

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(HABEAS CORPUS)**

APPELLATE SIDE

RESERVED ON: 03.01.2022
DELIVERED ON: 11.01.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

WPA (H) 39 OF 2021

SHASHANK SINGH MOURYA

VERSUS

UNION OF INDIA & ORS.

(VIA VIDEO CONFERENCE)

Appearance:-

**Mr. Sagar Bandopadhyay
Mr. Arijit Chakraborty
Mr. Debaditya Banerjee
Mr. Nilotpal Chowdhury
Mr. Prabir Bera**

.....For the Petitioner

**Mr. Y.J. Dastoor, Ld. ASG
Mr. Vipul Kundalia
Mr. Tapan Bhanja**

Ms. Samridhi Majumdar
Mr. Anurag Roy

.....for Union of India

Mr. Kaushik Dey

.....for the Respondent No. 4

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. The petitioner is the son of the detainee who has been detained under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act 1974, [the Act], by order of detention dated 15.01.2021. The said order states that the appropriate authority is satisfied that with a view to prevent the detainee from smuggling of goods, abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods in future, it is necessary to make an order of detention under section 3(1) of the Act. The impugned order has been challenged on the ground that infringes his fundamental rights enshrined under Article 19, 20 and 21 of the Constitution of India, that the order suffers from illegalities and procedural irregularities and thus is liable to be set aside. Further the subjective satisfaction of the detaining authority in issuing the order of detention is totally vitiated due to non-consideration of the relevant materials, total non application of mind to the relevant material and absence of live link between the instance of alleged smuggling activities and the date when the order of detention was issued. It is further contended that the detaining authority failed to apply the mind into the materials made available before him as there was no material which could

be the basis of arriving at a subjective satisfaction, that those materials did not constitute the ingredients of exercise of powers under section 3(1) of the Act. It is submitted that relevant materials such as retraction statements of the detainee as well as of other persons, bail petitions, relevant statements of primary witnesses, reply to the show cause notice have not been placed before the detaining authority or if it had been placed the same had not been considered which would render the order of detention as illegal. Further the representations dated 18.02.2021 and 27.02.2021 made by the detainee and on behalf of him by the petitioner for supply of legible copies of documents which were relied on were not taken into consideration which has denied adequate opportunity to the detainee to put forth his objections to the order of detention. Further the Lower Court records have been manipulated by the Sponsoring Authority which is evident from the orders dated 25.10.2019 and 02.11.2019, which were supplied in the compilation of relied upon documents at Pages 380 and 381 and a cropped version of cross border register was supplied which would vitiate the order of detention. It is further submitted that there were two cases which were mentioned in the ground of detention dated 15.01.2021. So far as the first case is alleged to have taken place between October 2018 to December 2018 and in support of second case seizures were made on 13.06.2019 and 17.06.2019 and the detainee was granted bail on 02.11.2019 and citing these instances and detaining the detainee in January 2021 by invoking the power under section 3(1) of the Act is draconian. It is further submitted that there were materials available before the detaining authority which suggests that there are other persons who are actually the beneficiaries and the actual persons involved in the transactions

of alleged fraudulent export and irregular import which are referred to in the grounds of detention but no other persons other than proprietor of M/s. Bullar Traders has been placed under preventive detention. Further with regard to the first case it is apparent that some of the customs officers were involved in the alleged fraudulent exports but none of them have been detained. Thus, it is contended that the order of detention is in gross violation of the fundamental rights of the detainee as guaranteed under the Constitution of India. With these grounds and referring to certain specific instances and factual details, the order of detention has been challenged.

2. Mr. Sagar Bandopadhyay, Learned Counsel appearing for the appellant assisted by Mr. Arijit Chakraborty, Learned Counsel in their oral submissions challenged the order of detention on the following grounds:-

- (i) There is no live link between the incidents of alleged smuggling activities and the date on which the order of detention was issued
- (ii) Subjective satisfaction for formation of opinion in issuing detention of order under Section 3(1) of the Act has been completely vitiated.
- (iii) Non-consideration of relevant materials by and/or non- disclosure of relevant materials before the Detaining Authority.
- (iv) Refusal to supply additional documents and the legible copies of some relied upon documents thereby denying proper opportunity to the detainee to make effective representation.
- (v) Cryptic and delayed consideration of representations of the detainee by the Central Government.

