to submit an

effective presentation to prove his innocence, however the request was not acceded to.

17. The present writ petition raises following questions of law:

- A. Whether the lack of subjective satisfaction by the detaining authority while passing of the present impugned order does not vitiate the detention order?
- B. Whether the impugned detention order which has been passed after a long and unexplained delay of almost nine months is sustainable in the eyes of law?
- C. Whether a long delay of almost nine months in execution of detention order does not vitiates the detention order?
- D. Whether the impugned detention order is liable to be set aside due to the serious deliberate latches on the part of the sponsoring authority in the non-placement of the vital documents before the detaining authority before passing the impugned detention order?
- E. Whether the detention order is not liable to be set aside on the ground of violation of detenu's right under Article 22 (5) of the Constitution of India as the detenu has not been provided various relied upon documents or provided documents which are not readable/dim etc. due to which it has created embargo in making effective and adequate representation which is the only right /remedy available to the detenu?
- F. Whether the detention order is not liable to be set aside on the ground of violation of detenu's right under Article 22 (5) of the Constitution of India as the detaining authority failed to show the contents of the CCTV footages so supplied to the detenu?

- G. Whether in the fact and circumstances of the present case, the invocation of preventive detention is bad in law when the ordinary law of the land was available and the same was not resorted to by the sponsoring authority?
- H. Whether the representation of the detainee was considered by the appropriate authority, *i.e.*, the person passing the detention order?
- I. Whether the delay on the part of respondent no. 3 in forwarding the communication and representation of the detainee amounts to violation of the Fundamental Right of the detainee?
18. Mr. Jain submits that the present detention order has been passed in gross violations of the guidelines issued by the detaining authority in matters of preventive detention. Mr. Jain further submits that there has been no subjective satisfaction by the detaining authority and the detention order has been passed for illegal and unlawful purposes. Counsel submits that the detainee was transferred on 28.11.2014 to SIB, Bhubaneswar, Orissa and by a subsequent order dated 10.12.2014, the detainee was relieved from his post at the Airport w.e.f. 15.12.2014.

This transfer order was passed on the basis of a request sent by the sponsoring authority. Counsel has also contended that there has been a long and ordinary delay in passing the impugned detention order. It is contended that the basic principle of passing the detention order is to nab the concerned person and break the live link of the detainee detained with the illegal activities and to prevent him from indulging in illegal activities from the date of the incident. Mr. Jain contends that the incident took place on 07.07.2014 and recording of all the statement was complete by 17.11.2014. A proposal was sent

seeking sanction to invoke preventive detention on 02.11.2014 which was consequently accorded by the Chief Commissioner on 19.11.2014, whereas the detention order was passed only on 31.03.2015. Counsel has also urged that there is a delay in execution of the impugned detention order and non-placement of relevant documents/record by the sponsoring authority before the detaining authority.

19. Another ground raised is the non-supply of relied upon documents, *i.e.*, no CD player was provided to enable the detenu to view 12 CDs which formed part of the relied upon documents.
20. Mr. Jain also submits that the basis of transfer order dated 28.11.2014, the detenu was transferred to SIB, Bhubaneswar, Orissa and thereafter an office order dated 10.12.2014 has been issued wherein detenu has been relieved from his post at the Airport w.e.f 15.12.2014 with instructions to report to DD, SIB, Bhubaneswar after availing admissible joining time and from 31.12.2014 detenu joined the SIB Bhubaneswar and started performing his duties over there as ACIO-I wherein the entire nature of the job was purely relating to collection of intelligence information which is very much different from the nature of the job being performed by the detenu earlier. It is also pointed out that the said transfer order was passed on the basis of the request sent by the sponsoring authority to the parent department of the detenu. Furthermore, the sponsoring authority also sent a communication dated 23.12.2014 to the Director, Dabolim Airport instructing the authorities not to permit the detenu to enter the Airport. It is thus contended by Mr. Jain that since the detenu had already been transferred on the request of the sponsoring authority which was prior to the passing of the

detention order dated 31.03.2015 which order was passed with a view to prevent him from prejudicial activities is wholly unwarranted, per se illegal and the detenu was no longer performing the duty at Goa Airport.

21. As noticed above, although various grounds were raised by the counsel for the petitioner, three grounds have been pressed before us. The first ground raised by Mr. Jain is that relevant documents were not placed before the detaining authority by the sponsoring authority. Mr. Jain has contended that there is a serious lapse on the part of the sponsoring authority in not placing the relevant records/documents before the detaining authority. It is submitted that the Supreme Court in the case of ***Ashadevi wife of Copal Ghermal Mehta (Detenu) v. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat and Anr.***, reported at [1979] 1 SCC 222 held that *“If material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the detaining authority, it would vitiate its subjective satisfaction rendering the detention order illegal.”*
22. Mr. Jain submits that the sponsoring authority did not place before the sponsoring authority the communications by which the detenu stood transferred to SIB, Bhubaneswar, Orissa.
23. Mr. Jain submits that the sponsoring authority has miserably failed to produce the above said letters before the detaining authority. If the same were placed before the detaining authority the detaining authority might have been influenced by the said letters and the outcome of the proposal so placed before the detaining authority would have been different.

24. Respondents no.1 and 2 in the counter affidavit have disputed the fact that these important letters were not brought to the notice of the detaining authority. The respondents in their counter affidavit have clearly deposed that all the relevant material had been placed before the detaining authority and the detaining authority had knowledge of the fact that the detenu was no longer in Goa and had been transferred to Bhubaneswar, Orissa.
25. In the present case as per Annexure 23, the sponsoring authority sent two communications both dated 23.12.2014 to Director, Dabolim Airport and also to Commissioner (Immigration), New Delhi, respectively, wherein the Airport Authorities were instructed not to permit the detenu to enter the Dabolim Airport. In the second letter of even date, the Commissioner (Immigration), the parent department of the detenu, was requested to immediately remove the the detenu from his duties at the Airport.
26. We find force in the submission made by Mr.Ahluwalia, learned counsel for respondents no.1 and 2 as it is not in dispute that a reply to the show cause notice was placed before the detaining authority. Paragraphs 1 of the reply would show that the detenu had informed the respondents regarding the factum of his transfer. Thus, it cannot be said that the detaining authority was unaware about the factum of transfer of the petitioner from Goa to Bhubaneswar.
27. The second submission of the learned counsel for the petitioner is that there has been a delay in execution of the impugned detention order of more than 09 months. The detention order was issued on 31.03.2015 and the detenu was continuing in performing his duties at Bhuvaneshwar even after passing of the said order, *i.e.*, till 13.07.2015.

