

#J-1 & J-2

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 04.06.2021
Judgment Pronounced On : 06.08.2021

+ **W.P.(CRL) 1829/2020**

GOPAL GUPTA

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondents

J-2

+ **W.P.(CRL) 1830/2020**

AMIT PAL SINGH

..... Petitioner

versus

**JOINT SECRETARY COFEPOSA
& ORS.**

..... Respondents

Advocates who appeared in this case:

For the Petitioners: Mr. Akhil Sibal, Senior Advocate with Mr. Shivek Trehan, Ms. Shagun Chopra, Mr. Samuel Lalroehan Khobung, Ms. Sayesha Suri and Mr. Pranay Mohan Govil, Advocates in W.P.(CRL.) 1829/2020
Mr. Akhil Sibal, Senior Advocate with Mr. Shivek Trehan, Ms. Shagun Chopra, Mr. Samuel Lalroehan Khobung, Ms. Sayesha Suri and Mr. Pranay Mohan Govil, Advocates in W.P.(CRL.) 1830/2020.

For the Respondents: Mr. Amit Mahajan, CGSC with Mr. Dhruv Pande and Mr. Kritagya, Advocates for UOI in W.P.(CRL.) 1829/2020 & W.P.(CRL.) 1830/2020.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

SIDDHARTH MRIDUL, J (via Video Conferencing)

1. These two writ petitions under Article 226 of the Constitution of India, essentially in the nature of writ of *habeas corpus*, have been instituted on behalf of Gopal Gupta, the petitioner in W.P.(CRL.) 1829/2020 and Amit Pal Singh, the petitioner in W.P.(CRL.) 1830/2020 (hereinafter collectively referred to as the 'detenu'), praying for quashing of detention orders bearing No. PD-12001/01/2020-COFEPOSA and PD-12001/02/2020-

COFEPOSA respectively, both dated 21.01.2020, and for further directions that the detenu be set at liberty forthwith.

FACTS OF THE CASE:-

2. The relevant facts *qua* the detenus, as are necessary for the adjudication of the subject writ petitions are briefly encapsulated as follows: -

- i) Both the detenus are statedly employees of a company namely, M/s. Its My Name Private Limited (hereinafter referred to as 'IMNPL').
- ii) IMNPL is a government recognized three star export house, engaged in the business of manufacturing, import and export of gold jewellery and other allied bullion items.
- iii) IMNPL has been duly issued an Import Export Code (IEC) bearing No.0514037342 from the office of the Joint Director, Directorate General of Foreign Trade (hereinafter referred to as 'DGFT') and is stated to have earned foreign exchange valuing around 150 million USD for the country.

- iv) IMNPL has also obtained Advance Authorization Licence from the office of DGFT, New Delhi, *inter alia* permitting import of 1000 kgs of gold bars.
- v) IMNPL has against the said Advance Authorization Licence imported 50 kgs of gold bars and completed export obligation of approximately 19 kgs of gold bars *vidé* Export Invoice No.ITS/EXP/04 dated 20.04.2019; with balance export obligation of approximately 31 kgs.
- vi) At this juncture, it is relevant to observe that the stock related to the aforementioned balance export obligation, was resumed by the Directorate of Revenue Intelligence (hereinafter referred to as the 'DRI') on 24-25.04.2019, from the factory premises of IMNPL at Pitampura, Delhi.
- vii) It is the detenus' case that similar licences have been duly issued in the past as well and that export obligations thereunder have been duly fulfilled by IMNPL.

- viii) IMNPL also purchased gold from the domestic market, duty and GST in relation to which has been duly paid; besides directly importing gold under the Advance Authorization Scheme, as afore-stated.
- ix) IMNPL is stated to have exported domestic gold jewellery under the Exhibition Export Scheme of the Foreign Trade Policy ([FTP 2015-20](#))
- x) At this stage, it is relevant to observe that as per Para 4.46 of FTP, read with Para 4.80 of the Hand Book of Procedure, domestic jewellery can be exported for exhibitions abroad with the approval of Gems & Jewellery Export Promotion Council (hereinafter referred to as 'GJEPC'), which approval was granted to IMNPL subject to the condition that unsold gold jewellery has to be re-imported back within 60 days from the close of such exhibition, failing which they would become liable to pay import duty on the quantity of the said re-import. Further, as per Customs Notification No.45/17 dated 30.06.2017,

the condition for exemption is that, the goods that are re-imported from such exhibition abroad are required to be the same which were exported.

- xi) IMNPL had, with the approval of GJEPC, exported gold jewellery manufactured from the domestic stock of gold for overseas exhibition. It is, therefore, the detenus' case that, evidently there was no duty payment required at the stage of re-import of the subject gold into the country, within the stipulated time period of 60 days.
- xii) IMNPL received an invitation for one such exhibition to be held from 18.02.2019 to 30.03.2019 from M/s. M.N. Khan Jeweller, based in United Arab Emirates (UAE), duly signed by its director Mr. Mohd. Nashruddin Khan; and in pursuance thereto had approached GJEPC seeking permission for participation, which was duly allowed *vidé* letter dated 15.02.2019 for the entire duration of the exhibition, as afore-noted.

- xiii) In pursuance to this invitation, detenu Amit Pal Singh was entrusted with the work to hand-carry (personal carriage) the gold jewellery to UAE for the purpose of exhibition, in accordance with the permission granted and in compliance with the provisions applicable.
- xiv) Export of the gold jewellery was done by IMNPL after filing the requisite shipping bills along with necessary documents.
- xv) The subject gold was duly assessed by the Customs at the time of clearance for export; the photographs of the goods being exported through hand-carry, were also checked and seen by the Customs Jewellery Appraiser posted at the Export Shed Air Cargo; and after verification of the same, the said photographs were signed and appraised by the Appraiser and then given back in sealed cover to the person hand-carrying the gold jewellery.

xvi) The gold jewellery, which remained unsold at the time of exhibition was brought back by the co-detenu Amit Pal Singh from UAE. The detenu Amit Pal Singh landed at the Indira Gandhi International Airport, New Delhi on 24.04.2019 at around 06.30 p.m. and approached the Red Channel for the purpose of declaration of the goods brought back by him.

xvii) Amit Pal Singh, the detenu is stated to have filed reimport documents such as packing lists cum invoice; and provided the sealed packet of photographs to the Customs Appraiser along with the shipping bills, Export Declaration Form and endorsed copies of packing list-cum-invoice, given to detenu at the time of export, respectively for the quantities of unsold gold jewellery being brought back out of earlier exported goods concerning shipping bills dated 20.02.2019 and 13.03.2019; as

well as making requisite declaration, as per the Standard Operating Procedure.

- xviii) The Customs Jewellery Appraiser deputed at the Red Channel, duly checked and verified the said documents and appraised the subject gold jewellery and after properly satisfying himself that the gold jewellery was the same, which was exported, allowed Amit Pal Singh, the detenu to take the same by issuing necessary Customs Gate Pass in this behalf.
- xix) However, when Amit Pal Singh, the detenu was about to leave the IGI Airport, after clearance from the Red Channel, the officers of DRI intercepted him, statedly on specific information and carried out search of his baggage as well as his person allegedly on the suspicion that he was illegally importing gold jewellery for evasion of customs duty.
- xx) DRI seized the gold jewellery weighing 51.172 kgs, carried by the detenu Amit Pal Singh in his baggage.

- xxi) Thereafter, the business/factory premises of IMNPL were also searched, wherein 25 foreign origin gold bars total weighing 25 kgs, cut pieces of gold bars, gold dust and assorted gold jewellery totally weighing 26.404 kgs and silver bars and cut pieces of silver weighing 44.78 kgs was recovered and seized under Panchnama dated 24-25.04.2019.
- xxii) Thereafter, *inter alia* search was also conducted at the residential premises of one Rahul Gupta, owner of IMNPL, although nothing incriminating was found or recovered therefrom.
- xxiii) Mohd. Nashruddin Khan, who was the director of M/s. M.N. Khan Jeweller, UAE and was travelling on the same flight as Amit Pal Singh (the detenu) was also intercepted and detained by the DRI.
- xxiv) Gopal Gupta detenu, who is employed as a Chartered Accountant by IMNPL was also detained by the DRI *vidé* arrest memo dated 26.04.2019.

- xxv) Statements of the detenus were recorded on 25.04.2019 under Section 108 of the Customs Act, 1962 (hereinafter referred to as the 'Customs Act') and they were taken into custody by the DRI, who formally placed them under arrest on 26.04.2019.
- xxvi) It is observed here that, bail was granted to the detenus on 03.06.2019.
- xxvii) One Vikram Bhasin, who was the Customs Jewellery Appraiser at the IGI Airport, New Delhi was subsequently arrested by the DRI on 31.05.2019 and his statements were statedly recorded by the DRI. The said Vikram Bhasin (Customs Jewellery Appraiser, IGI Airport, New Delhi) was released on bail *vidé* order dated 23.07.2019.
- xxviii) IMNPL requested the DRI for provisional release of the seized goods, which request was rejected by the ADJ, Adjudication, Delhi *vidé* order dated 04.10.2019.

- xxix) Before rejecting the request for provisional release, a Show Cause Notice dated 26.09.2019 was issued to IMNPL by the DRI, New Delhi proposing confiscation of the seized gold jewellery.
- xxx) IMNPL being aggrieved by the DRI's said order dated 04.10.2019, preferred a Customs Appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), which *vidé* order dated 13.11.2019 allowed conditional release of the seized goods. The said order passed by the CESTAT was modified by this Court *vidé* judgment dated 01.06.2020, permitting the provisional release of all the goods seized by the DRI, save and except the gold jewellery that was seized at the airport.
- xxxi) A review petition preferred by the IMNPL before this Court in the said proceeding is still pending adjudication; although DRI's Special Leave Petition (SLP) against this Court's judgment dated 01.06.2020 was disposed of by the Hon'ble Supreme

Court *vide* order dated 01.10.2020, modifying the judgment of this Court, only to the extent of enhancing the value of Bond and Bank Guarantee, to be furnished for the provisional release.

xxxii) In the meantime, the impugned detention orders were passed on 21.01.2020.

xxxiii) It is relevant to point out that the impugned orders of detention were earlier challenged by the petitioners herein at the pre-execution stage, by filing W.P.(CRL.) 1009/2020 and W.P.(CRL.) 1019/2020, respectively.

xxxiv) This Court by way of its judgment dated 11.09.2020 dismissed both the said writ petitions, which judgment has also been affirmed by the Hon'ble Supreme Court *vide* order dated 30.09.2020 in SLP (CRL.) 4618/2020 and SLP (CRL.) 4620/2020.

xxxv) Pursuant thereto, the petitioners surrendered before the learned Additional Sessions Judge, Patiala House Courts, New Delhi *vide* surrender application dated

30.09.2020; at which point of time they were served with the detention orders, impugned herein, in the Court premises itself by the officers of the Executing Authority on 01.10.2020 and thereafter taken to Tihar Jail, New Delhi; where the detenus are in custody till date.

3. A perusal of the grounds of detention, impugned in these proceedings reveal that the role assigned therein to detenu Gopal Gupta pursuant to the investigation carried out is that :-

- (a) Detenu was Chartered Accountant in IMNPL and used to prepare Bill of Entry for import of gold and packing list & invoice for export, preparation/validation of documents pertaining to exhibition export and re-import of M/s Its My Name Pvt. Ltd, in addition to accountancy work and maintaining accounts for sale/purchase of gold in IMNPL.