3. The Learned Counsel elaborated on the above grounds by raising the following contentions:-

- (i) It is submitted that from the grounds of detention it is seen that the order is passed based on two cases one is the subject matter of Case No. 136 of 2018 and the other in Case No. 19 of 2019 both on the file of the Chief Metropolitan Magistrate, Calcutta. So far as the first case, the allegation pertain to certain fraudulent exports made by different firms to Bangladesh without any goods being physically exported thereby making undue enrichment by way of IGST refunds. It is submitted that from page 3 of the grounds of detention that last of such alleged fraudulent exports took place on 10.12.2018. In so far as the second case is concerned the allegations pertain to importation of black pepper in the guise of Indonesian Plywood took place in June 2019. Therefore, there was no proximity/live-link between the alleged acts and the order of detention, hence the order of detention, is liable to be set aside. In support of such contention, the learned Counsel elaborately referred to the various provisions of the Customs Act namely Section 2(e), Section 3(1), Section 3 (2), Section 3(5), and Section 3(8). Further by referring Section 3 of the Act it is submitted that the provision is meant to actually prevent an alleged incident and not for doing something in support of an alleged incident which took place about a year back prior to the order of detention. It is submitted that the order of detention dated 15.1.2021 used the words “smuggling” whereas in the grounds of detention it does not state about any such smuggling activities. In this regard the Learned Counsel referred to Section 2 (39) of the Customs Act which defines smuggling. It is the submission of the Learned Counsel that alleged defraud of IGST claim cannot be brought under the

definition of smuggling. Therefore, there is absolutely no live link between the alleged acts mentioned in the grounds of detention to justify the order of preventive detention passed after a period of one year. In support of such contention, the Learned Counsel placed reliance on the following decisions:-

- (1) (1993)Supplementary(2) SCC 61
- (2) (2006) 11 SCC 339
- (3) (2020) 13 SCC 632
- (4) (2018) 12 SCC 150
- (5) (2006) 4 SCC 796
- (6) (2020)16 SCC 127,

Reliance was also placed on the decision of the High Court of Delhi in W.P. Criminal (CRL)630 of 2021 dated 30.09.2021 *Naveen Kasera alias Naveen Agarwal Vs. Union of India & Ors* .pertaining to a co-detenuue. These decisions have been referred to support the argument that the detention order must be passed on a reasonable prognosis of the future behavior of a person based on his past conduct in the light of the surrounding circumstances. The live and proximate link must exist between the past conduct of person and the imperative need to detain him and if such live link is absent it must be taken to have been snapped and the detention is vitiated. The detention order which is founded on stale incidents must be regarded as an order of punishment for a crime, passed without a trial though purporting to be an order of preventive detention. The essential concept of preventive detention is that the detention of a person is not to

punish him for something he has done but to prevent from doing it. Further it is submitted that this Court while reviewing, the detention order will not substantiate its judgment for the decision of the executive, nonetheless the court will enquire whether the decision of the executive is made upon matters laid down by the statute as relevant for reaching such a decision. This is so because what is at stake is the personal liberty guarantee the detenu by the constitution which cannot be deprived except for reasons laid down by law and for a purpose sanctioned by law. Further the case of stale incidents in the detention order is too pernicious to be ignored and the order must therefore go both on account of being vitiated due to malice in law and for taking into account matters which ought not to have been taken into account. Thus, it is contended that prejudicial activities of a person necessitating an order of preventive detention should be proximate to the time when the order is made or else live link between prejudicial activities and the purpose of detention must be snapped and an order of detention would be liable to be quashed.