The counsel contends that the respondents were fully aware of the whereabouts of the detenu which is very much borne out from the record. Even the show cause notice dated 1.1.2015 issued by the sponsoring authority has been served to the detenu through his office. It is also a matter of record that the reply dated 18.2.2015 to the show cause notice was submitted to the sponsoring authority wherein it has been specifically mentioned about the whereabouts of his official place of duties. Counsel submits that it is very much apparent and evident on record that both the sponsoring authority and the detaining authority were fully aware of the whereabouts of the detenu but admittedly no efforts were made to send the detention order at Bhuwaneshwar for its execution. No efforts were made to ensure execution of the detention order therefore the live link from the date of incident is snapped and renders the detention order invalid. It is also pointed out that the detention order was not executed till the surrendering of the detenu on 28.12.2015. The above long and unexplained delay in executing the above detention order vitiates the order and the purpose of passing the detention order itself was vitiated, by the inordinate delay in execution of the detention order. Therefore, the subjective satisfaction is invalid.

28. Mr. Jain points out that as per Annexure 23, the detention order was passed on 31.03.2015 and the master copy thereof reached the sponsoring authority on 02.04.2015 itself. Thereafter the sponsoring authority sent all the documents for execution to the executing authority on 05.05.2015, i.e., after more than one month of the passing of the detention order. That the above act of the sponsoring authority shows the lack of seriousness and the casual approach on the part of the sponsoring authority as well as the detaining authority. It is submitted that the said delay is uncondonable in as much as the relied upon

documents are suppose to be ready for execution at the time of passing of the detention order i.e on 31.03.2015 in the present case otherwise the purpose of the detention order is defeated.

29. In support of his submissions, Mr. Jain relies on the judgments in the case of (1) ***T.A.Abdul Rahman v. State of Kerala***, reported in (1989) 4 SCC 741; (2) ***Rajinder Arora v. UOI***, reported at AIR 2006 SC 1719; and (3) ***Raj Kumar v. UOI & Ors.***, reported at 151 (2008) DLT 770.
30. Per contra, Mr.Ahluwalia, learned counsel appearing on behalf of respondents no.1 and 2, has drawn the attention of the Court to Annexure 5 of the counter affidavit wherein details with regard to the efforts made by respondents no.1 and 2 in execution of the detention order have been given. The relevant portion of the chart reads as under:

Sr. No.	Date	Gist of Event/Events
6.	17.04.2015	A copy of the Detention order dated 31.03.2015 was sent to the Home Secretary, Government of Goa by speed post immediately on 17.04.2015.
7.	05.05.2015	A Copy of the Detention order dated 31.03.2015 was handed over to the Director General of Police, Govt of Goa (the Executing Authority) under acknowledgement along with photographs of the PDs and the SOP proforma containing all the material particulars about the PD, after completion of the following : - The set of documents and recording of CCTV footage and snapshots that were relied upon, when the Grounds of Detention were finalized and the final set of R.U.Ds consisting of 3237 pages each coupled with 12 CD of 8 GB each. - A total of 22 sets of RUDs including 22 Sets of 12 CD of 8 GB each were

		prepared, so that one set each could be provided to each of the 10 PDs immediately after their detention within the mandatory period and their acknowledgment obtained on each page of the other set. In order to ensure that RUDs contain complete and legible contents, each and every page was examined and replaced wherever required, then serially numbered and stamped with office seal.
8.	14.05.2015	Meeting with DIG (Goa) additional photos and brochure with details of Proposed Detenu (PD) handed over.
	Thereafter, the officer working under the Sponsoring Authority i.e. Commissioner of Customs, Goa is constantly liaisoning with the Executing authority i.e. the officers working under the Director General of Police, Govt. of Goa, which is also duly manifested in the following office records: -	
9.	01.06.2015	It has been recorded vide file noting dated 01.06.2015; 1) The ASI Crime Branch has contacted the undersigned asking for the present address as well as place of posting of Shri Gireesh Advalalath Meethal, then Immigration Inspector. 2) I contacted the office of the Chief Immigration Officer to get these details, who after two days or persuasion gave me a phone No. 0674-2391671 said to be pertaining to the Estt. Section SIB, Bhubaneshwar Orissa. On contacted, they refused to divulge these particulars unless a formal request is made, they did not even share their office address. 3) In view of above, a letter to Commissioner (Immigration) New Delhi is placed opposite for signatures please.
10.	01.06.2015	Joint Commissioner of Customs Goa has sent a letter to the "The Commissioner (Immigration) East Block VIII, Level-5, Sector-I R. K. Puram, New Delhi" informing that : -

		1) Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, COFEPOSA Unit, New Delhi, in exercise of powers conferred by Section 3(1) of Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974, has issued a detention order dated 31.03.2015 and directed that the said Shri Gireesh Adavalath Meethal, S/o Shri Gangadharan Nair, be detained and kept in Sub-Jail Sada, Marmagao, Goa. 2) The orders have been handed over to the Director General of Police, Government of Goa for execution. 3) It is therefore requested that complete particulars of the present place of posting as well as the residence of the proposed detainee Shri Gireesh Adavalath Meethal may kindly be supplied to this office 'as soon as possible' to enable us to help the Executing authority in executing the orders issued by the competent authority under Section 3(1) of Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974
11.	02.06.2015	Thereafter the Department received a letter No.PI/EOC/1261/2015 Economic Offences Cell, Goa Police dated 30.05.2015 requesting to furnish the present address of the person to be detained namely Shri Gireesh Adavalath Meethal.
12.	13.05.2015	The Sponsoring Authority i.e. the Commissioner of Customs, Goa as well as the Executing Authority i.e. Director General of Police, Goa have been requested to inform the Ministry about the efforts made to execute the Detention Order.
13.	23.06.2015	The Superintendent of Police (South Goa) vide his Letter F.No. SP/EOC/50/2015 informed the Ministry that the detention order issued against Shri Gireesh Adavalath Meethal, has been forwarded to The District Police Chief, Kozhikode (Rural), Vatakara, Kerala-6773105 on 20.06.2015 with request to take necessary action