(b) Detenu described the *modus operandi* *vidé* his voluntary statement recorded under Section 108 Customs Act dated 25.04.2019, whereby the re-imported gold jewellery was mis-declared at the time of import, using improper documentation. The Bill of Entry presented to Customs at the time of import was later replaced in the files in collusion with Vikram Bhasin, the then Jewellery Appraiser, IGI Airport, New Delhi, who allegedly used to replace Bill of Entry of large quantity with those of small quantity of gold jewellery in the official records; after clearance of the gold jewellery, which was exported from India and again brought (smuggled) back into India, in the guise of unsold gold jewellery and cleared through Customs by presenting either registered or unregistered manual Bill of Entry *qua* the re-import of unsold gold jewellery out of gold exported for exhibition;

- (c) The foreign origin duty free gold imported by IMNPL under the Advance Authorization scheme, was diverted into the domestic market through persons working for IMNPL, on the directions of detenu and the Proprietor Mr. Rahul Gupta;
- (d) Further, for execution of the conspiracy, a remote server was maintained by the detenu Gopal Gupta in his office (by using URL 'TRAMU.DDNS.NET' from the computer installed in their office) to store sensitive documents related to actual export, import, re-export transactions and other related papers. But the said detenu disabled remote server during search proceedings by DRI on 24/25.04.2019 so as to conceal the sensitive documents related to actual export, import, re-export transactions and other related papers;
- (e) In the course of investigation in one case detected by Customs (Prev.), relating to misuse of SEZ

scheme by M/s. Bharti Gems, it had transpired that the said detenu used to upload import-export documents through Team Viewer application and send it to M/s. Bharti Gems, where Amit Pal Singh, co-detenu, used to download the documents and submit the same documents to SEZ authorities, for further processing of import and export;

(f) Therefore, *prima facie* it appeared that all the documents relating to fraudulent re-import of gold jewellery for smuggling of the same into India, have been prepared by the said detenu.

4. Also a perusal of the grounds of detention, impugned in these proceedings, reveal that the role assigned therein to detenu Amit Pal Singh, pursuant to the investigation carried out is that:-

(a) Detenu was an employee of IMNPL and played significant role and aided Mr. Rahul Gupta (Director of

IMNPL) in misusing the Advance Authorization Scheme through circular trading of gold jewellery exported under the guise of exhibition from India through hand- carrying and subsequently re-importing (smuggling) the same fraudulently into India.

- (b) As per the travel details available on record detenu travelled from India to Dubai 115 times and travelled Dubai to India 115 times since 2016;
- (c) Detenu was allegedly a key member of the syndicate and played a key role therein by managing the circuitous trade of gold jewellery; by mis--declaring the quantity of gold jewellery; by importing the same through hand-carry; and thereby abetting Mr. Rahul Gupta in misusing the Advance Authorization Scheme; and making several visits from India to Dubai for the purpose of the exhibition of gold jewellery at Dubai on behalf of the firm, IMNPL and by hand-carrying the gold jewellery with him. The said detenu re-imported and smuggled the gold jewellery from Dubai to India (for

IMNPL) on each of his visit by using illegal import documentation in the form of illicit Bills of Entry, which had been used multiple times in the past.

- (d) Detenu specifically smuggled gold jewellery into India, which was declared to be exported to Nepal by M/s. M.N. Khan Jewellers in Dubai, in collusion with Musthafa Kamal, Mohd. Nashruddin and the Customs official at IGI Airport, New Delhi, on his earlier visits on 29.03.2019 and 02.04.2019 on the strength of Custom Gate Pass Serial No.1561 dated 29.03.2019 and 1563 dated 02.04.2019
- (e) Detenu was intercepted by DRI officials at IGI Airport on 24.04.2019 when they noticed that M/s. M.N. Khan Jewellers, Dubai has filed declaration before Dubai Customs that 51.362 kgs gold jewellery were exported to Kathmandu, Nepal through hand-carry by Mr.Musthafa Kamal Ramalap and 0.745 kgs gold jewellery was exported to Delhi through hand-carry by the detenu, but he received all the three consignments

of gold jewellery cumulatively weighing 51.362 kgs (gross weight declared to Dubai Customs), which were declared before Dubai Customs, to be exported to Kathmandu, Nepal (by M/s. M.N. Khan Jewellers FZE, Dubai) through Musthafa Kamal Ramalap along with the consignment of gold jewellery cumulatively weighing 0.745 kgs (gross weight), with an intention to smuggle the same into India. As a result detenu allegedly smuggled the whole consignments of gold jewellery into India (declared before Dubai Customs for export to Kathmandu and India.

ARGUMENTS ON BEHALF OF THE PETITIONERS:-

5. Mr. Akhil Sibal, learned Senior Counsel appearing on behalf of the petitioners vehemently assails the impugned orders of detention by first submitting that, the **detaining Authority was predisposed and lacked independence;** as the petitioners discovered a letter dated 02.09.2019 written by the Detaining Authority—Mr. R.P. Singh, Joint Secretary (COFEPOSA) to the Director General, DGFT which predates the impugned

detention order dated 21.01.2020 by 4½ months. The said letter was admittedly produced by the DGFT in certain other proceedings. A plain reading of the said communication establishes that Mr. R.P. Singh was aware of and involved with the investigation being conducted into the case against the petitioners much prior to passing the impugned detention orders. Pertinently, the letter is signed by Mr. R.P. Singh as 'Joint Secretary'. It was urged that in the said letter, Mr. R.P. Singh had painstakingly outlined the investigation carried out by the DRI, shared intelligence and requested cooperation of the DGFT, in what he statedly described as “*gold sector fraud having multi agency ramification*”. The said letter also carries a reference to an earlier letter dated 02.08.2019 from the DRI, thereby meaning that Mr. R.P. Singh was aware of the petitioners' cases at least as early as 02.08.2019. Mr. R.P. Singh pertinently ends the letter dated 02.09.2019 by recommending that the DGFT take action and also requests that “*...the Bureau may be given periodic updates in the matter*”

so that effective coordination in the investigation may be achieved.”

6. It was further submitted by learned Senior Counsel appearing on behalf of petitioners’ that the additional affidavit dated 10.02.2021 filed on behalf of the respondents in the present proceedings confirms that Mr. R.P. Singh authored the aforesaid letter. However, the affidavit then goes on to explain that the said letter was authored by Mr. R.P. Singh “...while working in the additional capacity of other vertical i.e. *Economic Intelligence of the CEIB...*”. However, axiomatically no such distinction is discernible from the letter itself. Paragraph 5 of the subject affidavit further states that CEIB is headed by a Director General who is assisted by one Joint Secretary designated as J.S. (COFEPOSA) and two Addl. Directors General. Pertinently, the letter dated 02.09.2019 is signed by Mr. R.P. Singh in his capacity as Joint Secretary and not in any other capacity. As a result, Mr. R.P. Singh was seized of the matter and was sharing intelligence and coordinating between different agencies as on 02.09.2019.

Even if it is assumed that Mr. R.P. Singh authored the letter dated 02.09.2019 in “*additional capacity of other vertical*”, though there is no material to suggest so, it is clear that he was actively engaged in the matter for months prior to passing the impugned detention orders and was abreast of the investigation for onward dissemination, coordination and action to other investigating agencies. Even the Show Cause Notice under Section 124 of the Customs Act dated 26.09.2019 issued by the DRI on culmination of their investigation was revealingly copied to the CEIB.

7. It is also submitted that the dual role played by Mr. R.P. Singh - first, in the Economic Intelligence vertical of the CEIB (as claimed by the respondents) in the active investigation; and second, as J.S. (COFEPOSA) in passing the impugned Detention Orders, goes to the root of the matter and defeats the very purpose of appointing a “*specially empowered*” officer under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the ‘COFEPOSA’), whose satisfaction must in

law, be independent and free from any bias or predisposition. As such, the subjective satisfaction of the Detaining Authority in the present case stands vitiated and the impugned detention orders ought to be quashed, on this ground alone.

8. It has then been argued on behalf of petitioners that there was gross and unexplained **delay in passing of detention orders dated 21.01.2020**, viewed within the four corners of settled law that a detention orders stand vitiated, if on account of delay in passing the same, the live and proximate link and between the prejudicial activities of the detenu and the rationale of clamping a detention orders on the detenu is snapped. In this behalf it is emphasized that the impugned detention orders were passed on 21.01.2020, after:

- 272 days from date of incident (24.04.2019);
- 270 days from formal arrest (26.04.2019);
- 232 days of grant of bail (03.06.2019); and
- 117 days of issuance of Show Cause Notice.

This, it is canvassed, evidently reflects that there is inordinate delay of 272 days in passing of the impugned detention orders from the date of the alleged incident. Therefore, the live-link

between the alleged prejudicial activities and the impugned detention orders stood snapped in the intervening 272 days. Moreover, when the Petitioners had already been released on bail on 03.06.2019, there is no justification for clamping a detention order after 232 days from such release, especially in the absence of any cogent material that indicates their involvement in the alleged prejudicial activities since their release on bail.

9. Learned Senior Counsel would further urge that the ground of delay was first urged by the petitioners in the aforesaid writ petitions filed at the pre-detention/pre-execution stage. At that time, the respondents sought to explain the delay in the counter affidavit as follows:-

26.09.2019	Investigation concluded and culminated into Show Cause Notice.
2nd Week Oct.2019	Proposal for invoking COFEPOSA was first ' <i>mooted</i> '.
<u>1st Week Nov. 2019</u>	<u>Further overseas evidence was received from Dubai.</u>
02.01.2020	Proposal was further analysed.

13.01.2020	Proposal was put up to Central Screening Committee (CSC).
14.01.2020	Recommendations of the CSC were submitted to the Detaining Authority.
21.01.2020	Impugned Detention Order was passed.

10. It is also submitted that the gap between October, 2019 and January, 2020 was sought to be explained away by receipt of overseas evidence from Dubai, purportedly in the month of November 2019, as evident from the counter affidavit filed by the respondents in the pre-execution writ petitions and the dates extracted above. Even otherwise, *vidé* order dated 11.09.2020 passed by this Court, dismissing the pre-execution writ petitions, the aspect of delay was dealt with in paragraphs 67-69 wherein this Court analysed the explanation of delay given by the respondents. However, at that stage the petitioners did not have the benefit of the impugned detention orders as the same had not been served on the petitioners. Upon being served with the impugned detention orders, the petitioners learnt that any reference to overseas evidence from Dubai in

November, 2019 was conspicuously absent and no such documents were placed before the Detaining Authority. Instead, what emerges from the detention orders is that all the material evidence, including overseas evidence, sought to be used against the petitioners was already collected as early as July, 2019.

11. It was further submitted by learned Senior Counsel for petitioners that another aspect which became strikingly noticeable to petitioners, which was not known to the petitioners at the pre-execution stage, is that Mr. R.P. Singh was all along aware of the case against the petitioners, at least as early as 02.08.2019. The aspect of delay, therefore assumes a different complexion. There is nothing in Section 3 or in the scheme of the Act which suggests that the specially empowered officer under Section 3 must act only on receipt of a proposal of some other agency or "*Sponsoring Authority*". In fact, the expressions "*Sponsoring Authority*" and "*Detaining Authority*" find no mention in the statute.

12. Learned Senior Counsel would also urge that **DRI Officers are not empowered under Customs Act,** in view of the decision of the Hon'ble Supreme Court rendered in the case of “*Canon India Pvt. Ltd. Vs. Commissioner of Customs*” dated 09.03.2021, which would render the Show Cause Notice dated 26.09.2019, as well as the proceedings emanating therefrom *non-est*. The Hon'ble Supreme Court in *Canon India (supra)* held Notification No.40/2012 dated 02.05.2012 issued by the Central Board of Excise and Customs (hereinafter referred to as ‘CBEC’) to be invalid and without authority of law. The said Notification No.40/2012 purports to entrust DRI Officers with functions and powers of Customs Officers under the Customs Act. The Hon'ble Supreme Court has held that the CBEC has no power under Section 2(34) of the Customs Act to issue such a notification and such power could only have been exercised by the Central Government under Section 6 of the Customs Act. The effect and consequence of the judgment in the case of *Canon India (supra)* is that the DRI Officers are

not “*Proper Officers*” under the Customs Act as the said Notification No.40/2012 is invalid, and resultantly *non-est*.