(ii) With regard to the subjective satisfaction of the detaining authority it is submitted that on reading of the grounds of detention it is clear that there is no material available before detaining authority for formation of the opinion that the detenu was engaged in smuggling of goods and/or abetting of smuggling of goods and/or engaging in transporting for concealing or keeping the smuggled goods and/or dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods and/or harboring persons engaged in smuggled goods or in abetting smuggling of

goods. Further it is submitted that though in the order of detention dated 15.01.2021, it was mentioned that the detinue is being detained with a view to prevent him from smuggling of goods, abetting in smuggling of goods and dealing in smuggled goods but in the grounds of detention it has been mentioned that the detinue has been detained on the ground that it has been found that the detinue was involved in several cases of defrauding the Government of its legitimate dues, which would not come within the purview of the definition of “smuggling” as defined under section 2 (39) of the Customs Act. Therefore, it is submitted that the subjective satisfaction of the Detaining Authority in issuing the order of detention is completely absent thereby rendering the order as bad in law. To support such detention reliance was placed on the decision in *Pooja Batra Vs. Union of India (2009) 5 SCC 296*, for the proposition that the subject of satisfaction of the detaining authority must be genuine and akin to its objects. Reliance was placed on the decision in the *Moulana Sham Shunnise Vs. Addl. Chief Secretary, (2010) 15 SCC 72*.

- (iii) With regard to the argument pertaining to non-consideration of relevant material and/or non-disclosures of relevant material before the detaining authority, it is submitted by the Learned Counsel that several documents which were part of case-records lying before the Chief Metropolitan Magistrate, Calcutta and the Adjudicating Authority under the Customs Act were not considered by the detaining authority in formation of his opinion for arriving at a subjective satisfaction about necessity to issue the order of detention, and none of these document (bail order) was placed before the detaining authority by the sponsoring authority. Further it is submitted that the manipulated documents were placed before the detaining authority

which will go to show that the relevant material have not been placed before the detaining authority in proper form. The Learned Counsel had referred to a list of 12 documents pertaining to both the cases referred to in the order of detention and submitted that these documents were not disclosed before the detaining authority. Emphasis was laid on the retraction statements of the detainee and that of the other persons who are also charged along with the detainee and it is submitted that the retraction was not considered especially when the retraction was made before the Learned Chief Judicial Magistrate. It is submitted that the detainee had stated that statement was obtained from him by coercion and if the statement given by the detainee is to be relied on by the authority then the retraction should also have been referred to and relied on. Further the statement which has been referred to in Paragraph M of the Grounds of Detention namely the statement of Subhashis Das alias Sovon has been retracted. Similarly, the statement of Partha Mishra has also been retracted. In paragraph "x" the order of detention the order of the Learned Chief Metropolitan Magistrate dated 13.12.2018 has been referred to but the detainee which was not supplied with the said documents. The Learned Counsel has referred to the various enclosures to the petition to emphasis the submissions that none of the retractions including that of the detainee were placed before the detaining authority. With regard to the second case which is being referred to as "black pepper case" there is a reference in sub para (e) at Page 8 of the Grounds of Detention to the statement of Dharambir Kumar Mahato which has been retracted before the Learned Chief Metropolitan Magistrate. With regard to the details of the goods alleged to have been diverted as mentioned