		at their end as per the order.
14.	29.06.2015	In response, the Joint Secretary (CFEPOSA) vide her D.O. No. 673/03/2015-Cus.VIII had informed the Executing Authority i.e. the Director General of Police, Goa to continue efforts to trace the proposed detainees and execute the detention orders as early as possible.
15.	30.06.2015	Since the D.O. issued against the petitioner remained unexecuted; the Joint Secretary (CFEPOSA) in exercise of powers conferred by Clause (b) of sub-section (1) of Section 7 of the Act directed the above said person vide her Order No. 673/03/2015-Cus.VIII dated 29.06.2015 to appear before the Director General of Police, Government of Goa, Panaji within 7 days of the publication of this order in the Official Gazette. The said order has been published in the official gazette on 30.06.2015.
15.	03.07.2015	Customs Department at Goa received a letter No.7/C-4/2015(278)-3537 dated 25.06.2015 from the Assistant Director Intelligence Bureau (Ministry of Home Affairs) Government of India communicating the present (of Bhubaneswar) and permanent residential address (of Kerala) of the said PD, but his office address was still not communicated.
16.	07.07.2015	The 4 th and 5 th being Saturday and Sunday the said addresses were communicated to the Goa Police vide this office letter of even Number dated 07.07.2015.
17.	13.07.2015	In pursuance of the said order dated 29.06.2015, the said notice has been published in following newspapers : 1) The Navhind Times Goa edition (English) dated 13.07.2015 2) The Times of India Goa edition (English) dated 13.07.2015 3) The Times of India Calicut, Kerala edition (English) dated 13.07.2015 4) The Nav Bharat Times, Bhubaneswar, Odissa edition (English) dated 13.07.2015

31. Relying on the aforesaid chart wherein date wise explanation has been given, learned counsel for respondents no.1 and 2 submits that there is no delay on the part of the respondents in execution of the detention order. Counsel for the respondents submits that time was taken for preparing 22 sets comprising of more than 3000 pages with CDs, thereafter steps were taken to locate the whereabouts of the detainee, including his permanent address at Kerala.
32. The objective of ensuring that a detention order is served upon the detainee immediately is that it would show that the intent of the detaining authority was to prevent the detainee from committing and continuing to commit the prejudicial activities, which may have been alleged against him. It is not in dispute that till 13.07.2015, the detainee was in active service at Bhubaneswar. After 13.07.2015, the detainee was on leave for one week and thereafter he sought medical leave.
33. Before the rival submissions of learned counsel for the parties can be considered, we deem it appropriate to revisit the law on the subject.
34. In the case of **Mohammed Farook v. Joint Secretary, GOI & Ors.**, reported at (2000) 2 SCC 360, more particularly in paras 3 to 10, Supreme Court observed as under:

“ 3. Several contentions have been raised in this Writ Petition but, however, it is not necessary to deal with all these contentions save and except the one which relates to delay in executing the order of detention. The precise contention in this behalf is taken by the petitioner in this petition in paragraph 6(ii). It is stated that although the detention order was made on February 25, 1999 but the authorities have not executed the same immediately. On the contrary the authorities have chosen to execute the detention order only on April 6, 1999 after an inordinate and unreasonable delay of nearly 40 days. It is further stated that during this period the petitioner did not

abscond but he was very much available in his office and residence at Chennai.

4. It is then stated that the petitioner during this period was regularly attending his office. In addition thereto he also appeared before the learned Additional Chief Metropolitan Magistrate on February 25, 1999 and March 25, 1999 when his case was listed before him. Despite the availability of the petitioner as indicated above the detaining authorities took no steps to execute the order. It is because of this delay in executing the order, it is stated that apprehension entertained by detaining authority as regards the likelihood of future activities of the petitioner being prejudicial under the COFEPOSA Act were neither real nor genuine and therefore the impugned order is nothing but a punitive. This inordinate delay and unreasonable delay in executing the detention order has vitiated the subjective satisfaction of the detaining authority.

5.

6. The Detaining Authority vide its supplementary affidavit has corrected the mistake in its earlier affidavit to the effect that the petitioner might have appeared in different case. It is now admitted position that the petitioner appeared before the Metropolitan Magistrate in the very same case arising out of his arrest pursuant to the action initiated by the Enforcement Directorate, Chennai on 17.3.1998/18.3.1998. In view of the above averments and the reply thereto filed on behalf of the Detaining Authority the question that falls for our consideration in this Writ Petition is as to whether the subjective satisfaction of the detaining authority is vitiated by reason of inaction on its part to execute the detaining order after a lapse of period of 40 days.

7.

8. Learned counsel for the petitioner in support of this contention drew our attention to the decisions of this Court in 1. 1992(2) SC 295 (K.P.M. Basier v. State of Karnataka and Anr. and 2. (Smfsultan Abdul Kader v. Jt. Secretary to Government of India and Ors. (1998) 8 SCC 343).

9. There is catena of judgments on this topic rendered by this Court wherein this Court emphasised that the detaining

authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the petitioner could not be located at his residence or in his office and therefore the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non execution thereof within a reasonable 5 time. From Annexure P.2 (the proceeding sheet of the M.M. Court Madras) it appears that the petitioner (accused) was present in the court of Additional Chief Metropolitan Magistrate on 25.2.1999 as well on 25.3.1999. 10 Despite such opportunities neither the detaining authority nor the executing agency as well as sponsoring authority were diligent to serve the detention order on the petitioner at the earliest. In this view of the matter, we 75 are of the opinion that the subjective satisfaction of the detaining authority in issuing detention order dated February 25, 1999 is vitiated It is in these circumstances it is not possible for us to sustain the 20 detention order.”

35. In the case of **SMF Sultan Abdul Kader v. Joint Secretary to Govt. of India & Ors.**, reported at (1998) 8 SCC 343, more particularly in para 2, Supreme Court held as under:

“2. It is not necessary to state the facts leading to the of the detention order as we are inclined to allow this petition on the second ground raised by Mr, K.K. Mani, learned counsel for the petitioner. The order of detention was passed on 14.3.1996. The petitioner came to be detained on 7.8.1997. The contention raised by Mr. Mani is that there was undue delay in execution

of the order and that clearly indicates that there was no genuine satisfaction on the part of the detaining authority regarding the necessity of immediate detention of the petitioner in order to prevent him from committing and continuing to commit the prejudicial activity alleged against him. In reply to this contention raised by the petitioner what the detention order could not be executed immediately as the petitioner was absconding.

.....

