

\$~8 to 14

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

%

Date of Judgment: 28th March, 2017

+ W.P.(CRL) 2129/2016

SHAIKH MOHAMMED RIZWAN

..... Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UOI & ANR.

..... Respondents

Through: Mr. Akshay Makhija, CGSC with
Ms.Divya Kapur, Advocate for UOI.

+ W.P.(CRL) 2305/2016

ABDUL AZEEM SALAMTI

..... Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UOI REP. ITS JOINT SECRETARY MINISTRY OF FINANCE

NEW DELHI & ORS.

..... Respondents

Through: Mr. Sanjeev Narula, CGSC with
Mr.Abhishek Ghai, Advocate for UOI.

+ W.P.(CRL) 2306/2016

SYED ALI FURKHAN

..... Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UOI REP.BY ITS JOINT SECRETARY MINISTRY OF FINANCE
NEW DELHI & ORS. Respondents

Through: Mr. Sanjeev Narula, CGSC with
Mr.Abhishek Ghai, Advocate for UOI.

+ W.P.(CRL) 2307/2016

SYED ANEESH KARIKAL Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UOI REP. BY ITS SECRETARY MINISTRY OF FINANCE NEW
DELHI & ORS. Respondents

Through: Mr. Sanjeev Narula, CGSC with
Mr.Abhishek Ghai, Advocate for UOI.

+ W.P.(CRL) 2816/2016

PRAKASH MAALLAPA MANOTGI Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UOI & ANR.

..... Respondents

Through: Mr. Amit Mahajan, CGSC with
Mr.Kunal Dutt, Advocate for UOI.

+ W.P.(CRL) 3104/2016

DURE AFSHA

..... Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Amit Mahajan, CGSC with
Mr.Kunal Dutt, Advocate for UOI.

+ W.P.(CRL) 3107/2016

ABRARUL-UI-HAQ

..... Petitioner

Through: Mr. Pradeep Jain, Advocate with
Mr.Shubhankar Jha, Mr. Rahul Raheja,
Mr.Ashish Bansal, Mr. Vikas Sarin
and Ms. Mansi Awasthi, Advocates.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Anil Soni, CGSC for UOI.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S. SISTANI, J. (ORAL)

1. Seven writ petitions have been filed. All the petitions seek a writ in the nature of *certiorari* for quashing of detention orders, all dated 31.05.2015 passed by the respondent no. 2 under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (briefly the '*COFEPOSA Act*'). A direction is also sought to quash the communication of the Central Government whereby the detention orders were confirmed.
2. At the outset, learned counsel for the parties point out that all the detainees have served their period of detention and have since been released from jail.
3. Mr. Jain, learned counsel for petitioners, submits that all the writ petitions are covered by a decision rendered by a Division Bench of this court in ***Smitha Gireesh v. UOI and Ors***, MANU/DE/1440/2016: 2016 SCC OnLine Del 3697. He further submits that the aforesaid decision has attained finality, which is also confirmed by the learned counsel for Union of India on instructions.
4. The detainee in ***Smitha Gireesh (Supra)*** therein was working as the Assistant Central Intelligence Officer-I in the immigration department under the supervision of the Intelligence Bureau and was on duty as the Wing In-charge on 07.07.2014 when four persons had been arrested consequent to seizure of 19.4 kgs of gold at Dabolim Airport, Goa. The detainee therein had been implicated owing to his conversations with one Sh.Javed Mohammad Sheikh, Assistant Manager of Minar Travels. This led to the detention order dated 31.03.2015 being passed, which was challenged before this Court. The writ petition was allowed on 02.06.2016 on two counts: first,

delay in execution of the detention order; and second, failure to supply a CD player despite heavy reliance upon the contents of 12 Compact Discs ('CDs') in the detention order inhibiting the capacity of the detainee therein to make an effective representation and violating Article 22(5) of the Constitution.

BRIEF FACTS

5. In the present writ petitions, the detainees allege to have been implicated in the same incident. The basic facts of each writ petition are being noticed below:
 - 5.1 In W.P. (Crl) 2129/2016, the detainee Shaikh Mohammad Javid was working as the Assistant Manager with M/s Minar Travels when the gold was seized on 07.07.2014. A detention order bearing F.No.673/03/2015-Cus.VIII dated 31.03.2015 was passed and the detainee surrendered on 30.10.2015 before the Goa Police, when the detention order was served upon the detainee. Thereafter on 31.10.2015, the grounds of detention, list of relied upon documents along with the documents were supplied to the detainee. Amongst the relied upon documents, 12 CDs were supplied to the detainee. The detainee requested the officials to be provided with an opportunity to view the contents of the CDs to no avail. The detainee initially filed a writ petition [Crl. W.P. 171/2015] before the Goa Bench of the Bombay High Court, which has been withdrawn on 22.06.2016 with liberty to file afresh.
 - 5.2 The detainee/petitioner Abdul Azeem Salamti in W.P. (Crl) 2305/2016 has impugned the detention order F.No.673/09/2015-Cus.VIII dated

31.03.2015. The detainee had surrendered before the Police Inspector, Vasco, Vasco-da-gama Police Station, Goa on 21.10.2015 and thereafter, the list of relied upon documents and documents were supplied to the petitioner on 23.10.2015. Along with the relied upon documents were 12 CDs/audio cassettes, but no mechanism for viewing the cassettes was provided. The detainee had previously approached the Bombay High Court at Goa in CrI. W.P. 169/2015 impugning the same detention order, but has since withdrawn the same with liberty to file afresh.