in sub para (f) at Page 8 of the order of detention, the Learned Counsel has referred to the prisoner's petition which was directed to kept on record by the order of the Learned Chief Metropolitan Magistrate, Calcutta dated 15.3.2019. Further it is submitted that in sub para (k) in page 9 of the Ground of Detention there is a reference to the Show Cause Notice issued by the Customs Authorities which was adjudicated and there is also reference to the penalty which was imposed on the detainee, but the reply given by the detainee to the Show Cause Notice was not placed before the detaining authority which is a very vital and material document. The Learned Counsel submitted that the bail order which was one of the relied upon documents is a manufactured and concocted document. In this regard, the Learned Counsel has drawn our attention to Pages 380 and 381 of the informal paper book volume 3 and submitted that the document which was placed before the detaining authority is a concocted document. Further it is submitted that the second bail petition of the detainee has not been referred to in the order of detention. Therefore, it is submitted that the order of detention is liable to be quashed on ground of non-consideration of relevant materials and non-disclosure of relevant material before the detaining authority and placing concocted document before the detaining authority. In support of the aforementioned contention the Learned Counsel placed reliance on the decisions in the case of *Sita Ram Somani Vs. State of Rajasthan and others* (1986) 2 SCC 86, *Ahmed Nassar Vs. State of Tamil Nadu and Others* (1999) 8 SCC 473, *Union of India Vs. Ranu Bhandari* (2008) 17 SCC 348, *Ayya Alias Ayub Vs. State of U.P and Another* (1989) 1 SCC 374 and *Pallavi Vinod Patni Vs. State of Maharashtra and others*, (2001) Cr LJ

3197. As mentioned above these decisions were to support the arguments that if materials or vital facts which were in 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 not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. These decisions have also been relied on for the proposition that all documents irrespective of whether they are against the detainee or in his favour and whether detainee had engaged thereof or not must be furnished to the detainee to enable him to make an effective representation in exercise of his rights under Article 22 (5) of the Constitution.

- (iv) With regard to the non-supply of additional documents and legible copies of documents, it is submitted that the detainee had made representation on 18.2.2021 which was in the form of prisoner's petition which was rejected by the detaining authority by passing a cryptic order dated 02.03.2021 and the Central Government also in a similar manner vide communication dated 09.04.2021 had rejected the petition without assigning any reasons. The representation made by the son of the detainee claiming for legible and readable copies of the relied upon documents was also rejected by a similar cryptic order dated 03.03.2021 and similar order was passed by the Government dated 09.04.2021 rejecting the representation of the son of the detainee. This will clearly show that there was non-application of mind on the part of the authorities while considering the representations. In support of such contention reliance was placed on the decisions in *Smt. Dharmista Bhagat Vs. State of Karnataka and another*, (1989)Supplementary 2 SCC 155, *Thahira Haris and Others Vs. Government of Karnataka and others*, (2009) 11

SCC 438 and Ruma Moitra Vs. Union of India & Ors, (2005) volume 1 CHN 290 (Cal).

- (v) With regard to the manner in which the representation was considered, the Learned Counsel reiterated that the rejection of the prisoner's petition as well as the representation made by the son of the detainee were mechanically rejected by passing cryptic orders without application of mind. Further the representation was made to the Advisory Board on 05.03.2020 but there was an unexplained delay in considering representations dated 18.02.2021 and 27.02.2021 by the Director General, CEIB for the Central Government and they were rejected only on 09.04.2021 nearly after 30 days, which is violative of Article 22 of the Constitution of India. On the above grounds, the Learned Counsel sought for setting aside the order of detention. On the above grounds the petitioner seeks for setting aside the order of detention.

4. The respondent would contend that the detainee was running the business of freight forwarding in Calcutta and behind the facade of the said business he has been found to be involved in several case of defrauding the Government of its legitimate dues which was detected by the DRI, Kolkata Zonal Unit. Investigation revealed that the detainee had played a pivotal role in the case of fraudulent attempt either to evade duty through mis-declaration or to earn undue export benefits through mis-declaration of the export products. It is submitted that upon thorough investigation by DRI it was found that the detainee is involved in two cases namely with regard to the fraudulent export consignment with claim of refund of IGST and other export benefits through Petrapole Land Customs Station and the other is

smuggling of high value foreign origin black pepper abusing the facilities under the Indo-Nepal Treaty on Trade and Transit.