No material has been produced on the basis of which it can be said that the police authorities had made reasonable efforts to locate the petitioner and apprehended him and yet they were not successful in finding him out. There is also no material to show that the detaining authority had made any serious attempts during this whole period of delay to find out if the detention order was executed or not. Thus, the delay in execution of the detention order remains unexplained. The reasonable delay in executing the order creates a serious doubt regarding the genuineness of the detaining authority as regards the immediate necessity of detaining the petitioner in order to prevent him from carrying on the prejudicial activity referred to in the grounds of detention. We are of the opinion that the order of detention was passed by the detaining authority not in lawful exercise of the power vested in him. We, therefore, allow this petition, set aside and quash the order of detention and direct that the petitioner be set at liberty forthwith unless his presence is required in jail in connection with any other case.”

36. In the case of ***Shafiq Ahmed v. District Magistrate, Meerut & Ors.***, reported at (1989) 4 SCC 556, more particularly in paras 4 to 6, Supreme Court observed as under:

“4. In this petition various grounds have been taken before this Court challenging the order under Article 32 of the Constitution. Mr. C.P. Mittal, learned counsel for the petitioner, however, urged before us three grounds upon which he contended that the said order be quashed or set aside. It was submitted by Mr. Mittal that there was inordinate delay in arresting the petitioner pursuant to the order, which indicated that the order was not based on a bona fide and genuine belief that the action or conduct of the petitioner were such that the

same were prejudicial to the maintenance of public order and that preventive detention of the petitioner was necessary for preventing him from such conduct. He further submitted that delay in the circumstances of this case in arresting the petitioner and or in acting pursuant to the order indicated that the "so-called grounds" were merely make-belief and not genuine grounds upon which the satisfaction of the authority concerned was based.

5.

6. To shift the blame for public order situation and raise the bogey of the conduct of the petitioner would not be proof of genuine or real belief about the conduct of the petitioner but only raising a red herring. This question was examined by this Court in *Nizamuddin v. The State of West Bengal*, [1975] 2 SCR 593. The question involved therein was under s. 3(2) of the Internal Security Act, 1971. There was delay of about two and a half months in detaining the petitioner pursuant to the order of detention and the Court considered that unless the delay was satisfactorily explained, it would throw considerable doubt on the genuineness of the subjective satisfaction of the Distt. Magistrate recited in the order of detention. Mr. Justice Bhagwati, as the learned Chief Justice then was, speaking for the Court observed at page 595 of the report that it will be reasonable to assume that if the Distt. Magistrate was really and genuinely satisfied after proper application of mind to the materials before him that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner, he would have acted with greater promptitude in securing the arrest of the petitioner immediately after invoking of the order of detention, and the petitioner would not have been allowed to remain at large for such a long period of time to carry on his nefarious activities. It is, however, not the law that whenever there is some delay in arresting the subjective satisfaction of the detaining authority must be held to be not genuine or colourable. Each case must depend on its own peculiar facts and circumstances. In this case, from the facts and the circumstances set out hereinbefore we find no reasonable or acceptable explanation for the delay. In a situation of communal tension prompt action is imperative. It is, therefore, not possible for this Court to be satisfied that the District Magistrate had applied his mind and arrived at "real" and "genuine" subjective satisfaction that it was necessary to

detain the petitioner to "prevent" him from wrong doing. The condition precedent, therefore, was not present. But as Justice Chinnappa Reddy explained in Bhawarlal Ganeshmalji v. State of Tamil Nadu & Anr., [1979] 2 SCR 633 at page 638 that there must be 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention, and in appropriate cases it is possible to assume that the link is 'snapped' if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. Mr Yogeshwar Prasad, learned counsel for the State of U.P. drew our attention to the decision of this Court in Indradeo Mahato v. State of West Bengal, [1973] 4 SCC 4. That was also a case of arrest under the Maintenance of Internal Security Act, 1971. It was urged in that case that there was no real or genuine apprehension that the petitioner there was likely to act in a manner prejudicial to the maintenance of public order. This Court in the facts of that case, was unable to accept the said contention. The Court held that mere failure to take recourse to ss. 87 & 88 of the Criminal Procedure Code would be a warrant to believe that the delay was unreasonable. Whether the delay was unreasonable depends on the facts and the circumstances of each case. We are satisfied, in view of the facts and circumstances of the case mentioned before, that by the conduct of the respondent authorities, there was undue delay, delay not commensurate with the facts situation in this case. the conduct as aforesaid betrayed that there was no real and genuine apprehension that the petitioner was likely to act in any manner prejudicial to public order. The order, therefore, is bad and must go."

37. Delay in executing the detention order has been considered rather seriously by the Courts for the reason that delay clearly indicates that there is no genuine satisfaction on the part of the detaining authority regarding the necessity of immediately detaining the person in order to prevent him from committing and continuing to commit the prejudicial activities alleged against him. Wherever the explanation rendered is found to be genuine, the same has been accepted by the court.

38. Applying the law laid down to the facts of the present case, it may be kept in mind that the petitioner at the time of the incident was posted at Goa Airport as Assistant Central Intelligence Officer(ACIO-I) in the Immigration Department under the supervision of Intelligence Bureau. On 07.07.2014, he was on duty as Wing In-charge in the Immigration Department. It is also not in dispute and as per the Annexure-23, the sponsoring authority sent two communications both dated 23.12.2014 to Director, Dabolim Airport and also to Commissioner (Immigration), New Delhi respectively wherein the Airport Authorities were instructed not to permit the detenu to enter the Dabolim Airport. In the second letter of even date the Commissioner (Immigration) was requested to immediately remove the the detenu from his duties at the Airport. Thereafter, as per records it is quite evident from Annexure-15 that the sponsoring authority was intimated on 09.01.2015 by the Immigration Department that the detenu has been transferred to SIB Bhubaneswar by a written communication.
39. The fact that the respondents were aware that the detenu stood transferred to SIB, Bhubaneswar is also evident from para 25 of the counter affidavit filed by respondents no.1 and 2 before High Court of Kerala at Ernakulam which reads as under:

“25. In response to this, a letter was received from the Joint Deputy Director Intelligence Bureau (Ministry of Home Affairs) (Government of India) vide F.NO.17/Imm/2014(02)-85 dated 09/01/2015 informing that Shri Gireesh Adavalath Meethal ACIO-I/G has been transferred to SIB Bhubaneswar.”