13. Consequently, DRI Officers are not properly and validly authorized to exercise powers and functions of Customs Officers under the various Sections mentioned in the said Notification No.40/2012. More importantly for the present case, the DRI Officers are not authorized under Sections 100, 103, 106, 106A and 110(1) and 110(3) of the Customs Act, meaning thereby that DRI does not have any power of search, seizure and confiscation of allegedly smuggled goods. Section 110(1) and 110(3) would reveal that only a “*Proper Officer*” under the Customs Act can exercise the power of confiscation of smuggled goods. Since Notification No.40/2012 has been held to be invalid, DRI Officers were never authorized by law to confiscate the allegedly smuggled goods. If the confiscation in the present case is bad in law and without legal authority, no case of smuggling can be foisted upon the petitioners. Even the Show Cause Notice dated 26.09.2019 is bad in law as it is based on a seizure and confiscation without authority. Since

the confiscation under Sections 110(1) and 110(3) of the Customs Act is bad in law, the goods so confiscated can no longer be deemed to be smuggled goods in terms of Sections 111 and 2(39) of the Customs Act, and as a result the detention of the petitioners under COFEPOSA, which essentially emanates from seizure and confiscation without authority, is also illegal and must be set aside.

14. It is furthermore submitted that **retractions by co-detenus were not considered and even rebuttals by DRI were issued belatedly.** On a perspicacious analysis of the impugned detention orders it is revealed that the respondents rely heavily on inculpatory statements recorded under Section 108 of the Customs Act. Statements of the co-detenus are reproduced throughout the impugned detention order. Petitioner Amit Pal Singh's statements dated 25.04.2019, 04.09.2019 and 06.09.2019; Petitioner Gopal Gupta's statement dated 25.04.2019 and co-detenu Mohd. Nashruddin Khan's statements dated 25.04.2019, 08.08.2019, 20.08.2019, 21.08.2019, 22.08.2019 and 03.09.2019 are reproduced

extensively in the Grounds of Detention. Both the Petitioners and the co-detenu retracted their statements and the retractions are noted in the impugned detention order. The impugned detention order further records that the DRI issued rebuttals to the said retractions on 16.01.2020. It is pertinent to note here that the manner in which the Detaining Authority has discarded the retractions of the Petitioners and the co-detenus shows complete non-application of mind. While heavy reliance is placed on the inculpatory statements, the retractions are discarded mechanically by noting that the same have been rebutted by the DRI on 16.01.2020, while completely ignoring the fact that the DRI did not rebut the retractions from May, 2019 to January, 2020, and even when it did so, it was done conveniently 05 days prior to passing of the impugned detention order. It is clear that the Rebuttal dated 16.01.2020 was issued by DRI for the sake of dealing with the retractions in the impugned detention orders, whereas DRI had no real intention to rebut the same for 8 months prior thereto.

15. It is submitted that **retractions by co-accused persons were not placed before the Detaining Authority** as in addition to the statements recorded under Section 108 of the Customs Act of the Petitioners and the co-detenu Mohd. Nashruddin Khan, the impugned Detention Orders further rely on the inculpatory statements of 02 more co-accused persons, namely Shri. Vikram Bhasin and Shri. Mahesh Jain. Vikram Bhasin's statements dated 26.04.2019, 27.04.2019, 23.05.2019, 24.05.2019 and 20.09.2019 recorded under Section 108 of the Customs Act were reproduced in the impugned detention orders as well as Mahesh Jain's statements dated 14.06.2019 and 15.06.2019. While the impugned detention orders rely upon the statements of Vikram Bhasin and Mahesh Jain, their subsequent retractions are not placed before the Detaining Authority. The non-placement of retractions of co-accused, whose inculpatory statements have been otherwise relied upon, goes to the root of the matter and tends to vitiate the subjective satisfaction of the Detaining Authority. Vikram Bhasin's retraction dated 03.06.2019 was addressed to Mr. Manish

Khurana, learned CMM, Patiala House Courts, New Delhi and had the effect of retracting all his previous statements. The DRI cannot claim it had no knowledge of the same as they filed a reply dated 17.01.2020 - just 4 days prior to the passing of the impugned detention orders dated 21.01.2020. Similarly, Mahesh Jain's retraction dated 31.10.2019 was addressed to the Additional Director General (Adjudication), DRI and has the effect of retracting all prior statements. The DRI, which is the Sponsoring Authority in the present case, was always aware of the retractions issued by the co-accused persons and ought to have placed the said retractions before the Detaining Authority, especially if it placed on record the inculpatory statements of such co-accused persons.

16. It was further submitted by the counsel for petitioners' that the Detaining Authority while arriving at subjective satisfaction has to satisfy itself with respect to propensity of the detenu to continue indulging in prejudicial activity. For this purpose, all facts and documents that are vital to consider the required causal link between suspicion and preventive detention, by the

Detaining Authority, must be placed before it and must also be supplied to the detenu.

17. It has been argued on behalf of petitioners that IMNPL was put under the Denied Entity List by the DGFT **vidé order dated 26.06.2019**, meaning thereby that IMNPL could no longer import gold under Advance Authorisation Scheme and hence there was no possibility of it misusing the said scheme. This is essential as the entire basis of the detention of the petitioners is the alleged misuse of Advance Authorisation as stated in Grounds Nos.2 and 5 of the impugned detention orders. The orders placing IMNPL under the Denied Entity List ought to have been placed before the Detaining Authority as they are vital documents, which was neither placed and nor considered.
18. It is also submitted that as aforesaid, IMNPL was put under Denied Entity List by the DGFT. The DGFT took this measure pursuant to a UO Note dated 21.06.2019 issued by the DRI to the DGFT. This UO Note dated 21.06.2019 was also never placed before the Detaining Authority and the subsequent fact of IMNPL being put in the Denied Entity List was also not

disclosed. Non-placement of a vital document such as the UO Note dated 21.06.2019 which led to the company being put under the Denied Entity List by the DGFT amounts to vitiating the subjective satisfaction.

19. It was further submitted by the counsel for petitioners' that the suspension order of Mr.Vikram Bhasin's--Customs Jewellery Appraiser was not placed before Detaining Authority. It is the case of the respondents that *"The role of Vikram Bhasin was so crucial since without his collusion, the smuggling of Gold could not have been possible"*. Vikram Bhasin was suspended on 03.06.2019. Crux of the allegations against the Petitioners was that they were smuggling gold jewellery with the aid of the Customs Jewellery Appraiser. However, the fact that the said Vikram Bhasin was under suspension was not considered by the Detaining Authority as the Suspension Order was never placed before it by the DRI.
20. It is further argued that Petitioner Amit Pal Singh's passport was seized at the time of his arrest and was never released. The order dated 28.08.2019 passed by the learned CMM, Patiala

House Courts, New Delhi would reveal that the passport of petitioner Amit Pal Singh was withheld on the request made by the DRI. This fact was never placed before the Detaining Authority, nor was the said order dated 28.08.2019.

21. Further, it is submitted that petitioners were granted bail *vidé* order dated 03.06.2019 passed by the learned CMM, Patiala House Courts, New Delhi. The impugned detention orders were passed on 21.01.2020 i.e. after 232 days thereafter. When the petitioners were on bail for such a long period, and there was no material to indicate any prejudicial activity during such period, the Detaining Authority ought to have considered the post-bail conduct of the Petitioners while passing the detention orders.
22. It has been argued on behalf of petitioners that findings returned by the CESTAT in its order 13.11.2019 were ignored by the respondents, as when IMNPL approached the CESTAT against the order dated 04.10.2019 passed by the Additional D.G. rejecting the prayer for provisional release of seized goods; CESTAT passed an Order dated 13.11.2019 in favour of

IMNPL directing release of all seized goods. Before returning its findings, the CESTAT noted the requirements for duty-free import of gold under the Advance Authorization Scheme and the Export Exhibition Scheme. It was noted by the Tribunal that IMNPL possesses Importer-Exporter Code and is entitled to import upto 1,000 kgs of gold under the Advance Authorization Scheme. The Tribunal further noted that under the scheme of export exhibition, manufactured jewellery is taken abroad after preparing invoices, filing shipping bills and the jewellery is inspected by the customs and the photographs of the said jewellery are kept under the seal of customs. The Tribunal also observed that re-import of the jewellery exported is duty free if done within 60 days of closing of the exhibition. At the time of re-import, Customs authorities verify the relevant particulars (export documents) and tally the photographs of the jewellery with the re-imported jewellery. The Tribunal observed that all supporting documents related to jewellery such as assessed bills of entry, packing lists, export documents and photographs with gate pass were in possession

of petitioner Amit Pal Singh. The Tribunal held that the Revenue Authority has failed to provide any cogent reason for its refusal to provisionally release the goods. The Tribunal further held that there exists no ground to hold that the seized goods fall under the category of “prohibited goods” as the Appellant is in possession of all legal documents necessary. Accordingly, CESTAT ordered release of all the seized gold jewellery, bars and articles.

23. While the CESTAT order dated 13.11.2019 is referred to in the impugned detention order, it is submitted that apparently the Detaining Authority has not applied its mind to the order and makes only a fleeting reference to the same. Neither is the reasoning given in the CESTAT order dealt with, nor does the Detaining Authority apply its mind to the documents dealt with by the CESTAT. Documents such as the Advance Authorization Scheme, the Export Exhibition Scheme and Customs Notification No.18/2015 dated 01.04.2015 which are referred by the CESTAT in its order do not form part of the Relied Upon Documents. The CESTAT order was challenged

by DRI in CUSAA No.229/2019 before the High Court. The High Court did not interfere with the order of release as far as 51 kgs of gold and 44.778 kgs of silver is concerned. Release only with respect to 25,299.680 gms was restrained. However, the order of the High Court in CUSAA No.229/2019 was passed on 01.06.2020 i.e., after the passing of the detention order dated 21.01.2020. As such, on the date of the passing of the impugned detention orders, the CESTAT order was not disturbed and ought to have been considered. A review bearing Revision Petition No. 117/2020 against the order dated 01.06.2020 is pending before a Division Bench of this court.

24. It was further submitted by the counsel for petitioners' that the Detaining Authority failed to appreciate that the petitioners are merely employees of IMNPL. Once the license of the company was put in Denied Entity List, there was no likelihood of the petitioners continuing any prejudicial activity. This, despite the Detaining Authority noting that the mastermind of the conspiracy is some other person and the petitioners are merely employees and **have not acquired any unjust enrichment.**

25. It is also submitted that it is a matter of record that neither the bail applications, nor the remand applications, nor the replies to the bail applications and documents filed therein by the petitioners/detenus have been placed by the Sponsoring Authority before the Detaining Authority.
26. It is further argued that on a plain reading of Ground No.2 of the Grounds of Detention it is reflected that while arriving at its subjective satisfaction with respect to the need to detain the petitioners, the Detaining Authority held that the petitioners were evading payment of customs duty and the same amounted to *smuggling*. However, the DRI in its Additional Submissions dated 29.05.2019 filed in the bail proceedings had categorically conceded that the present case was not one of evasion of duty. This document was never placed before the Detaining Authority and non-consideration of the same amounts to vitiating the subjective satisfaction. The Additional Submissions of DRI, just like the Bail Applications, ought to have necessarily been placed before the Detaining Authority by the Sponsoring Authority.

27. It was further submitted by the counsel for petitioners' that reliance has been placed by the Detaining Authority on the case of M/s. Bullion LLP. While the Show Cause Notice dated 31.08.2018 in the case of M/s. Bullion LLP forms part of the Relied Upon Documents, the documents listed in the said Show Cause Notice including panchnamas etc. have not been placed before the Detaining Authority. More importantly, there is no mention of Petitioners Amit Pal Singh and Gopal Gupta in para xxvi(a) relating to M/s. Bullion Line LLP. The said Show Cause Notice is not issued to the Petitioners and has nothing to do with the Petitioners. Further, the goods that were seized were released on 19.01.2017 and the said fact has also not been placed before the Detaining Authority. The Respondents in the Counter Affidavit have stated that the *"...Panchnamas pertaining to the investigations in the cases of M/s Bharti Gems or M/s Bullion Line LLP do not pertain to the SA and therefore could not have been shared"*. Firstly, the investigation is being conducted by DRI. Secondly, the explanation that the DRI did not have access to documents is

an abdication of the constitutional responsibility of the Sponsoring Authority to place all relevant material before the Detaining Authority.