5. With regard to the first case, it is submitted that group of persons were involved in the conspiracy for making undue enrichment through IGST refunds and other export benefits and the main person in the syndicate is the detenue and one other person running office of Petrapole LCS and working under a Customs broker. All these persons in collusion with some officers of Customs at Petrapole LCS have formed a syndicate and perpetrating the fraud over a period of time by preparing false documents such as forged purchase orders, forged exports invoices etc. and based on the same shipping bills were filed which would have been processed for exports on paper only without presenting actual goods at any time and even without the vehicle carrying the goods. Further it came to light that shipping bills filed by M/s. Buller Traders there was no physical movement of goods for export. It is submitted that the detenue is the master mind.
6. In a statement recorded under section 108 of Customs Act the detenue has admitted that he used to procure false documents from one Manish Jain and used his connection with Subhashis Das and Partha Mishra to file shipping bills at Petrapole LCS through Customs Broker M/s. Global Exim and Logistics Pvt. Ltd. The said Manish Kumar Jain is one of the main members of the syndicate based in Delhi and Dubai, who sent forged export documents to the detenue for filing and processing the shipping bills without physically presenting the goods at the LCS. It is submitted that in reality the goods were not physically exported and the group of persons based in Kolkata perpetrating the crime of fraudulent exports worth Rs.

2,45,04,800/- without physical exports and used export benefits to the tune of Rs. 58,74,668/- as IGST benefits plus GST compensation cess on Pan Masala amounting to Rs. 30.34 lakhs. Further it is submitted that statement was recorded from the detainee on 12.12.2018 and 25.09.2019 under Section 108 of the Customs Act wherein he has stated he received export documents from M/s. Buller Traders and two other firms, handed over those documents for processing to Partha and Sovon knowing fully well that no physical exports were to take place under those shipping bills that till then he had received two Shipping Bills and was paid Rs. 6,40,000/- as charges for getting the documents processed by Customs. The statements of the other persons namely Sovan, Parth Mishra, Manish Kumar Jain, Sujit Swarnakar alias Mantu, Sajal Swarnakar were also referred. Further it is stated investigation has revealed that different layering is designed to keep the detainee away from the persons who actually handle the processing of documents for exports. It is further submitted that considering involvement of the detainee, he was arrested on 12.12.2018 for offences punishable under section 132 and 135 of the Customs Act and was produced before the Learned Chief Metropolitan Magistrate, Calcutta on 13.12.2018 and he was remanded to judicial custody on 28.12.2018, the detainee was released on bail subject to conditions. It is further submitted that in the order dated 13.12.2018 Learned Chief Metropolitan Magistrate mentioned that prayer has been made on behalf of the detainee for retraction of statement given to DRI. The Court recorded that the detainee is at liberty to do so by filing appropriate petition duly attested by the lockup in-charge. The respondent would state that no such petition was ever forwarded to DRI by the detainee.

Further it is submitted that the statement given by the Sujit Swarnakar alias Mantu, Sajal Swanakar, Partha Mishra, Subhashis Das alias Sovon and Manish Kumar Jain which were referred to and relied on were not retracted before the DRI. It is submitted that the detainee has claimed that only on 05.03.2021 on the first meeting before Central Advisory Board, it was stated that the statement was retracted before the Learned Chief Metropolitan Magistrate immediately after their arrest. However, all the said persons in their statement which was recorded by the DRI under section 108 of the Customs Act reiterated their earlier statements and did not mention anything about retractions of earlier statements. This subsequent statement was recorded in the correctional home after their arrest and after they were released on bail. With regard to the second case, it is submitted that there is evidence to show direct involvement of the detainee in the high value foreign origin black pepper case, violating various provisions of the Indo-Nepal Treaty. It is submitted that the detainee arranged a godown which was not located in the specified route of the consignment with the help of one Arvind Rana, who stated to be skilled persons who can open the doors of the container keeping the seals intact and the detainee was to arrange to take the vehicle to the said godown with the help of one Dharambir Kumar Mahato, the detainee engaged Arvind Rana to open the container keeping the seals intact, de-stuffed the foreign origin black pepper from the import container and re-stuffed the container with locally procured plywood which matched with the declaration in the document and kept the seal of the container intact and the container was then planned to be sent to Nepal border and the black pepper was to be taken to the Indian market. It