40. It may also be noticed that in the reply to the show cause notice issued to the detenu, the detenu had in the opening paragraph of the reply

stated that he had received a show cause notice on 4.2.2015 at his office Subsidiary Intelligence Bureau, Bhubaneswar, Orissa, where he was working. A copy whereof has been filed along with the writ petition. In the light of the facts that there is little room for doubt that the respondents were aware prior to the passing of the detention order, the detainee stood transferred to Bhubaneswar. In this view, the explanation which has been rendered and extracted in paragraph foregoing, shows complete non-application of mind and a rather sorry state of affairs.

41. As per the explanation rendered, a copy of the detention order was sent to the Home Secretary, Government of Goa, by Speed Post on 17.4.2015. The first explanation, which is required to be given by the respondents no.1 and 2 is the time spent between 31.3.2015 to 17.4.2015. After 17.4.2015, as per the explanation rendered, 22 sets of documents of 3237 pages and 12 CDs each were prepared between 17.4.2015 to 5.5.2015.
42. Mr. Ahluwalia submits that during the period between 17.04.2015 to 05.5.2015 time was taken to prepare 22 sets, each containing 3200 pages and 12 CDs each set and it is for this reason that 18 days were spent to prepare the sets. In today's day and age to say that it took 18 days to prepare 22 sets is not believable.
43. This explanation also shows that on 1.6.2015, ASI Crime Branch was contacted and he was asked for the present address and place of posting of the detainee. It is also pointed out by Mr.Ahluwalia that on 12.10.2015 proceedings under Sections 82 and 83 Cr.P.C. were also initiated against the detainee.
44. It has also been explained that after two days of persuasion, the particulars were provided and thereafter on 23.6.2015 the

Superintendent of Police (South Goa), vide his letter no.F.SP/EOC/50/2015 informed the Ministry that the detention order issued against the detainee (Gireesh A.M.) had been forwarded to the District Police Chief, Kozikhode (Rural), Vatakara, Kerala, on 20.6.2015 with the request to take necessary action at their end as per the order.

45. It may be noted that this exercise was futile and an eye wash as even in the record of the detaining authority the detainee stood transferred to Bhubaneswar and all steps taken to serve this detention order to the detainee at a place where he was not posted shows complete non-application of mind. Knowing fully well that he was working for gain at Bhubaneswar and sending any communication at the address at Kerala was a mere formality and a futile exercise.
46. The law in this regard is well-settled. After the passing of the detention order, the detaining authority must ensure that the order of detention is served upon the detainee at the earliest opportunity available unless and until respondents are able to give a satisfactory explanation for the reasons of non-execution of the detention order.
47. In this case, although an explanation is sought to be given but the explanation cannot be accepted as firstly the detainee is a Government servant and he was not absconding and was available and performing his duties at Bhubneswar. Further, material placed on record would show that the detainee continued to perform his duties upto 13.7.2015. Thus, in our view, the order of detention is liable to be quashed as there is unexplained delay in execution of the impugned detention order.
48. The third and the only other ground which is sought to be raised before us seeking quashing of the detention order is that the detainee was supplied with 12 CDs containing 8 GB data, each, but despite a

representation having been made for supply of a CD player to watch the CDs, the CD player was not supplied to him.

49. Mr. Jain submits that at the time of serving of the ground of detention and relied upon documents, the detenu had made a request to view the CD's of CCTV footage and snapshots supplied to him along with the relied upon documents, but no arrangement was provided by the detaining authority which amounts to serious laches on the part of the detaining authority. Mr. Jain contends that on 21.01.2016, the detenu had again sent a formal written request to the detaining authority requesting it to provide the legible copies of certain documents supplied to him along with the ground of detention and also requested to make necessary arrangements to view the contents of the CDs supplied to him. But the detaining authority has not at all made any arrangement till date to view the same nor supplied the legible copies of the documents. The counsel submits that the said request has been summarily rejected by the detaining authority vide its communication dated 03.03.2016 without affording any reason for the rejection of the same.
50. Mr. Jain also submits that the above act on the part of the detaining authority is a serious lapse whereby the detenu is totally prevented from making an effective representation and is as such a violation of his right under Article 22(5) of the Constitution of India. He submits that considering the above facts, it is quite evident that the detaining authority had committed grave injustice towards the detenu and on that score also the detention order is liable to be quashed. The counsel submits that non-supply of the above said documents has also prejudiced the Constitutional right of the detenu to effectively represent his case before the Advisory Board.

51. Mr.Ahluwalia, learned counsel for respondents no.1 and 2, submits that this ground urged by the petitioner is not available to the petitioner as at the time when his statement was recorded under Section 108 of the Customs Act, the CCTV footage was shown to the detinue, which stands duly acknowledged by him in the statements and he did not dispute either the authenticity of the CCTV footage or his presence at the place where the CCTV footage was being shot. Mr.Ahluwalia further submits that the petitioner has failed to show any prejudice having been caused to him and also that CDs were provided to him along with the show cause notice at the pre-detention stage and, thus, the petitioner was well aware about the contents of the CCTV footage.
52. Mr.Ahluwalia submits that reference was made to the Advisory Board on 21.01.2015 and simultaneously a representation was made by the detinue to the detaining authority, which had been sent to the Advisory Board in view of the judgment in the case of ***Golam Biswa v. Union of India (UOI) & Ors.***, [CrI.A.No.829/2015].
53. Additionally, Mr.Ahluwalia has submitted that the detinue had made a representation of more than 100 pages, which apparently has been printed in the jail and, thus, it seems that he had the access to an electronic device on which the CDRs could have been played. Mr.Ahluwalia submits that on 29.12.2015 when he relied upon documents and 12 CDs were supplied to him no request was made at that stage for providing of CD player.
54. Reliance is placed by Mr.Ahluwalia on a decision rendered by the Supreme Court of India in the case of ***Golam Biswa v. Union of India (UOI) & Ors.***, CrI.A.No.829/2015, more particularly para 15, which reads as under:

“15. As the quoted text would reveal, in essence, it was reiterated that if a representation is received by an appropriate authority and there is no time to dispose of the same having regard to the time frame fixed by the Act for reference of the matter to the Advisory Board, the representation must also be forwarded to the Advisory Board along with the records of the detenu. This assumes significance, in our comprehension, in view of the binding nature of the opinion of the Advisory Board, in case, on a consideration of the materials on record, it decides to hold against the detention. In case, the Advisory Board holds that the detention order is invalid, it is not open for the appropriate Government to continue therewith and it has to essentially revoke the same though the converse may not be the same. In other words, if the Advisory Board upholds the order of detention, it would still be open to the Central Government, depending on the merits of each case, to release the detenu. The fact that the opinion of the Advisory Board against continuance of the order of detention is final vis-a-vix the appropriate Government, in our opinion, is the motivating imperative for requiring the appropriate Government to forward the pending representation to the Advisory Board so as to enable it to traverse the entire panorama of grounds taken against the detention order for an effective, timely and meaningful consideration of the case for the detenu. This requirement as has been essentially recognized and mandated by two decisions of the Constitution Bench of this Court, does not, in any way, undermine the appropriate Government’s authority to consider and dispose of such representation of any detenu under the preventive detention law. The right of the Central Government or for that matter any appropriate Government to consider and dispose of a representation of a detenu, preventively detained, has to be harmoniously construed with the obligation cast on it to forward a pending representation to the Advisory Board as has been consistently held Jayanarayan Sukul (supra) and K.M. Abdulla Kunhi and B.L. Abdul Khader (supra).”

55. The submission of learned counsel for the respondents is without any force. In the absence of any evidence, this submission of the learned counsel for respondents no.1 and 2 cannot be entertained as there is no

material placed before us to show that the detainee had access to any electronic device on which CDs could have been watched.

56. Moreover, Mr.Jain has pointed out that CD player was provided to a co-detainee to enable him to watch the contents of the CDs but the co-detainee had declined to accept such an offer.
57. It is a settled law when clause (5) of Article 22 and sub-section 3 of Section 3 of COFEPOSA Act provide that the grounds of detention should be communicated to the detainee within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detainee. If there are any documents, statements or other material relied upon in the grounds of detention, they must also be communicated to the detainee, because being incorporated in the grounds of detention, as they form part of the grounds and the grounds furnished to the detainee cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detainee a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detainee within the prescribed time. The stand of the respondents that they had shown the CDs to the detenu during the course of investigation is not a proper service as per law. The detaining authority heavily relied upon the CDs in the grounds of detention and thus were duty bound to show the entire contents of the same to the detainee as a matter of right. The Court cannot lose track of the fact that the detainee was in judicial custody and he could not have access to any facility for seeing the CDs and cannot be forced to rely on his memory for making an effective representation against the detention order. The right to make a representation is a right provided in the Constitution. The supply of 12 CDs as relied upon

documents are not disputed by the respondents, but the respondents failed to provide the facility to see the CDs for making an effective representation even before the meeting of the Advisory Board which was held on 12.02.2016. It may also be noted that from the list of events enclosed by the respondents in their counter affidavit at Serial No.106 of page No.38, that an officer was deputed to the Sub-Jail Sada Goa along with a laptop to facilitate the viewing of the CDS by the detainee—Imtiyaz Hussain. There is no explanation why the respondents took a different approach against the request of the present detainee and could not provide a CD player to the detainee to view the CDs which form part of the relied upon documents.

58. The law is well settled. Article 22(2) of the Constitution provides (1) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detainee the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detainee the earliest opportunity of making a representation against the order of detention. Thus, 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. In case an audio file is heard prior to the passing of the detention order by the detainee is not reason enough to supply the CD or the player to enable him to hear or know the same. The audio/video files are primary

evidence and are documents as defined in Section 3 of the Evidence Act.

59. In the case of ***Ichhu Devi Choriria v. Union of India & Ors.***, reported at (1980) 4 SCC 531, more particularly para 6, it was held as under:

“6. We must therefore now proceed to examine whether there was any breach of the requirements of Article 22 clause (5) of the Constitution and Section 3, sub-section (3) of the COFEPOSA Act, for that is the breach which is claimed by the petitioner as invalidating the continued detention of the detainee. Clause (5) of Article 22 of the Constitution reads as follows:

"Art. 22(5): 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."

Section 3, sub-section of the COFEPOSA Act provides as under:

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

The true meaning and import of clause (5) of Article 22 of the Constitution was explained by this Court in Khudiram Das v. State of W.B :

"The constitutional imperatives enacted in this article are two-fold: (1) the detaining authority must, as soon as may

be, that is, as soon as practicable after the detention, communicate to the detainee the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detainee the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before an executive authority can be permitted to preventively detain a person and thereby drown his right of personal liberty in the name of public good and social security."

60. In the case of **Devender Singh Chadha v. UOI & Anr.**, W.P.(Crl.) 615/2015, the detainee was not supplied CD of the CCTV video footage nor the audio file/CD relied upon by the detaining authority and in spite of written request, audio file was not made available nor played. In paras 6, 16 to 26, it was held by the Court as under:

"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 detainee were searched on 13th June, 2013. The order of detention was passed after 10 months on 16th April, 2014.

(ii) Detainee 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 detainee 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.

.....
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:-*

.....
17. *In the counter-affidavit dated 20 th 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 it"s 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 detenue 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 detenue would record his conversation with Chandan Kumar Jain, after the consignment had been seized. The recording served no purpose or benefitted the detenue. 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 detenue to record a conversation, highlighting the conversation itself mentions that the telephone of the detenue 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 detenue 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 its 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 *Ziyauddin 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. Maqsood 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 *Ziyauddin Burhanuddin Bukhari*, relying on *R. v.*

Maqsud Ali, a Bench of three Judges of this Court held that the taperecords 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 All 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 Chorasiya 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.”

61. In the case of *Smt.Dharmista Bhagat v. State of Karnataka And Anr.*, reported at 1989 (Supp) (2) SCC 155, more particularly in paras 5 to 7, it was held as under:

“5. The learned Counsel appearing on behalf of the Respondent No. 1, Union of India has contended that even though legible copy of Panchnama referred to in the list of documents mentioned in the grounds of detention has not been supplied to the detenu yet the fact that five gold biscuits of foreign marking were recovered from the possession of the detenu was sufficient for subjective satisfaction of the detaining authority in making the said order of detention. So the detention order cannot be termed as illegal and bad for non-supply of legible/typed copy of the said document i.e. Panchnama dated February 12, 1988.

The Panchnama dated February 12, 1988 which had been referred to in the list of documents referred to in the grounds of detention and a copy of which had been given to the detenu along with the grounds of detention, is not at all legible as is evident from the copy served on the detenu. It is also not in dispute that on receiving the documents along with the grounds of detention the detenu had made a representation to the Respondent No. 1 stating that some of the documents including the Panchnama which had been supplied to him are illegible and as such a request was made for giving typed copies of those documents to enable the detenu to make an effective representation against the same. The detaining authority on receipt of the said representation sent a reply denying that the copies of those documents were illegible and refusing to supply typed copies of the same. It is clearly provided in Sub-article (5) of Article 22 of the Constitution of India that :-

“(5) 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.”