28. Learned Senior Counsel would also urge that statements of the petitioners and the co-detenu Mohd. Nashruddin Khan were recorded in the case of Bharti Gems whilst in judicial custody. However, the said statements were not placed before the Detaining Authority. Further, the Show Cause Notice dated 30.08.2020 issued in the case pertaining to Bharti Gems has been stayed by a Division Bench of Hon'ble Rajasthan High Court *vidé* order dated 11.01.2021 in Writ Petition (Civil) No.14008/2020.
29. Further, it is submitted that IMNPL issued a detailed representation dated 08.05.2019 *vidé* email to the DRI seeking release of its employees and seized goods. The representation is a vital document as it explains the stand of the company with respect to the transactions undertaken by it and offers a defence on behalf of its detained employees. The said representation has also not been placed before the Detaining

Authority. The stand of the Petitioners is that the same is a vital document and ought to have been placed and considered.

30. It was further submitted that by Id senior counsel appearing on behalf of petitioners' there has been **delay in deciding their representation by Central Government.** The Petitioners were detained on 01.10.2020. Petitioner Amit Pal Singh filed representations dated 16.10.2020 with the Detaining Authority and with the Central Government (D.G., CEIB). Similarly, petitioner Gopal Gupta filed representations dated 20.10.2020. The Detaining Authority rejected the respective representations made by the petitioners *vidé* Memorandum dated 03.11.2020. D.G. CEIB, however, did not deal with the respective representations of the detenus expeditiously and instead made a Reference dated 03.11.2020 in terms of Section 8(b) COFEPOSA to the Central Advisory Board. The Central Advisory Board gave its opinion that there existed sufficient grounds for the detention of the petitioners. Based arguably on the opinion of the Central Advisory Board, the Central Government on 21.12.2020, in exercise of powers under

Section 8(f) of COFEPOSA, confirmed the detention order dated 21.01.2020. Representations of the petitioners were rejected vide Memorandum dated 24.12.2020. Peculiarly, the order confirming the detention was passed on 21.12.2020 i.e., 03 days prior to rejection of the representations. This shows complete non-application of mind by the Central Government while dealing with the petitioners' Representations.

31. Learned Senior Counsel would further urge that by not deciding the respective representations of the Petitioners immediately and referring the same to the Advisory Board, the Central Government is guilty of inordinate and unexplained delay. In the case of Amit Pal Singh and Gopal Gupta, there is an inordinate delay of 69 and 65 days, respectively by the Central Government in dealing with their Representations. Further, the reliance placed by the Central Government on the case of **Golam Biswas vs. UOI & Anr.** reported as (2015) 16 SCC 177 is manifestly erroneous and highly misplaced. Ratio laid down in **Golam Biswas** (*supra*) is not an authority for the proposition that the Central Government is exempt from

deciding the detenu's representation expeditiously. **Golam Biswas** (*supra*) only lays down that the Central Government should not reject the detenu's representation during the pendency of proceedings before the Advisory Board. This does not mean that the Central Government is exempt from expeditious disposal of the detenus representation or that it can sit over the same till such time it makes a reference to the Advisory Board, even though it had sufficient time and opportunity to deal with it prior to making the reference.

32. It is also submitted that in the present case, the representations of petitioners Amit Pal Singh and Gopal Gupta were filed on 16.10.2020 and 20.10.2020, respectively. It is pertinent to note that as per Section 8(b) of COFEPOSA, the reference to the Advisory Board has to be made within 5 weeks from the date of detention. Therefore, the Central Government had to make the reference to the Advisory Board on or before 05.11.2019. Admittedly, the reference was made on 03.11.2019. However, the representations dated 16.10.2019 and 20.10.2019 were filed well before the reference had to be made and the Central

Government had 20 days to decide Petitioner Amit Pal Singh's representation (16th October to 05th November) and 16 days to decide petitioner Gopal Gupta's representation (20th October to 05th November), which was sufficient time to deal with the same before making the reference.

33. It is further argued that there has been complete and utter non-application of mind by the Detaining Authority while passing the impugned detention orders which is further evident from the fact that the grounds of detention in the case of the petitioners are identical to the grounds of detention of another detenu in an entirely different case. A person named Happy Arvind Kumar Dhakad came to be detained *vidé* detention order dated 17.05.2019, also passed by Mr. R.P. Singh. On a comparison between the impugned detention orders and the detention order dated 17.05.2019 of Happy Arvind Kumar Dhakad, it is clear that the same are identical, barring a few differences in names and references etc. The petitioners have already filed the detention order dated 17.05.2019 passed in the case of Happy Arvind Kumar Dhakad along with a

comparison of the grounds of detention in the impugned detention orders dated 21.01.2020. The comparison makes it clear that the entire exercise of passing the impugned detention orders is mechanical as the grounds have been lifted from the grounds of an altogether distinct case. Such a blatant copy-paste job by the Detaining Authority shows non-application of mind.

34. In order to support and buttress the petitioners' exhaustive oral submissions, the following decisions have been pressed into service:-

- (i) **Ankit Ashok Jalan v. Union of India & Ors.** reported as (2020) 16 SCC 127.
- (ii) **Golum Biswas v. Union of India** reported as (2015) 16 SCC 177.
- (iii) **Vimal Ashok Dhakne v. State of Maharashtra** being Crl. Appeal No. 163 of 2012
- (iv) **M/s Canon India Private Limited v. Commissioner of Customs** reported as 2021 SCC OnLine SC 200.
- (v) **Daljit Singh Sandhu v. Union of India** reported as (1993) 51 DLT 667.
- (vi) **Satnam Singh v. Union of India** reported as 1992 SCC Online Del 328.

- (vii) **Saeed Zakir Hussain v. State of Maharashtra** reported as (2012) 8 SCC 233.
- (viii) **Pooja Batra v. Union of India** reported as 2009 5 SCC 296.
- (ix) **Union of India v. Happy Dimple Dhakkad** reported as 2019 (20) SCC 609.
- (x) **Madasamy v. Pasumponpandian** reported as 2016 SCC OnLine Mad 20650.
- (xi) **Jeganath v. Principal Secretary** reported as 2017 SCC OnLine Mad 27423.
- (xii) **Avtar Singh v. Union of India & Ors.** reported as 2013 SCC OnLine Del 3806.
- (xiii) **A.Sowkath Ali v. Union of India** reported as (2000) 7 SCC 148.
- (xiv) **P. Saravanan v. State of Tamil Nadu** reported as (2001) 10 SCC 212.
- (xv) **Ashadevi v. K Shivraj** reported as (1979) 1 SCC 222.
- (xvi) **Union of India v. Ranu Bhandari** reported as (2008) 17 SCC 348.
- (xvii) **Sahil Jain v. Union of India** reported as 2014 (140) DRJ 319.
- (xviii) **Husainbi Abdullah v. State of Maharashtra** reported as 2013 SCC OnLine Bom 160.
- (xix) **Gimik Piotr v. State of Tamil Nadu** reported as (2010) 1 SCC 609.

- (xx) *Moulana Shamshunissa & Ors. V. Additional Chief Secretary & Ors.* reported as (2010) 15 SCC 72.
- (xxi) *Rajesh Gulati v. State of NCT of Delhi* reported as (2007) 7 SCC 233.
- (xxii) *Naresh Kumar Jain v. UOI* reported as 2011 SCC OnLine Del 442.
- (xxiii) *T.A. Abdul Rahman v. State of Kerela* reported as (1984) 4 SCC 741.
- (xxiv) *Ahmad Nassar v. State of Tamil Nadu* reported as (1999) 8 SCC 473.
- (xxv) Order dated 12.04.2021 passed by the Hon'ble High Court of Delhi in W.P.(Crl.) No.821/2021.

ARGUMENTS ON BEHALF OF THE RESPONDENTS: -

35. Per Contra, Mr. Amit Mahajan, learned Central Government Standing counsel appearing on behalf respondent No.1 and respondent No.2 would submit that impugned detention orders dated 21.01.2020 passed by the Competent Authority under Section 3 (1) of the COFEPOSA are legal and constitutional and the same have been passed by the Competent Authority with due application of mind and after arriving at the requisite subjective satisfaction; based on the sufficient material facts and circumstances of the case.

36. It is further argued that the Detaining Authority is a different and independent from the Sponsoring Authority and that before issuing the impugned detention order, the Detaining Authority has applied its mind fully independent of the Sponsoring Authority. Further, before the proposal is placed before the Detaining Authority, the Central Screening Committee (CSC) consisting of senior officers from different Miniseries/Departments screen the entire proposal and make its recommendations; it is only after the recommendation made by the CSC, the proposal goes to the Detaining Authority. It is, thus, evident that there are three different and independent authorities entrusted with the task to examine the incriminating material and facts available against the proposed detenu. The Detaining Authority has to arrive at his subjective satisfaction fully independent of the prosecution proceedings initiated by the Sponsoring Authority. The Detaining Authority passed the detention orders upon satisfying itself about the propensity of the proposed detenu to indulge in prejudicial activities in future and it has nothing to do with the prosecution

proceedings. Hence, the allegation of malice in issuing the impugned order is fundamentally unfounded, wrong, misconceived and untenable.

37. It was further submitted by the counsel for respondent that the detenu was an employee of IMNPL, who indulged in misusing the Advance Authorization Scheme through circular movement of gold jewellery exported under the guise of exhibition from India through hand-carry and subsequently smuggled gold jewellery back into India under the garb of re-importing the said jewellery without the required documents and permissions and posed an imminent and insidious threat to the economic security of the country.
38. Further, it is submitted that the primary allegation of the petitioners that Mr. R.P Singh was not only aware but also took an active part in the investigation and issued detailed communications with respect to ongoing investigation *vidé* letter dated 02.09.2019, is misleading and frivolous, since CEIB is the nodal agency and as such the information was shared with the DGFT for necessary action in the routine

course. Also, the detention order passed against the petitioner and other co-detenus under Section 3 of the COFEPOSA was based on Mr. R.P Singh's independent evaluation and subjective satisfaction, as an officer of the Detaining Authority.

39. It has been argued on behalf of respondents that the respondents have followed the law, in letter and spirit, while issuing the impugned detention order. It was submitted that an order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention.
40. Further, it is submitted that preventive detention is a "suspicious jurisdiction" i.e. jurisdiction based on suspicion and an action is taken "with a view to preventing" a person from acting in any manner prejudicial to certain activities enumerated in the relevant detention law and the Detaining Authority has issued the detention order after it had arrived at the subjective satisfaction that the detenu had to be preventively detained, which has been elaborated in the

grounds of detention. Similarly, the allegation of ill-treatment, custodial violence, etc., ought not to affect the detention order.

41. It is further argued that without prejudice, all the relevant documents and vital documents were placed before the Detaining Authority and only after arriving at its subjective satisfaction, was the impugned detention order passed.
42. It was further submitted by the counsel for the respondent that that only copies of documents on which the impugned detention order is primarily based are required to be supplied to the detenu and not any and every document. Mere reference of certain instances for the purposes of completing the narration would not entitle the detenu to copies of such documents. It is submitted that all the relevant and vital documents/material was placed by the Sponsoring Authority before the Detaining Authority, the perusal of which led to the subjective satisfaction of the Detaining Authority in passing the detention order.
43. It is also submitted that contention of the petitioner that there was delay of 09 months in passing of the detention order, has

previously been agitated by the petitioner and has been dealt by this Court in W.P (Crl.) No.786/2020 in the case titled '*Mohd. Nashruddin Khan v. Union of India & Ors.*' decided on 11.09.2020 wherein this Court categorically observed that there was no delay.