5.3 W.P. (CrI) 2306/2016 has been filed by Riyaz Ahmed on behalf of the detainee Sh.Syed Ali Furkhan challenging the detention order F.No.673/11/2015/Cus.VIII dated 31.03.2015 *inter alia* on the ground that along with the detention order, the detainee was given 12 audio cassettes/CDs without any means to view their contents. We may only note that the detainee had surrendered on 21.10.2015 and the grounds of detention, list of relied upon documents and the relied upon documents were served on 23.10.2015. The detainee had approached the Goa Bench of the Bombay High Court in Criminal Writ Petition 168/2015; this writ was withdrawn on 22.06.2016 “*with liberty to file fresh petitions challenging the same detention orders.*”

5.4 In W.P. (CrI) 2307/2016, the detainee Sh. Syed Anees Karikal has impugned the detention order bearing F.No.673/10/2015-Cus.VIII dated 31.10.2015. The remaining facts remain identical as W.P. (CrI) 2306/2016 inasmuch as the detainee surrendered on 21.10.2015 and the grounds of detention, list of relied upon documents and the relied upon documents were served on 23.10.2015. He had also impugned the

same detention order before the Goa Bench of the Bombay High Court in Crl.W.P. 167/2015 which was withdrawn prior to the filing of the present writ along with liberty to file afresh.

- 5.5 The petitioner/detenué in WP (Crl) 2816/2016 was working as casual employee of Air India at Dabolim Airport, Goa. On 07.07.2014, he received a white polythene bag containing gold from certain international passengers at the airport, which was detected by the authorities. The authorities immediately accosted the petitioner, who confessed to receiving gold. The petitioner identified the three international passengers and pursuant to a comprehensive search, the three international passengers along with the detenué were arrested on 08.07.2014. All of them were granted bail on 10.07.2014 by the Chief Judicial Magistrate. On the basis of this incident, a detention order bearing No. F.No.673/04/2015-Cus.VIII dated 31.03.2015 was issued against the petitioner. The petitioner claims to have learnt about the order much later and immediately thereafter, surrendered before the Goa Police on 30.10.2015. On the very same day, the detention order was served upon him and the grounds of detention, list of relied upon documents along with the relied upon documents were served on 31.10.2015. The petitioner *inter alia* claims that along with the relied upon documents, 12 CDs were supplied to the petitioner without any device to view the same despite request of the petitioner. In the first week of December, 2015 the detenué had filed a writ petition [Crl.W.P. 172/2015] before the Goa Bench of the Bombay High Court which has since been withdrawn with liberty to file afresh. Thus, the petitioner has impugned the detention order dated 31.03.2015 and the

consequent communication dated 31.12.2015 confirming the detention order.

- 5.6 Dure Afsha has filed W.P. (Crl) 3104/2016 on behalf of her husband Muhammed Saleem Musba (detenue) who has been detained pursuant to Order bearing F.No.673/8/2015-Cus.VIII dated 31.03.2015. Her husband had surrendered on 23.10.2015 before the Goa Police and was detained in Sada Jail. On the same day of his arrest, the detenue was served with the impugned detention order and the grounds of detention along with list of relied upon documents and the relied upon documents. This detention order has been impugned in the writ petition on numerous grounds including the denial of a mechanism to view the CDs/audio cassettes provided along with the grounds of detention.
- 5.7 Similarly in W.P. (Crl) 3107/2016, the detenue Sh.Mohammad Asif, being represented by his *pariokar*, has sought to challenge his detention order F.No.673/7/2015-Cus.VIII dated 31.03.2015. The detenue had surrendered on 23.10.2015; on which date the detention order was served upon him. Later on 27.10.2015, the grounds of detention along with list of relied upon documents and the relied upon documents were provided to him. One of his grievance is that though 12 CDs were given to him, no mechanism was provided to view the same. The detenue had previously approached the Bombay High Court at Goa in Crl. W.P. 38/2015, which was withdrawn with liberty to file afresh.
6. Mr.Jain submits that most of the detenues had previously approached the Goa Bench of the Bombay High Court, which have since been

withdrawn with liberty to file fresh petitions impugning the same detention orders. He further submits that the aforesaid order was passed in the presence of the counsel for the respondents and there was no opposition to such liberty having been granted.