Therefore, it is imperative that the detaining authority has to serve the grounds of detention which include also all the relevant documents which had been considered in forming the subjective satisfaction by the detaining authority before making the order of detention and referred to in the list of documents accompanying the grounds of detention in order to enable the detenu to make an effective representation to the Advisory Board as well as to the detaining authority. Therefore, the non-supply of legible copy of this vital document i.e. Panchnama dated February 12, 1988 in spite of the request made by the detenu to supply the same renders the order of detention illegal and bad. This Court in Mehrunissa Versus State of Maharashtra has observed that : (SCC p.710)

“The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents. The

failure of the detaining authority to supply copies of such documents vitiated the detention, as has been held by this Court in the two cases cited by counsel. The detenu is, therefore, entitled to be released. He is accordingly directed to be released forthwith.”

6. In *Bhupinder Singh v. Union of India and Ors.* the detenu made a complaint before the Advisory Board that the copies of the documents which were supplied to him along with the grounds of detention were not legible and he placed before the Advisory Board a copy of representation said to have been made by him for supply of legible copies of the documents. The legible copies of the documents were, however, supplied to the detenu after the detention order was confirmed. It was held that the detenu was denied the opportunity of making a representation and as such there was a clear contravention of the right guaranteed by Article 22 of the Constitution. The detenu was, therefore, set at liberty.

7. Considering these decisions we are constrained to hold that the refusal on the part of the detaining authority to supply legible copies of the said relevant document to the detenu for making an effective representation infringed the detenu's right under Article 22(5) of the Constitution. The order of detention is, therefore, set aside and the detenu is directed to be released forthwith. The appeal is thus allowed.”

62. In the case of ***Powanammal v. State of T.N. And Another***, reported at (1992) 2 SCC 414, more particularly in para 9, Supreme Court held as under:

“9. However, this court has maintained a distinction between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention. Whereas non-supply of a copy of the document relied upon in the grounds of detention has been held to be fatal to continued detention, the detenu need not show that any prejudice is caused to him. This is because non-supply of such a document would amount to denial of the right of being communicated the

grounds and of being afforded the opportunity of making an effective representation against the order. But it would not be so where the document merely finds a reference in the order of detention or among the grounds thereof. In such a case, the detainee's complaint of non-supply of document has to be supported by prejudice caused to him in making an effective representation. What applies to a document, would equally apply to furnishing translated copy of the document in the language known to and understood by the detainee, should the document be in a different language."

63. Further in the case of ***Mehrunissa v. State of Maharashtra***, reported at (1981) 2 SCC 709, a similar defence was raised that copies of documents were not supplied to the detainee as the detainee was already aware of the contents of the documents. The Supreme Court held that the detainee is entitled to be supplied with copies of all the material documents instead of having to rely upon his memory in regard to the contents of the documents. The relevant observation made by the Apex Court reads as under:

*"The principal submission made by Miss Rani Jethamalani, learned Counsel for the petitioner, in this application for the issue of writ of habeas corpus is that copies of material documents referred to in the grounds of detention were not supplied to the detenu and he was thus prevented from making an effective representation. The documents about which the complaint is made are the Panchnama dated 15-1-80 said to have been recorded at the time of the seizure of the silver and the statement said to have been made by the detenu in the enquiry under Section 108 of the Customs Act on 15-1-80. Miss Jethamalani relied upon the decisions of this Court in *Ichhu Devi v. Union of India* (1980) AIR 1980 and *Smt. Shalini Soni v. Union of India* (1980) AIR 1981. No counter has been filed on behalf of the State of Maharashtra, but Shri O.P. Rana, learned Counsel for the State of Maharashtra urged that the copies of the documents were not supplied to the detenu as the detenu was already aware of the contents of the documents. That is*

hardly an answer to the submission made on behalf of the detenu. The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents. The failure of the detaining authority to supply copies of such documents vitiated the detention, as has been held by this Court in the two cases cited by counsel. The detune is, therefore, entitled to be released. He is accordingly directed to be released forthwith. The petition is allowed."

64. In the case of **Satyaprakash Behl v. UOI & Ors.**, Criminal Writ Appeal No.241/1997, more particularly in paras 4 to 13, the Supreme Court held as under:

"(4) Learned Counsel for the petitioner has challenged the order on several grounds. He has first contended that the audio cassette and the transcript of the cassette were not supplied alongwith the order/grounds of detention or within five days after the service of the same; and still the transcript of the cassette recording has not been supplied atall. In the absence of this material, the petitioner was denied the opportunity of making an effective representation against the order, resulting in violation of Art. 22(5) of the Constitution of India. For this reason detention is illegal and void. Whereas learned Counsel for the respondent has contended that the audio cassette has not been relied upon by the detaining authority and as such non-supply of the same is of no consequence.

(5) In the grounds of detention, about the audio cassette, it has been stated as under: "ON23.2.1996, Narcotics Control Bureau, Mumbai Zonal Unit received information from a source who provided audio cassette, recording of telephonic conversation between Shri Satya Prakash Bahl @ S.P. Bahl and one "Haji Khan" of Pakistan regarding shipment. In this conversation, Shri S.P. Bahl, inter alia, informed Haji Khan that the contents of the fax he received was not readable and asked Haji Khan to fax it again with "Attention Mr. Kumar". Shri Bahl also alerted Haji Khan not to speak on his residential number "3038". On enquiry from him, Haji Khan replied that total is 35 and further added that it is three and a half. To Haji Khan's query as to where the money will be paid, Shri Bahl

replied that the money may be paid at Dubai or in India or at Peshawar."

(6) In paragraphs 23 and 25 it has been further stated as under:

"23.I have carefully gone through all the documents referred to hereinabove. On the basis of the statements and documents mentioned hereinabove, I have no hesitation in arriving at the conclusion that Shri Satya Prakash Bahl @ S.P. Bahl had engaged himself in the procurement, storage and abetting in the export from India of narcotic drugs.

25.While passing the detention order under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, I have relied upon the documents mentioned in the enclosed list."