44. It has been argued on behalf of respondents that in so far as the allegation *qua* overseas evidence is concerned, the authorities during investigation are at liberty to gather all evidence pertaining to the offence, and by no stretch of imagination can gathering and collating of information by the Sponsoring Authority be held to be the cause of delay in passing of the detention order.
45. It is also submitted that as far as the averment regarding retractions filed by detenu Amit Pal Singh is concerned, the detenu did not file any retraction at the time of first production before the Judicial Magistrate. The retraction was filed subsequently and was general and vague in nature and was filed as an after-thought. The subsequent retractions have already been duly rebutted and are on the record of the learned

CMM, Patiala House Courts, New Delhi. Further, the detenu has time and again relied upon the observations made in the bail order dated 03.06.2019 made by the learned CMM, Patiala House Courts, New Delhi, including in his challenge to the detention order at the pre-execution stage *vidé* W.P.(Crl.) No.1009/2020. However, it is submitted that the granting of bail by no stretch of imagination can be inferred as absolving the proposed detenu of the alleged offence. It is also trite that a Court does not go deep into the merits of the matter while considering an application for bail and only forms a *prima facie* opinion; however, the merits of the matter are to be tested at the stage of trial. It is further submitted that by virtue of the COFEPOSA the respondents are vested with powers to issue detention order against the petitioner. It is further submitted that grant of bail or its denial is not a ground for quashing of the detention order as long as the said fact is taken note of by the Detaining Authority and subjective satisfaction is arrived at as to the propensity of the person to indulge in prejudicial activities.

46. It is further argued that the contention of non-consideration of other documents/material cannot be a ground for vitiating the detention order. As sufficient documents and materials were placed before the Detaining Authority and upon considering the individual role of the petitioner, the Detaining Authority satisfied itself as to his continued propensity and his inclination to indulge in the act of smuggling in a planned manner to the detriment of the economic security of the country, which made it necessary to prevent the petitioner from smuggling goods, by detaining him.
47. It is also contented that delay, either in passing the detention order or execution thereof, is not fatal except where the same remains unexplained. Even in a case of undue or long delay between the prejudicial activity and the passing of a detention order, if the same is satisfactorily explained and a tenable and reasonable explanation is offered, the order of detention is not vitiated.
48. Further, it is submitted that as much emphasis has been laid by the petitioner upon the findings of the CESTAT order which

has already been modified and subsumed by the judgment dated 01.06.2020 rendered by this Court in CUSAA No.229/2019, wherein this Court has held that an order of provisional release of the seized gold, gold jewellery and silver is, at all times, an interlocutory exercise, and does not finally adjudicate on any liability.

49. It was further submitted by the counsel for respondent that the contention of the petitioner that the communication from FCA, Dubai, in November, 2019 was not included in the Relied Upon Documents, is wrong, baseless and misleading. As regards the contention relating to guidelines issued by the department itself, it is submitted that the relevant guidelines are only executive/ internal instructions for use by the department officer and the same have been complied with in the instant case in addition to all the statutory and constitutional provisions.
50. It is also submitted that as far as rebuttals to the retraction filed by the detenu are concerned, no retraction was filed or made by the detenu at the time of his arrest. Only on 27.04.2019 was

the retraction filed, which was duly rebutted by the DRI on 29.05.2019 by filing additional submissions before the learned CMM, Patiala House Courts, New Delhi. It is noted that the rebuttal clearly mentions that the retraction made by the detenu was general and vague and already stands rebutted *vidé* the evidence contained in the Show Cause Notice dated 26.09.2019 duly served upon the detenu. Therefore, no prejudice has been caused to the detenu.

51. It has been argued on behalf of Respondents that persons engaged in smuggling activities pose a serious threat to the economy and thereby to the security of the nation; and as a precaution no hard and fast rule can be precisely formulated that would be applicable under all circumstances; rather it follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and order of detention.
52. Lastly, it is also submitted that there was no inordinate delay in deciding the representation of the petitioners by the Central Government as the representation dated 16.10.2020 was

received from the petitioner through his counsel in the office of the D.G., CEIB on 16.10.2020 itself and the requisite information/comments of the Sponsoring Authority were sought on 19.10.2010 on the said representation. The requisite information/comments of the Sponsoring Authority were received on 02.11.2020 and thereafter the matter was referred to the Advisory Board on 03.11.2020. The answering respondents on 02.12.2020 sent copies of the representation of the detenu to the Advisory Board alongwith the comments on the representation of the detenu, prepared by the Sponsoring Authority. The Advisory Board on 14.12.2020 opined that there exists sufficient cause for detaining the detenu in pursuance to the Detention Order dated 21.01.2020. Thereafter the opinion of the Advisory Board was submitted for necessary approval of the Hon'ble Finance Minister on behalf of the Central Government on 15.12.2020. The approval was received on 21.12.2020 and thereafter the representation was disposed on 23.12.2020 and communicated to the petitioner on 24.12.2020. Thus, there was no inordinate delay in deciding

the representation of the petitioners by the Central Government.

53. In support of his arguments, Mr. Amit Mahajan, learned CGSC appearing on behalf of the respondent has relied upon the following decisions: -

- (i) **Union of India & Ors. v. Muneesh Suneja** reported as (2001) 3 SCC 92).
- (ii) **Licil Antony v. State of Kerala & Anr.** reported as (2014) 11 SCC 326.
- (iii) **T.A.Abdul Rahman vs State of Kerala**, reported as (1989) 4 SCC 741.
- (iv) **Mohd. Nashruddin Khan v. Union of India & Ors** in W.P. (Crl) 786/2020 decided on 11.09.2020
- (v) **Mohd. Nashruddin Khan v. Union of India & Ors** in W.P.(Crl) 786/2020, decided on 11.09.2020.
- (vi) **Radhakrishnan Prabhakaran v. State of Tamil Nadu & Ors** reported as (2000) 9 SCC 170.
- (vii) **Union of India & Anr. v. Dimple Happy Dhakad** reported as (2019) SCC Online SC 875.
- (viii) **Haradhan Saha v. The State of West Bengal & Ors.** reported as (1975) 3 SCC 198.
- (ix) **State of Maharashtra & Ors. v. Bhaurao Punjabrao Gawande** reported as (2008) 3 SCC 613.

- (x) **Madan Lal Anand v. UOI & Anr** reported as (1990) 1 SCC 81.
- (xi) **Kamarunnisa v. Union of India & Anr.** reported as (1991) 1 SCC 128.
- (xii) **Union of India v. Yumnam Anand M. Alias Bocha Alias Kora Alias Suraj & Anr.** reported as (2007) 10 SCC 190.
- (xiii) **Golam Biswas v. Union of India & Anr** reported as (2015) 16 SCC 177.
- (xiv) **Mohammad Seddiq Yousufi v. Union and Anr.** decided on 21.01.2020.
- (xv) **Sheetal Manoj Gore v. State of Maharashtra & Ors** reported as (2006) 7 SCC 560.
- (xvi) **Maya Ajit Satam v. The State of Maharashtra** reported as 2012 (114) BOMLR 2969.
- (xvii) **Shabnam Arora v. Union of India and Ors** reported as 2017(357)ELT 127(Del.).

54. These petitions were heard at great length by us and extensive submissions were put forth by learned Senior Counsel appearing on behalf of the parties, who have also filed detailed written submissions. Therefore, we have taken utmost care in taking note of all the rival contentions and the principles of law attracted for adjudication, in writing our considered

decision, because of which, it has not been possible to write a brief judgment.

DISCUSSION AND CONCLUSION:-

55. Having heard learned counsel appearing on behalf of the parties and after due consideration of the rival submissions in the context of the facts and circumstances on record, as well as the relevant provisions of law and the decisions relied upon by the parties; and having perused the material on record, including the pleadings, the detailed written submissions filed on behalf of the parties and the original file, the following issues arise for consideration in these proceedings:-

- a. Whether the Detaining Authority acted independently and without any bias, whilst rendering the impugned orders of detention;
- b. Whether the impugned orders of detention passed are bad in law and vitiated on the ground of inordinate delay;
- c. Whether the impugned detention orders are vitiated on the ground of non-application of mind;

- d. Whether the detaining authority has arrived at its subjective satisfaction without properly appreciating and satisfying itself *qua* the propensity of the detenu to continue indulging in prejudicial activities;
 - e. Whether there has been delay on the part of the Central Government in deciding the representation filed by the detenus; and lastly
 - f. Whether the detention orders stand vitiated owing to the reason that the grounds stated therein have been lifted from the grounds taken in an entirely different case?
56. Insofar as the **first** issue, as to whether the Detaining Authority acted independently and without any bias whilst passing the impugned orders of detention, is concerned; we have considered the rival submissions made before us in the backdrop of the original records and material placed before us in the present proceedings. We have also considered the judgment dated 11.09.2020 passed by this Court at the pre-

detention stage in W.P.(Crl.) No.1009/2020 and W.P.(Crl.) No.1019/2020.

57. Whilst declining to entertain the aforesaid petitions at the pre-execution stage, this Court observed as follows:-

“There is nothing produced before us by the petitioners to show that the Detaining Authority had any interaction with either of these petitioners, or in relation to their respective cases, before he passed the Detention Orders against each of them. There is absolutely no material placed on record by the petitioners to justify the claim of either malice in fact, or in law, against the members of the Central Screening Committee, or the Detaining Authority.”

58. The petitioners have in the course of the present proceedings placed on record, by way of their rejoinder affidavits, a letter dated 02.09.2019 addressed by Mr. R.P. Singh, Joint Secretary (COFEPOSA) to the DGFT, the opening paragraph of which reads as under:-

“This has reference to a letter bearing DR/HQ-GI/338/VI/Enq-2/ENT-NIL/2019/2835 dated 02.08.2019, in the matter of a case of misuse of hand carry & exhibition provision of the Foreign Trade Policy (FTP) in respect of precious Metals & Jewellery and Advance Authorization Scheme, received in the Bureau from Directorate of Revenue Intelligence.

2. It has been reported that a person was intercepted by DRI at IGI airport on 24.04.2019 and found in

possession of 51.172 kg of assorted gold jewellery.....”

The aforesaid letter concludes with the following directions:-

“9since the case involves huge revenue implication/fraud angle and has multi-agency ramifications, it is requested that the Bureau may be given periodic updates in the matter so that effective coordination in the investigation may be achieved.”

59. It is pertinent to observe here that the aforesaid letter predates the detention order dated 21.01.2020 by approximately four and half months.
60. From a plain reading of the said communication dated 02.09.2019, it is clear beyond doubt that Mr. R.P. Singh, who passed the detention order, was actively involved in the investigation, which was being conducted into the cases against the petitioners, much prior to the passing of the detention order by him. Mr. R.P. Singh, in his letter dated 02.09.2019, elaborately summarized the specifics of the investigation, which was initiated by the DRI in the matter pertaining to the petitioners regarding the case of misuse of hand-carry and exhibition provisions of the FTP, in respect of

the precious Metals and Jewellery and Advance Authorization Scheme.

61. In this regard, it is observed that the respondents have not disputed the contents of the aforesaid letter or the circumstance that Mr. R.P. Singh was the author of the said communication. However, the respondents have in their affidavits dated 10.02.2021, taken the stand that the said letter dated 02.09.2019 was authored by Mr. R.P. Singh “.....while working in the additional capacity of other vertical i.e. *Economic Intelligence of the CEIB.....*”
62. The petitioners have refuted the said stand by urging that no such distinction is discernible from the said letter itself. It is further submitted by them that in the said affidavit dated 10.02.2021, the respondent has also admitted that the CEIB is headed by a Director General, who is assisted by one Joint Secretary, designated as J.S. (COFEPOSA). Thus, there is no manner of doubt that the letter dated 02.09.2019 is signed by Mr. R.P. Singh, in his capacity as Joint Secretary and not in any other capacity. In this regard, it is also the submission of

the petitioners that Mr. R.P. Singh himself filed an affidavit dated 26.02.2021, in CONT. CAS (C) No.84/2021, wherein he rebutted the facts stated in the affidavit dated 10.02.2021.