is submitted after the first container was intercepted by DRI on 13.06.2019 the second container was dumped in a container yard and it was found to contain black pepper of foreign origin which was declared as plywood in the documents and both containers were seized and the value of the black pepper is Rs. 3.92 crores. Various other facts have been set out to substantiate the contention that it is the detainee who hatched the conspiracy along with Dharambir Kumar Mahato the owner of the transporting company to plan the smuggling activities of black pepper into India. Thus, it is submitted that there are sufficient materials to indicate that it is the detainee who played a vital role in smuggling of goods using fraudulent export documents and therefore, there was a need for detention of the detainee under the provisions of the COFEPOSA Act with a view to prevent him from smuggling of goods, abetting of smuggling goods and dealing in smuggled goods and otherwise than by engaging in transporting or concealing or keeping smuggled goods in terms of Section 3(1) of the Act. Thus, there is need to immobilize the detainee by passing the order of detention with a view to prevent him from smuggling of goods or abetting of smuggling goods. The detainee was heard by Advisory Board where he was represented by Counsel and the advisory board rendered its opinion which was considered by the Central Government and the order of detention was confirmed vide order dated 08.04.2021. It is reiterated that no petition for retraction of the statement, as averred, had been provided to the DRI either by the Lower Court or by the person who retracted the statement. It is further submitted that none of the affidavits of either the detainee or Partha Mishra or Subhashis Das bears any date though all of them are signed by

the lock up in charge on 13.12.2018. Further the purported petition of the detainee praying for acceptance of retraction petition is without any date and signature. It is further submitted that with regard to the retraction petition filed by the detainee and two others the Learned Chief Metropolitan Magistrate in his order dated 13.12.2018 has recorded the prayer made on behalf of the accused for retraction of statement given to DRI and ordered that they are at liberty to do so by filing appropriate petition duly attested by the lock up incharge. It is submitted that this fact has not been suppressed and it is part of the relied upon documents, 4B of the ground of detention. Further it has been discussed by the detaining authority in paragraph (ii) and (x) of the grounds of detention. Further it is submitted that the detainee was again examined by the DRI on 25.09.2019 under section 108 of the Customs Act (RUD 4 of grounds of detention) where he has given further revelations in continuation of his earlier statement. Further he did not mention anything about retraction of his statement dated 12.12.2018. Further a copy of the bail petition of Partha Mishra and Subhashis Das were not furnished to the DRI and they came to know of the alleged retraction petition only on 05.03.2021 at the time of hearing before the Central Advisory Board. Furthermore, the detainee in his representation dated 18.02.2021 and 27.02.2021 never disclosed anything about the availability of retraction petition and it is only on 05.03.2021 the Learned Counsel representing the detainee before the Central Advisory Board made such submission. Regarding the retraction petition of Manish Kumar Jain the Learned Chief Metropolitan Magistrate vide order dated 04.11.19 ordered to keep the retraction petition of Manish Kumar Jain on record for future

reference. The said Manish Kumar Jain never retracted the statement there after though their statement were recorded on 07.11.2019 and 13.11.2019 while he was in judicial custody at correctional home and statement was in his own handwriting and in both the statement he has reiterated the previous statement dated 02.11.2019 and did not even mention about any retraction filed by him. Similar submission is made with regard to the alleged retraction of Sujal Swarnakar and Sajal Swarnakar and it is submitted that they have reiterated their previous statements given on 17.12.2018, 20.12.2018, 24.12.2018, 01.03.2019, 15.05.2019, and 05.12.2019. Further it is submitted that the representation of the detainee were duly considered by the respective competent authorities and disposed of bearing in mind the direction of the Hon'ble Supreme Court in Case of *Gulam Biswas Vs. Union of India Criminal Appeal No. 829 of 2015*. Further it is submitted that legible copies of all the documents mentioned had already been received by the detainee and further seeking the same again is a ploy to create road blocks to the detention. Further the allegations that fabricated copy of the bail order was placed as a relied upon documents is absolutely false and what was placed was the order sheet which was made available from the concerned court. Further with regard to the supply of incomplete Cross Border Register it is submitted that the purpose for which the concerned page was supplied is to establish that fraudulent export consignment of Segahox Enterprises is tagged with a genuine bill of export in an attempt to show that the export was effected, and the same is evident from the copy CBC register at Page 229 RUD 11 of grounds of detention. According to the respondent this establishes fraudulent export of Segahox

Enterprises which was tagged with a genuine bill of export and which has been specifically discussed in paragraph (ii) and (u) on the grounds of detention. On the above grounds the respondent seeks to sustain the order of detention.