(7) In the list of documents supplied alongwith the grounds of detrition, the audio cassette was not included nor supplied with the grounds of detention. The conversation mentioned in the first paragraph has apparently been extracted or paraphrased from some audio cassette recording. This conversation is apparently suggestive of some clandestine deal between the petitioner and Hazi Khan and possibly connecting the petitioner with the seizure of the narcotic drug in Russia and Netherlands. In that case the audio cassette is very relevant material to show the complicity of the petitioner and this material should have been supplied to the petitioner alongwith the grounds of detention. However, this was not done. After receipt of the detention order, the petitioner on 2.3.1997 vide his letter dated 3.3.1997, had asked for supply of the cassette to enable him to make an effective representation. The cassette was supplied on 22.3.1997 but with out the cassette player and its transcript and it was on further demand made in letter dated 22.3.1997 cassette player was supplied on 29.3.1997, yet, the transcript was not supplied.

(8) In Khudiram Dass v. State of West Bengal and Ors., regarding the constitutional safeguards under Article 22(5), it was observed:

(1) the Detaining Authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order of detention has been made, and (2) the Detaining Authority must afford the detenu the earliest opportunity of making a representation against the order of detention. These are the barest minimum safeguards which must be observed before the executive authority can preventively detain a person...."

(9) It was further held in this case that the "grounds" under Article 22(5) mean all the basic facts and materials which have been taken into account by the Detaining Authority in making the order of detention and on which, therefore, the order of detention is made.

(10) In the counter affidavit dated 9.7.1997 filed on behalf of the respondents, but not of the Detaining Authority who had passed the order, the stand taken is that "the audio cassette was not relied upon document. The non supply of which could have caused no prejudice to the interest of the petitioner".

(11) It has been repeatedly laid down by the Supreme Court that an opportunity to make a representation against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him, it means that the detenu is to be informed not merely of inferences of fact but all the inferences of facts plus factual material. Whether the documents concerned, are referred to, relied upon, or taken into consideration by Detaining Authority, they must be supplied to the detenu as part of the grounds as far as possible to enable the detenu to make an effective representation immediately on receiving the grounds of detention. Delay in complying this requirement would invalidate the order of detention. [Smt. Shalini Soni v. Union of India and Ors., ; Tushar Thakkar v. Union of India and Ors., ; S. Gurdip Singh v. Union of India & Ors., ; Mehdi Mohd. Zowli v. State of Maharashtra, , and Kirti Kumar v. Union of India, .

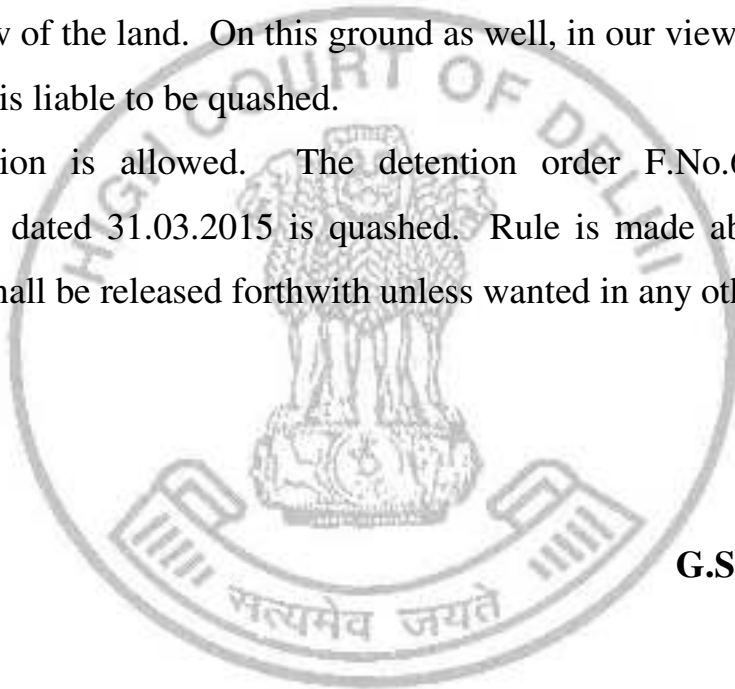
(12) If material or vital facts which would have bearing on the issue and influence the mind of the Detaining Authority one way or the other are withheld or suppressed by the Sponsoring

Authority or ignored and not considered by the Detaining Authority before issuing the detention order, it would vitiate its subjective satisfaction rendering the detention order illegal. [D.S. Duggal v. The Police Commissioner & Another,]

(13) As noticed earlier the audio cassette was a very material circumstance/ material. It ought to have been taken into consideration by the Detaining Authority. If the stand taken in the counter affidavit is correct and the audio cassette was not relied upon and considered by the Detaining Authority, this itself would vitiate the subjective satisfaction and render the order illegal.”

65. It has been repeatedly held by the Supreme Court of India that the relied upon documents must be supplied to a detainee. To say that at the time of recording of the statement under Section 108 of the Customs Act and at the stage when a show cause notice was issued to the detainee, copies of these CDs were provided to him and simply because the detainee was aware of what was the material which was contained in the CDs cannot be accepted.
66. In the case of ***Pawanammal v. State of Tamil Nadu & Ors.***, reported at (1999) 2 SCC 413, the Supreme Court explained the distinction between the document, which has been relied upon by a detaining authority on the grounds of detention in comparison to a document, which may find a mere reference in the grounds of detention. The Supreme Court also explained that non-supply of a copy of document, relied upon in the grounds of detention, has to be held to be fatal to continue detention and the detainee does not have to show that any prejudice was caused to him, as non-supply of such a document and of not being afforded the opportunity of making an effective representation against the order.
67. In this case, the CCTV footage contained in the 12 CDs find mention in the grounds of detention.

68. There are reference to CCTV footage in paragraphs 87 to 89 and as many as 29 times in the entire grounds of detention. In effect, it can safely be said that to form a subjective satisfaction the detaining authority has relied on the CCTV footage, and thus, the CCTV footage in the 12 CDs are held to be relied upon documents. Merely because the CDs provided to the detenue along with the show cause notice or he was shown the CCTV footage at the time of recording of the statement under Section 108 of the Customs Act, in our view cannot take the place of providing the mechanism for viewing the CDs in view of the settled law of the land. On this ground as well, in our view, the order of detention is liable to be quashed.
69. The petition is allowed. The detention order F.No.673/05/2015-CUS.VIII dated 31.03.2015 is quashed. Rule is made absolute. The detenue shall be released forthwith unless wanted in any other case.



G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JUNE 02, 2016

pst/msr