63. In view of the above, upon a perusal of the documents placed before us, we have no hesitation in holding that Mr. R.P. Singh was actively involved in the subject investigation and was closely monitoring the same with different agencies, as early as on 02.09.2019.
64. It is, therefore, irrefutable that the Detaining Authority had prior interaction with the petitioners' case. At this juncture, we must observe that this Court while rendering the judgment dated 11.09.2020 admittedly did not have the benefit of considering the said letter dated 02.09.2019.
65. We are thus of the considered view, as submitted on behalf of the petitioners, that Mr. R.P. Singh was actively involved in the case pertaining to the detenus for a long period, prior to the passing by him of the impugned detention orders; and was admittedly coordinating the investigation undertaken by the competent agencies in that regard.

66. The dual role played by Mr. R.P. Singh - first, in the Economic Intelligence vertical of CEIB (as claimed by the respondents) during the active investigation; and second, as J.S. (COFEPOSA), in passing the impugned Detention Orders, goes to the root of the matter and defeats the very purpose of appointing a "specially empowered" officer under Section 3(1) of the COFEPOSA, whose satisfaction, jurisprudentially, must be independent and free from any bias or predisposition. In our opinion, the test to be applied for bias or predisposition is that of 'identity of intellectual apparatus', namely, whether the person who passed the detention order, purporting to act as the 'specially empowered' human agency, has dealt with the same matter prior to that in any other capacity. It is of no consequence to say that the same person, with the same intellectual apparatus, acted under a different official designation or in a different official capacity. Therefore, the issue of a pre-determined approach and bias, while passing the impugned orders of detention, is writ large in the instant case;

and as such, the subjective satisfaction of the Detaining Authority in the present case stands vitiated.

67. In our view, the powers conferred under Section 3(1) of the COFEPOSA have not been complied with independently in the present case. We are also in agreement with the submissions made by learned Senior Counsel in this behalf that, there is nothing in Section 3 of the COFEPOSA or in the scheme of the Act, which suggests that the especially empowered officer must act only on receipt of the proposal of some other agency or “Sponsoring Authority”. In fact the expression “Sponsoring Authority” and “Detaining Authority” find no mention in the statute.

68. In this behalf, it is therefore observed, that there was nothing that prevented Mr. R.P. Singh, whilst acting as J.S. (COFEPOSA), from passing the impugned orders of detention at the first opportunity. Resultantly, in our view, the argument of pre-determined approach and bias stands established in the present case.

69. Our view is elucidated appositely by the decision of the Hon'ble Madras High Court in **Madasamy vs. Secretary to Govt. & Ors.,** reported as **2016 SCC OnLine Mad 20650** and in particular paragraphs 41 to 43 of the said report, wherein it was observed as under:-

- “41. The Detaining Authority should act independently and with an open mind. He should not prejudge the issue even before considering the materials produced before him by the sponsoring authority.
42. In the subject cases, it is clear that the Commissioner of Police actively took part in the process of sponsoring the case of the detenus for detention. The affidavits of the sponsoring officers were attested by the Commissioner of Police by sitting in the arm-chair of the Detaining Authority. He was, therefore, in the know of things, even before the commencement of statutory proceedings for detention. In short, the Commissioner of Police himself was part of the team of complainants otherwise called as sponsoring authorities. Thereafter, he turned the chair and acted in a different capacity as the Detaining Authority. The sponsoring authority and Detaining Authority are practically one and the same in all these matters.
43. The active participation of the Detaining Authority in the process of sponsoring the name of the detenus for detention would go to the root of the matter and, therefore, is sufficient to set aside the orders of detention on the ground of predetermination. We are, therefore, of the view that the detention orders are unsustainable in law.”

70. To the similar effect are the findings recorded in the judgment of the Madras High Court in Jeganathan @ Jegan vs. Secretary to Govt. & Ors., reported as 2017 SCC OnLine Mad 27423.
71. Insofar as the **second** issue whether the orders of detention are bad in law and vitiated on the ground of inordinate delay is concerned, our attention was invited on behalf of the petitioner to the Chart of Events placed on record, in conjunction with the dates thereof, which preceded the passing of the detention orders.
72. It is the petitioners' submission that there was inordinate and unexplained delay of 272 days in passing the impugned detention orders from the date of the alleged initial incident.
73. In this regard, it is submitted on behalf of the petitioners that the respondent had sought to justify the delay before this Court at the pre-execution stage by contending that overseas evidence had been received from Dubai in the first week of November, 2019 and that the proposal for detention was resultantly analysed on 02.01.2020, which was then put-up

before the Central Screening Committee on 13.01.2020 and after recommendation of the Central Screening Committee on 14.01.2020, the impugned orders of detention were passed on 21.01.2020; and that therefore, there was no delay in passing the same.

74. The respondents at the post-execution stage have taken the stand that since the aspect of delay was already considered by this Court and rejected at the pre-execution stage, it is no longer open to the detenus to re-agitate the same.
75. The respondents have alternatively submitted that the plea of delay cannot be taken when the same is satisfactorily explained, as in the present case.
76. The petitioners have sought to counter the said arguments on behalf of the respondents that the overseas evidence from Dubai was received in the first week of November 2019, by submitting that there is nothing on record to indicate or substantiate the said assertion. It is further stated by them that it is only upon the receipt of the detention orders that the petitioners became aware that the reference to overseas

evidence from Dubai, which was ostensibly received by the DRI in November 2019, was conspicuous by its absence in the detention orders; and no material or documents in this regard were placed before the Detaining Authority. As a matter of fact, what emerges from the detention orders, is the position that all the material evidence, including the purported overseas evidence, sought to be relied upon against the petitioners, had already been collected as early as in July 2019, as is clear from the record, and had already culminated into the issuance of the Show Cause Notice dated 26.09.2019. Therefore, it is apparent that the stand taken by the respondents *qua* the receipt of overseas evidence from Dubai in November 2019 was merely window-dressing, used to cover-up the substantial delay that transpired from the time of issuance of the said Show Cause Notice dated 26.09.2019 to the proposal of detention being issued in January, 2020 and that the same is specious and untenable. In these circumstances, the question of delay assumes relevance and is germane and requires *de novo* consideration by this Court.

77. Having perused the impugned order of detention as well as the grounds of detention, it is observed that although it was urged before this Court by the respondents at the pre-execution stage about the overseas evidence received from Dubai in November, 2019; however, no reference to such evidence is to be found in the impugned detention orders.
78. We are, therefore, of the view that in the absence of any mention of such overseas evidence in the subject detention orders, the same cannot be considered as germane in order to satisfactorily explain the delay occasioned in passing the impugned orders of detention.
79. This Court while passing the said judgment dated 11.09.2020 had proceeded on the basis of the stand taken by the respondents that gathering of overseas evidence had delayed the issuance of the subject detention orders. However, since in the post-execution proceedings, the respondents have failed to even cite or rely upon the purported overseas evidence collected; nor did they place any such evidence before the Detaining Authority, the respondents have failed to explain

away the delay on that count. This Court is therefore obliged to re-consider the issue of delay at the post-execution stage in the present proceedings.

80. In view of the facts and circumstances elaborated hereinabove and the judicial pronouncements on the issue, to the effect that the Court can interfere with the orders of detention on the ground of inordinate and unexplained delay, *a fortiori* we are of the view that there has been a delay in passing the impugned orders of detention. As a result, in the absence of a satisfactory explanation, the inordinate delay leads to snapping of the live and proximate link and direct nexus between the alleged prejudicial activity and any immediate need to detain the petitioners.

81. In this behalf, it is incumbent upon us to emphasise the dictum of the decisions of the Hon'ble Supreme Court in the following cases:-

a) In **Saeed Zakir Hussain Malik vs. State of Maharashtra & Ors.**, reported as (2012) 8 SCC 233 and in particular paragraphs 22 to 28 thereof, the Hon'ble Supreme Court

whilst considering the question of delay, in relation to detention orders, observed as follows:-

“22. In *Rajinder Arora v. Union of India* [(2006) 4 SCC 796 : (2006) 2 SCC (Cri) 418] this Court considered the effect of passing the detention order after about ten months of the alleged illegal act. Basing reliance on the decision in *T.A. Abdul Rahman* [(1989) 4 SCC 741 : 1990 SCC (Cri) 76] the detention order was quashed on the ground of delay in passing the same.

XXXX	XXXX	XXXX	XXXX
XXXX	XXXX	XXXX	XXXX

27. As regards the second contention, as rightly pointed out by the learned counsel for the appellant, **the delay in passing the detention order, namely, after 15 months vitiates the detention itself. The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case.** Though there is no hard-and-fast rule and no exhaustive guidelines can be laid down in that behalf, **however, when there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the court to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay has occasioned.**

28. It is also the duty of the court to investigate whether causal connection has been broken in the circumstance of each case. We are satisfied that in the absence of proper explanation for a period of 15 months in issuing the order of detention, the same has to be set aside. Since, we are in agreement with the contentions relating to delay in passing the detention order and serving the same on the detenu , there is no need to go into the factual details.”

b) In T.A. Abdul Rahman vs. State of Kerala and Others, reported as (1989) 4 SCC 741, the Hon’ble Supreme Court has elaborated on the issue of when unexplained delay vitiates the detention order by observing as follows:-

“10. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a

tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.”

82. In view of the *ratio decidendi* of the above extracted decisions, we are of the view that in the facts and circumstances of the present case, the causal connection between the alleged prejudicial activities of the detenus and the necessity of the passing orders of detention *qua* the petitioners stands broken.
83. We hasten to add that whilst arriving at this conclusion, we have given our careful consideration to the judgment relied upon by the respondents on the question of delay in issuing the orders of detention. In this behalf, we observe that the reliance placed by the respondents on the decision in the case of *Union of India vs. Muneesh Suneja*, reported as (2001) 3 SCC 92, does not come to the aid of the respondents, inasmuch as, that was a case where the detention order was quashed by the High Court at the pre-detention stage and consequently, the Supreme Court observed that the same was not a fit case for the issuance of any writ of *habeas corpus* **but for certain other types of reliefs and, therefore, the matter had been**

examined as an ordinary writ petition. In this behalf, the Hon'ble Supreme Court held as under in the concluding paragraphs:-

“In addition, we may also notice that the order made by us will not prejudice the interest of the respondent that in the event the said order of detention is given effect to, it is open to the respondent to raise all grounds as are permissible in law notwithstanding what we may have observed in the course of this order.”

84. A plain reading of the paragraphs above extracted leaves no manner of doubt that the detention order may be quashed at the post execution stage, even though it has not been quashed at the pre-detention stage. It leads to but one inescapable conclusion that considerations while examining the validity of detention order at post-detention stage can be different from the considerations that obtain at the time of examining such an order at the pre-detention stage.
85. The respondents have also invited our attention to the judgment of **Licil Antony vs. State of Kerala and Another**, reported as **(2014) 11 SCC 326**, in addressing the issue of delay in issuing the order of detention.

86. In ***Licil Antony*** (*supra*), while dealing with the question of delay, the Hon'ble Supreme Court in paragraph 18 thereof observed that "*the question whether the prejudicial activity of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activity and the purpose of detention is snapped depends upon the facts and circumstances of each case*".
87. The facts and circumstances which demonstrate the snapping of the live-link between the alleged prejudicial activity and the purpose of detention have been copiously detailed in the present writ petition and the written submissions filed on behalf of the petitioners.
88. The present case is, therefore, entirely distinguishable on facts from the case of ***Licil Antony*** (*supra*), since in that case there was a delay of one month between the arrest of the detenu and the issuance of proposal of detention by the Sponsoring Authority. The detenu in ***Licil Antony*** (*supra*) was arrested on

17.11.2012 and the proposal for detention dated 17.12.2012 was received by the Detaining Authority on 21.12.2012.

89. In the present case, however, the petitioners were admittedly arrested on 24.04.2019, whereas the proposal for detention by the Sponsoring Authority was made, belatedly, only in January, 2020. Thus, evidently in the present case, there is a delay of over 08 months between the arrest of the petitioners and the proposal for detention by the Sponsoring Authority to the Detaining Authority; which is in complete contrast to the delay of just one month in the relied upon decision in ***Licil Antony*** (*supra*).