7. Mr. Jain, learned counsel for the petitioners, submits that although various grounds have been raised by the petitioners in their respective writ petitions but the petitioners would only press one ground, i.e. non-supply of relied upon documents in complete form and legible copies of documents. To avoid prolixity, we only mention the broad grounds urged in W.P. (Crl) 2129/2016:
 - a. Inordinate delay in passing the detention order;
 - b. Delay in execution of the detention order;
 - c. Failure to supply relied upon documents in complete form and legible copies of documents;
 - d. Subjective satisfaction having wrongly arrived at inasmuch as the notice of termination of service of the petitioner was not placed before the detaining authority; and
 - e. Representation of the detainee to the Central Government and the detaining authority has not been decided.
8. Mr. Jain submits that aforesaid ground sought to be urged was a subject matter of the earlier writ petition which was filed in Delhi High Court by a co-detinue in the case of ***Smitha Gireesh (Supra)***. Learned counsel appearing for the Union of India in the respective writ petitions adopt the arguments raised by them in the case of ***Smitha Gireesh (Supra)***, but do not dispute the fact that the arguments so urged did not find favour with the Court and the Court

had quashed the detention order. There is no quarrel with the fact that the judgment in ***Smitha Gireesh (Supra)*** has attained finality.

9. Since the detention orders are substantially the same and the arguments raised before us are also the same, we deem it appropriate to discuss the judgment of a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in extenso. A brief factual background to the decision has already been given in paragraph 4 aforegoing. Today, we are only concerned with one ground, i.e. the failure to supply a CD Player or any other alternative mechanism to the detainees to enable them to view the CDs relied upon in the detention order. The following question of law was framed by the Bench:

“F. Whether the detention order is not liable to be set aside on the ground of violation of detainee'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 detainee?”

10. The learned counsel for the petitioner therein had argued that the detainee was supplied with 12 CDs containing 8 GB data each, but was not supplied with a CD Player to view the same despite repeated requests. The requests were later arbitrarily rejected altogether. This, according, to the counsel for the petitioner was a serious lapse on the part of the authorities depriving him from making an effective representation against the detention order in violation of Article 22 (5) of the Constitution. Additionally, a CD player was provided to a co-detainee Imtiaz Hussain.

11. The counsel representing the Union of India therein had attempted to controvert the submissions of the petitioner on the following counts:
 - a. The detenue had previously seen the contents of the CDs;
 - b. The authenticity of the CCTV footage was not in question nor was the presence of the detenue in the same;
 - c. No prejudice had been shown by the detenue; and
 - d. That since the representation given by the detenue from Jail was typed and more than 100 pages, he had access to an electronic device to view the contents of the CDs.
12. The arguments for the Union did not find favour with the Court, which came to the conclusion that depriving the detenue therein from viewing the contents of the CDs, which were heavily relied upon and found mentioned in the relied upon documents, had inhibited the capacity of the detenue in making an effective representation and ran afoul of the mandate of Article 22 (5) of the Constitution. While coming to the conclusion, the Bench relied upon the judgments in *Icchu Devi Choriria v. Union of India & Ors.*, (1980) 4 SCC 531; *Smt.Dharmista Bhagat v. State of Karnataka and Anr.*, 1989 Supp (2) SCC 155; *Powanammal v. State of T.N. and Anr.*, (1992) 2 SCC 414; *Mehrunissa v. State of Maharashtra*, (1981) 2 SCC 709; and *Panawanammal v. State of Tamil Nadu & Ors.*, (1999) 2 SCC 413 of the Apex Court and *Devinder Singh Chadha v. UOI & Anr.*, W.P. (Crl) 615/2015 dated 29.05.2015; and *Satyaprakash Behl v. UOI & Ors.*, W.P. (Crl.) 241/1997 dated 17.10.1997 of this Court. We deem it appropriate to reproduce the relevant extract of the judgment in *Smitha Gireesh (Supra)* below:

“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 detenue 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 detenue. If there are any documents, statements or other material relied upon in the grounds of detention, they must also be communicated to the detenue, because being incorporated in the grounds of detention, as they form part of the grounds and the grounds furnished to the detenue cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenue 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 detenue 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 detenue as a matter of right. The Court cannot lose track of the fact that the detenue 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 detenue-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.

...

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 detainee 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.

(Emphasis Supplied)

13. Similarly in the cases before us, it is not in dispute that the CDs were part of the relied upon documents and there are repeated references to the CCTV footage contained in 12 CDs in the grounds of detention. Thus, it can be safely concluded that the CCTV footage was relied upon by the detaining authority to form his subject satisfaction. This coupled with the fact that they were a part of the relied upon

documents, it was imperative for the authorities to provide an electronic device to enable the detainees to view the CCTV footage and merely because they were provided CDs along with the show cause notice and shown CCTV footage at the time of recording of their statements under Section 108 of the Customs Act cannot be a substitute in place of a right provided in law.

14. Therefore, the detention orders in all the aforesaid writ petitions are quashed on this ground alone which has been urged before us. All other grounds, which have not been pressed, are kept open.
15. The above writ petitions are allowed in above terms.
16. No costs.

G. S. SISTANI, J.

VINOD GOEL, J.

MARCH 28, 2017

// /jitender