7. The Learned Additional Solicitor General submitted that there has been no actual withdrawal of the statements of the detainee and the prayer for filing retraction petition by the detainee was noted and from the order dated 13.12.2018 passed by the Learned Chief Metropolitan Magistrate, it is seen that the detainee was granted liberty to file appropriate petition for retraction of his statements. However, no such petition was forwarded to the DRI. Further it is reiterated that the retraction petition of the detainee and two other co-accused dated 13.12.2018 was never forwarded to DRI nor taken on record by the Learned Chief Metropolitan Magistrate as could be seen from the order dated 15.03.2019. Further, it is submitted that the purported retraction petition of another accused Manish Kumar Jain was only taken on record for future reference. It is further submitted that after the alleged withdrawal of the statement by the detainee on 12.12.2018 another statement under section 108 of the Customs Act was recorded on 25.09.2019, wherein he has stated that he has gone through the statement given by him on 12.12.2018 and signed the statement. Therefore, it is submitted that the statement recorded under section 108 of the Act can be relied on to arrive at subject satisfaction as to the necessity of detention of the detainee. Further, the statements of the co-accused given against the detainee in the black pepper case on various dates clearly implicate the detainee and those statements were not withdrawn. Therefore, it is

submitted that the statements can be relied upon as the detention proceedings does not require legally admissible evidence and the only requirement is that the detaining authority should be mindful of the withdrawal of the statement, if any. With regard to the supply of legible copies of documents, it is submitted each and every document that was sought for in the representations of the detainee can be shown to be of no great import and/or are necessarily to be supplied. It is submitted that in the representation, documents have been sought for in accordance with Section 65 B of the Evidence Act, 1872, however, such certification is not necessary. Further, supply of copies of summons would in no manner affect the detainee to make representations and what is relevant is the voluntary statement. With regard to the photocopies of the Cross Border Register, it has been referred to by the detaining authority to show that there was export only on paper without physical delivery of goods and therefore, the other records are not relevant. Furthermore, it is submitted that there is no averments in the representation dated 18.02.2021 that any of the documents supplied in the compilation of relied upon documents are illegible or missing. Furthermore, no representation was made prior to 18.02.2021 and the representation was made 26 days after detainee received the relied upon documents which was supplied to him on 23.01.2021. Therefore, the representation is only to delay the proceedings and lacks bonafide. Further, in the representation dated 27.02.2021 legible copies of certain documents have been sought for. These documents are hand written documents and merely because they are hand written it cannot be said to be illegible and perusal of the documents would show that they are readable

and this is clear from the written submission filed before the Advisory Board on 05.03.2021. Further the contention in the written submissions filed before this Court that reference is made only to readable portion of these documents is incorrect as the detainee was fully aware of the contents of the documents which he states to be illegible. Furthermore, the representation dated 27.02.2021 was submitted after more than one month after relied upon documents were supplied and therefore, intention of the detainee is to delay the proceedings before the Advisory Board. The representations were considered by the authorities by duly applying their mind and there is nothing to indicate that there has been non-application of minds. The contention that the reply to the show cause notice was not given, cannot be a ground because the detention is not based upon the stand taken by the detainee in the reply to the show cause notice in the black pepper case and the reply being not the basis for the detention the same is not required to be supplied. It is further submitted that the allegations that the copy of the bail order is a manufactured document is absolutely incorrect since the documents is a typed copy issued by the Learned Chief Metropolitan Magistrate on 12.11.2019, while granting bail to the detainee in the black pepper case. Further it is submitted that the detaining authority has placed his subjective satisfaction on the materials placed before it considered the gravity of the smuggling activities of the detainee and the propensity to engage in the same in future which are based on his antecedents. Further, it is submitted that Section 2(39) read with Section 111 and 113 of the Customs Act will clearly bring the activities of the detainee within the meaning of "smuggling" and smuggling of black pepper squarely falls within