90. Further, in ***Licil Antony*** (*supra*), the Detaining Authority after scrutinizing and evaluating the proposal dated 25.01.2013, placed the same before the Screening Committee and forwarded the same on 01.02.2013. The Detaining Authority took the decision to detain the detenu on 15.04.2013. The detention order was expeditiously passed on 06.05.2013, after the draft grounds in English were approved on 19.04.2013 post translation to Tamil, which took time till 03.05.2013. It is in

these circumstances that the delay in passing the detention order was considered satisfactory in the facts and circumstances of ***Licil Antony*** (*supra*). However, in the present case, as elaborated hereinabove, there has been no satisfactory explanation forthcoming as to why there was a delay of more than 08 months on the part of the Sponsoring Authority in issuing a proposal for the detention of the petitioners.

91. Even in ***Licil Antony*** (*supra*), the Hon'ble Supreme Court in paragraph 09 thereof observed that *the delay in issuing order of detention, if not satisfactorily explained, itself is a ground to quash the order of detention*. It is in these circumstances that we are of the view that the decision relied upon by the respondents does not support their contentions in the present case.
92. Mr. Amit Mahajan, learned Central Government Standing Counsel appearing on behalf of the respondent, has vehemently argued that the question of delay in relation to the passing of the detention order cannot be re-agitated in these proceedings, since that aspect had already been dealt with by

this Court in *Mohd. Nashruddin vs. Union of India & Ors.*, **W.P.(CRL.) No. 786/2020 decided on 11.09.2020**, wherein it was held that there was no delay in passing of the impugned detention orders.

93. In this behalf, it is observed that this Court was clearly disinclined to accept the argument of delay urged on behalf of the detenus herein at the pre-execution stage, which finding is reflected in paragraphs 68 and 69 of the said judgment dated 11.09.2020. However, as is evident from the dictum of the Hon'ble Supreme Court in *Muneesh Suneja (supra)*, there can be no quarrel with the legal position, that even though the detention order has not been quashed at the pre-detention stage, it may be quashed at the post-detention stage. In this behalf, it would be pertinent to observe that, at the time of mounting a challenge to the impugned detention orders at the pre-detention stage, the petitioners admittedly did not have access to the detention orders, the grounds thereof, as well as the Relied Upon Documents, since the same were served upon

them only on 01.10.2020, consequent upon their arrest and detention.

94. It is at that stage that the petitioners became aware for the first time about the absence of the details and particulars of overseas evidence from Dubai in November 2019, since the same was neither mentioned in the impugned detention orders nor formed part of the Relied Upon Documents. It is in this view of the matter, as well as the dictum of the Hon'ble Supreme Court in *Muneesh Suneja (supra)*, that we find ourselves unable to agree with the respondent's submission that as the aspect of delay was dealt with by this Court in *Mohd. Nashruddin (supra)* in the earlier round at the pre-detention stage, we ought not to examine that issue at the post-detention stage. The parameters, in our considered view, in relation to the consideration of the subject detention orders at the post-detention stage are entirely different.
95. The next issue that requires adjudication is whether the impugned detention orders are vitiated on account of non-application of mind. In this behalf, we are constrained to

observe that in the grounds of detention, strong reliance has been placed upon the statements of the detenus and co-detenus, recorded under the provisions of Customs Act, 1962. A plain reading of the said grounds of detention clearly reflects the extensive reliance placed upon the said statements by the Detaining Authority, for arriving at its purported subjective satisfaction.

96. It is immediately evident, however, that the Detaining Authority did not consider the circumstance that the detenus and the other questioned individuals, whose statements formed the basis of the grounds of detention, had long since retracted those statements. In this behalf, the impugned orders of detention makes only a passing reference to the circumstance that the DRI had issued rebuttals to the said retractions on 16.01.2020, barely five days before passing the subject orders. This circumstance highlights the considerable gap of time between the retraction of their statements by the detenus and co-detenus, and rebuttal thereof by the DRI. This belated rebuttal on the part of the official respondents was relevant and

merited consideration by the Detaining Authority, particularly when extensive reliance was evidently placed upon those statements. The Detaining Authority would also have been well-advised to consider the aspect of admissibility of the statements, which stood retracted; and were only rebutted by the Sponsoring Authority, a few days before the passing of the impugned orders of detention. Further, we find from the record of the Detaining Authority that strong reliance has been placed upon the statement of not just the detenus but also the statements allegedly recorded of Vikram Bhasin and Mahesh Jain, statedly the co-accused. In this behalf, the record reflects that Vikram Bhasin and Mahesh Jain retracted their statements as far back as on 03.06.2019, which retractions have evidently not being placed before the Detaining Authority by the Sponsoring Authority. In our view, once the Detaining Authority has relied upon the inculpatory statements of the co-accused their retractions assumed great relevance in the factual backdrop of the present case. Consequently, the admissibility of the said statements becomes questionable once there is a

retraction, which issue merited consideration, not accorded to it by the Detaining Authority.

97. In this behalf, it is also trite to state that the Sponsoring Authority was under a legal obligation to have placed the said retractions before the Detaining Authority for the latter's subjective satisfaction.

98. In this behalf, it would be beneficial first to consider the observations of the Hon'ble Supreme Court in **A Sowkath Ali vs. Union of India & Others.** reported as (2000) 7 SCC 148 and particularly in paragraph 20 thereof. The said paragraph is extracted hereinbelow for the sake of facility:-

“20. There can be no doubt, it was not necessary, while considering the case of the petitioner detenu, to place all or any of the documents which are relevant and are relied on in the proceedings of a co-accused, **but where the sponsoring authority opts out of its own volition to place any document of the other co-detenu, not merely as a narration of fact but reiterating in details the confession made by him, then it cannot be said it would not prejudice the case of the detenu. If this has been done it was incumbent for the sponsoring authority to have placed their retraction also. As held in *Rajappa Neelakantan case* [(2000) 7 SCC 144 : (2000) 2 Scale 642] the placement of document of other co-accused may prejudice the case of the petitioner. In the first place the same should not have been placed, but if**

placed, the confessional statement and the retraction, both constituting a composite relevant fact both should have been placed. If any one of the two documents alone is placed, without the other, it would affect the subjective satisfaction of the detaining authority. What was the necessity of reproducing the details of the confessional statement of another co-accused in the present case? If the sponsoring authority would not have placed this then possibly no legal grievance could have been made by the detenu. But once the sponsoring authority having chosen to place the confessional statement, then it was incumbent on it to place the retraction also made by them. In our considered opinion, its non-placement affects the subjective satisfaction of the detaining authority. This Court has time and again laid down that the sponsoring authority should place all the relevant documents before the detaining authority. It should not withhold any such document based on its own opinion. All documents, which are relevant, which have bearing on the issue, which are likely to affect the mind of the detaining authority should be placed before him. Of course a document which has no link with the issue cannot be construed as relevant.”

99. In a similar vein are the observations of the Hon’ble Supreme Court in **P. Sarvanan vs. State of T.N. and Others**, reported as (2001) 10 SCC 212 and in particular paragraphs 7, 8 and 9 thereof. The said paragraphs as extracted hereinbelow:-

“7. When we went through the grounds of detention enumerated by the detaining authority we noticed that there is no escape from the conclusion that the

subjective satisfaction arrived at by the detaining authority was the cumulative result of all the grounds mentioned therein. It is difficult for us to say that the detaining authority would have come to the subjective satisfaction solely on the strength of the confession attributed to the petitioner dated 7-11-1999, particularly because it was retracted by him. It is possible to presume that the confession made by the co-accused Sowkath Ali would also have contributed to the final opinion that the confession made by the petitioner on 7-11-1999 can safely be relied on. What would have been the position if the detaining authority was apprised of the fact that Sowkath Ali had retracted his confession, is not for us to make a retrospective judgment at this distance of time.

8. The second contention that non-placement of the retraction made by Sowkath Ali would not have affected the conclusion as the petitioner's confession stood unsullied, cannot be accepted by us. The detaining authority had relied on different materials and it was a cumulative effect from those materials which led him to his subjective satisfaction. What is enumerated in Section 5-A of the COFEPOSA Act cannot, therefore, be applied on the fact situation in this case.
9. In this context, it is to be mentioned that the detention order passed against Sowkath Ali was quashed by this Court when he challenged that detention order under Article 32 of the Constitution (vide *A. Sowkath Ali v. Union of India* [(2000) 7 SCC 148 : 2000 SCC (Cri) 1304 : (2000) 5 Scale 372]).

100. Further, in *Ashadevi vs. K. Shivraj*, reported (1979) 1 SCC 222

the Hon'ble Supreme Court held as under:-

“6. It is well-settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. In *Sk. Nizamuddin v. State of West Bengal* [(1975) 3 SCC 395 : 1975 SCC (Cri) 21 : AIR 1974 SC 2353] the order of detention was made on September 10, 1973 under Section 3(2)(a) of MISA based on the subjective satisfaction of the District Magistrate that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and this subjective satisfaction, according to the grounds of detention furnished to the petitioner, was founded on a solitary incident of theft of aluminium wire alleged to have been committed by the petitioner on April 14, 1973. In respect of this incident of theft a criminal case was filed inter alia against the petitioner in the Court of the Sub-Divisional Magistrate, Asansol, but the criminal case was ultimately dropped as witnesses were not willing to come forward to give evidence for fear of danger to their life and the petitioner was discharged. It

appeared clear on record that the history-sheet of the petitioner which was before the District Magistrate when he made the order of detention did not make any reference to the criminal case launched against the petitioner, much less to the fact that the prosecution had been dropped or the date when the petitioner was discharged from that case. In connection with this aspect this Court observed as follows:

“We should have thought that the fact that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. That circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, no order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the pendency of a criminal case against him to the District Magistrate.”

It is true that the detention order in that case was ultimately set aside on other grounds but the observations are quite significant. These observations were approved by this Court in *Suresh*

Mahato v. District Magistrate, Burdwan [(1975) 3 SCC 554 : 1975 SCC (Cri) 120 : AIR 1975 SC 728] . The principle that could be clearly deduced from the above observations is 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. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order.

7. In the instant case admittedly three facts were not communicated to or placed before the detaining authority before it passed the impugned order against the detenu, namely, (i) that during interrogation of the detenu, in spite of request, neither the presence nor the consultation of the Advocate was permitted; (ii) that in spite of intimation to the Advocate in that behalf the detenu was not produced before the Magistrate on December 14, 1977 and (iii) that the confessional statements were squarely retracted by the detenu on December 22, 1977 at the first available

opportunity while he was in judicial custody; the first two had a bearing on the question whether the confessional statements had been extorted under duress from detenu or not, while the third obviously was in relation to the confessional statements which formed the main foundation of the impugned order and as such were vital facts having a bearing on the main issue before the detaining authority. As regards the first this Court in *Nandini Satpathy* [*Nandini Satpathy v. P. L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236] case has observed in para 63 of the judgment thus:”

101. In **Union of India vs. Ranu Bhandari**, reported as (2008) 17 SCC 348, the Hon’ble Supreme Court has observed so in Paragraphs 33, 34 and 35, which are reproduced hereunder:-

- “33. In the instant case, as some of the vital documents which have a direct bearing on the detention order, had not been placed before the detaining authority, there was sufficient ground for the detenu to question such omission. We are also of the view that on account of the non-supply of the documents mentioned hereinbefore, the detenu was prevented from making an effective representation against his detention.
34. In the said circumstances, we do not see any reason to interfere with the judgment and order of the

High Court and the appeal is accordingly dismissed.

35. In parting, we may reiterate what we have indicated hereinbefore, that since the personal liberty and individual freedom of a citizen is curtailed by an order of preventive detention, the detaining authorities must apply their minds carefully and exercise great caution in passing such an order upon being fully satisfied from materials which are both for and against the detenu that such an order is required to be passed in the interest of the State and for the public good.”

102. The reliance placed by the respondent on the decision of the Hon’ble Supreme Court in **Madan Lal Anand vs. UOI**, reported as **(1990) 1 SCC 81**, to the effect that it has been held therein that only copies of documents, on which the impugned detention orders are primarily based should be supplied to the detenus and not any and every documents, we observe that it was also clearly held therein in paragraph 24 thereof as under:-

“We must not, however, be understood to say that the detaining authority will not consider any other document.”

103. In view of the above extracted decisions, the legal position that emerges on this aspect is that, if the documents are relevant

and have a direct bearing on the case, they must be placed before the Detaining Authority for its 'subjective satisfaction'.

104. The reliance placed by the respondent upon the decision of **Kamarunnisa vs. Union of India**, reported as (1991) 1 SCC 128, does not come to their aid, since in the present case we agree with the submissions made on behalf of the petitioners, that the present is a case of non-placement of vital facts and documents before the Detaining Authority and that the 'subjective satisfaction' is vitiated since the latter was not in possession of vital material. The ratio in **Kamarunnisa** (*supra*) is, therefore, distinguishable on the facts thereof. We, therefore, answer the third issue by observing that the Detaining Authority fell into error in not considering vital material, thereby vitiating its subjective satisfaction, being hit by the vice of non-application of mind.
105. As far as the **fourth** issue is concerned, we observe that the Detaining Authority whilst arriving at its 'subjective satisfaction' failed to properly examine whether the detenus exhibited propensity to continue indulging in any prejudicial

activities, for the reason that there was no consideration of the circumstance that IMNPL had been placed under the Denied Entity List, thereby clearly indicating and establishing that it could no longer import gold under the Advance Authorization Scheme; and completely eliminating the possibility of it misusing the said scheme. The consideration of the said aspect is conspicuous by its absence in the impugned detention orders.

106. Also the factum of suspension of Vikram Bhasin, the co-accused, who was the Jewellery Appraiser, was neither placed nor considered by the Detaining Authority. On this behalf, it would be pertinent to observe that it was the case of the Sponsoring Authority itself that *"The role of Vikram Bhasin was so crucial since without his collusion, the smuggling of Gold could not have been possible"*. It was, therefore, incumbent upon the DRI to place the suspension order *qua* Vikram Bhasin for due consideration of the Detaining Authority.

107. Further, insofar as the detenu Amit Pal Singh is concerned, the DRI was required to bring the circumstance of the seizure of his passport at the time of his arrest and non-release thereof, to the notice of the Detaining Authority, since the same was a relevant factor for the purpose of determining whether the said detenu would have the propensity to indulge any further in the alleged prejudicial activities.
108. Lastly, the Detaining Authority did not consider the conduct of the detenus post their enlargement on bail, whilst rendering the impugned orders of detention.
109. Additionally, the order of CESTAT dated 13.11.2019 directing the provisional release of the goods, was also a relevant factor, that was not accorded any consideration by the Detaining Authority in the present case.
110. In **Husainbi Abdullah Ghalamsalam vs. State of Maharashtra**, reported as **2013 SCC OnLine Bom 160**, it was held by a Division Bench of Bombay High Court in paragraphs 6 and 7 thereof, as follows:-

“6. Learned Counsel for the Petitioner relied upon the ruling in *Smt. Nafisa Syed Ali v. The state of*

Maharashtra reported in 2013 ALL MR (Cri) 78. A Division bench of this Court after reference to observations and ratio in *GIMK PIOTR* 2010 ALLMR (Cri) 308 (SC) **had allowed the Writ Petition on the ground that when a passport of the detenu was retained with the Customs department, the likelihood of the detenu indulging in the smuggling activities was foreclosed. Impounding the passport of the detenu was enough to curb the potentiality of the smuggling, and therefore there was no justification to pass order of preventive detention when there was no chance of the detenu travelling to foreign country without passport. In the present case, admittedly the passport of the detenu was retained by the Authorities and was not returned.**

7. In the present case, likelihood of the detenu travelling to foreign country illegally without the passport was remote. In view of the law laid down in the aforesaid decisions, the detention order is based only on clause (i) of Section 3(1) of the COFEPOSA Act, the order of detention deserves to be set aside.”

111. In *Moulana Shamshunnisa vs. Additional Chief Secretary and Others*, reported as (2015) 15 SCC 72 the Hon’ble Supreme Court in paragraphs 7, 8 and 9 observed as under:-

- “7. In this background, the learned counsel has submitted that the observations of the detaining authority and the High Court, therefore, **that in case the detenu was released from jail, he could continue with his smuggling activities within India, notwithstanding that he could not travel abroad as his passport had been seized, was not acceptable as there was no material to justify this conclusion.** In this

connection, the learned counsel has placed reliance on *Rajesh Gulati v. Govt. (NCT of Delhi)* [(2002) 7 SCC 129 : 2002 SCC (Cri) 1627] and *Gimik Piotr v. State of T.N.* [(2010) 1 SCC 609 : (2010) 1 SCC (Cri) 864].

8. In *Rajesh Gulati case* [(2002) 7 SCC 129 : 2002 SCC (Cri) 1627] **the question that came to be canvassed on behalf of the detenu was that as his passport continued to be in the possession of the Customs Authorities, there was no question of the appellant travelling abroad or indulging in any smuggling activity. This plea was accepted by this Court by observing that it was not the case of the detaining authority at any stage that the detenu would be able to continue with his smuggling activities within India, though he could not go abroad his passport having been seized. It was observed thus: (SCC p. 134, para 15)**

“15. ... The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. These findings are sufficient to invalidate the impugned detention order and it is not necessary to consider the other issues raised by the appellant.”

9. This opinion has been further fortified by this Court in *Gimik Piotr case* [(2010) 1 SCC 609 : (2010) 1 SCC

(Cri) 864] . In SCC para 32, it has been held as under:
(SCC p. 619)

“32. In the present case, the detention order was passed under Section 3(1)(i) of Cofeposa. The Customs Department has retained the passport of detenu. The likelihood of the appellant indulging in smuggling activities was effectively foreclosed. As observed by this Court in *Rajesh Gulati case* [(2002) 7 SCC 129 : 2002 SCC (Cri) 1627], that the contention that despite the absence of a passport, the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation.”

And again in SCC para 35: (*Gimik Piotr case* [(2010) 1 SCC 609 : (2010) 1 SCC (Cri) 864] , SCC p. 619)

“35. In our considered view, the submission of the learned counsel for the appellant requires to be accepted. In the instant case as the facts reveal that there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to

smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the facts and circumstances of the case.”

112. We are, therefore, of the view that the Detaining Authority has erred in arriving at the finding *qua* the propensity of the detenus to involve themselves in further prejudicial activities, by failing to consider the facts and circumstances, elaborated hereinabove.
113. On the **fifth** issue regarding the delay on the part of the Central Government in deciding the representation filed by the detenus, it would be relevant to consider the circumstance that both detenus were detained on 01.10.2020 and filed representations dated 16.10.2020 and 20.10.2020 respectively, with the Detaining Authority, as well as with the Central Government. Although the Detaining Authority rejected their representations on 03.11.2020, no decision, however, was

taken by the Central Government on the detenus' representations. Instead the Central Government made a reference dated 03.11.2020 to the Central Advisory Board, which gave its opinion *qua* the sufficiency of the grounds with regard to the detenus detention. The subject representations were finally rejected by the Central Government only on 23.12.2020, three days after confirmation by it of the orders of detention by the Central Advisory Board.

114. A bare perusal of the above clearly reflects, that insofar as the case of detenus Amit Pal Singh and Gopal Gupta are concerned, there was massive delay of 69 days and 65 days respectively by the Central Government in dealing with their representations.
115. In *Ankit Ashok Jalan vs. Union of India and Others*, reported as (2020) 16 SCC 127, the Hon'ble Supreme Court observed, particularly in paragraph 17 thereof, as under:-

“17. In terms of these principles, the matter of consideration of representation in the context of reference to the Advisory Board, can be put in the following four categories:

17.1. If the representation is received well before the reference is made to the Advisory Board and can be considered by the appropriate Government, the representation must be considered with expedition. Thereafter the representation along with the decision taken on the representation shall be forwarded to and must form part of the documents to be placed before the Advisory Board.

17.2. If the representation is received just before the reference is made to the Advisory Board and there is not sufficient time to decide the representation, in terms of law laid down in *Jayanarayan Sukul* [*Jayanarayan Sukul v. State of W.B.*, (1970) 1 SCC 219 : 1970 SCC (Cri) 92] and *Haradhan Saha* [*Haradhan Saha v. State of W.B.*, (1975) 3 SCC 198 : 1974 SCC (Cri) 816] **the representation must be decided first and thereafter the representation and the decision must be sent to the Advisory Board.** This is premised on the principle that the consideration by the appropriate Government is completely independent and also that there ought not to be any delay in consideration of the representation.

17.3. If the representation is received after the reference is made but before the matter is decided by the Advisory Board, according to the principles laid down in *Haradhan Saha* [*Haradhan Saha v. State of W.B.*, (1975)

3 SCC 198 : 1974 SCC (Cri) 816] , the representation must be decided. The decision as well as the representation must thereafter be immediately sent to the Advisory Board.

17.4. If the representation is received after the decision of the Advisory Board, the decisions are clear that in such cases there is no requirement to send the representation to the Advisory Board. The representation in such cases must be considered with expedition.”

116. It is, therefore, well settled that the right of the detenus to make a representation and have it considered by the appropriate Government, with expedition, is a constitutional right under Article 22 (5) of the Constitution of India and any unreasonable and unexplained delay in considering the representation is fatal to the continued detention of the detenu.
117. In this view of the matter; and the circumstances that this proposition is too well settled in a long line of decisions, it is not considered necessary for us to examine the other authorities relied upon by the respondents on this aspect.

118. We, therefore, hold that there has been inordinate and unexplained delay on the part of the Central Government in deciding the statutory representations filed by the detenus.
119. The **last** issue that arises for determination before us is whether the subject detention order stands vitiated for the reason that the grounds stated therein have been lifted from the grounds taken in an entirely different case.
120. The petitioners herein have produced certified copies of the detention orders dated 17.05.2019 passed in the case of **Union of India & Anr. vs. Dimple Happy Dhakad**, reported as (2019) 20 SCC 609 (filed by the detenu's wife) from the records available in the Supreme Court of India. A purposive comparative consideration of the grounds of detention dated 17.05.2019 in **Dimple Happy Dhakad (supra)**, also passed by Sh. R.P. Singh, the Detaining Authority in these proceedings; and the impugned detention orders, gives substance to the inference is that barring a few differences in the names and references etc—*mutatis mutandis*—the grounds are unerringly identical. The said comparison ground-for-ground

leads but to one inescapable conclusion, that the entire exercise of passing the detention orders is mechanical, as the grounds have been lifted from the grounds of an altogether distinct case. Such a blatant *copy-paste* by the Detaining Authority demonstrates a clear non-application of mind.

121. We, therefore, hold that the impugned orders of detention are liable to be vitiated on this ground as well.
122. In view of the foregoing discussion, and having accorded our thoughtful consideration to the material on record, the issues cited hereinabove are decided in favour of the detenus and against the respondents.
123. Accordingly, the writ petitions succeed. In the result, the detention orders bearing No. PD-12001/01/2020-COFEPOSA and PD-12001/02/2020-COFEPOSA respectively, both dated 21.01.2020 passed against the detenus (Gopal Gupta, the petitioner in W.P.(CRL.) No.1829/2020) and (Amit Pal Singh, the petitioner in W.P.(CRL.) No.1830/2020) are set-aside and quashed. The detenus are directed to be set at liberty *forthwith*

unless their custody is required in connection with any other case.

124. The writ petitions are disposed of in the above terms.
125. A copy of this judgment be provided to learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court *forthwith*.

**SIDDHARTH MRIDUL
(JUDGE)**

**ANUP JAIRAM BHAMBHANI
(JUDGE)**

AUGUST 06, 2021
dn/di

[Click here to check corrigendum, if any](#)