the provisions of Section 2(39) of the Customs Act. Furthermore, there are statements available that show that the detenue was the master mind behind the smuggling of black pepper. With regard to the aspect, that there is no live link or that the live link had expired on account of efflux of time, it is submitted that there is subsisting live link in support of sham export and the investigation which commenced on 10.12.2018 is proceeding and the time limit for completion of investigation is 5 years under section 28(4) of the Customs Act. Therefore, it is submitted that investigation is yet to be completed and pursuant to the investigation from 10.12.2018 incriminating material have been found against the detenue so as to justify his detention. Thus, subjective satisfaction as to the future conduct of the detenue is to be arrived at by looking at his antecedents which are proximate in time. Further it is submitted that the grounds of detention are severable in nature and even if one ground is substantiated the order of detention could be confirmed. The respondent authorities have established all the grounds of detention which have been mentioned and therefore, the order of detention is valid and it is prayed that the same be sustained. In support of his contention the Learned Additional Solicitor General placed reliance on the decision of the Hon'ble Supreme Court in *Union of India Vs. Ankit Ashok Jalan*, 2020 (16) SCC 185, *Haradhan Saha Vs. State of W.B & Ors.*, 1975 (3) SCC 198, *Union of India Vs. Paul Manickam & Anr.*, 2003 (8) SCC 342, *Jamseena Vs. Union of India*, 2021 SCC Online Kerala High Court 3572, *Gajanan Krishnan Yalgi Vs. Emperor*, AIR 1945 Bombay 533 (DB), *Kacharu Ram Vs. District Magistrate*, AIR 1966P&H 399 (FB), *Surjeet Singh Chhabra Vs. Union of India & Ors.*, 1997 89 ELT 646, *State of T.N Vs. Abdullah Kadher*

Batcha & Anr. 2009 (1) SCC 333, Rameshwar Shaw Vs. District Magistrate, Burdwan & Anr., AIR 1964 SC 334, Union of India & Anr. Vs. Dimple happy Dhakkad, 2019(20) SCC 609, and Gautam Jain Vs. Union of India, 2017 (345) ELT 586 (SC).

8. We have elaborately heard the Learned Counsels for the parties and carefully perused the materials placed on record.
9. The Hon'ble Supreme Court in *Haradhan Saha* (supra) elaborately explained the concept of preventive detention to mean that the detention of a person is not to punish him of something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenue acting in a manner similar to his past acts and preventing him by detention from doing the same. Further it has been held that a criminal conviction is for the act already been done which can be possible by a trial and legal evidence and there is no parallel between prosecution in a Court of Law and detention order under the Act as one is punitive action and the other is the preventive act. It has been further held that the power of preventive detention is qualitatively different from punitive detention, power of preventive detention is a precautionary power exercised in reasonable anticipation it may or may not relate to an offence, it is not a parallel proceedings, it does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may not have been launched. Further, it has been held that Article 14 is inapplicable because preventive detention and prosecution are not synonymous as the purposes are different and the authorities are

different. In prosecution, the accused is sought to be punished for a past act and in preventive detention the past act is merely the material for interference about the future course of probable conduct on the part of the detainee.

10. In *Paul Manickam & Anr.* (supra) it has been held that in case of preventive detention no offence is proved nor is any charge formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent the apprehended objectionable activities. Further it has been held that the scope of review of order of detention by the High Court is limited and while dealing with Habeas Corpus application undue importance is not to be attached to technicalities but at the same time where the Court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the Court has to take serious note of unclean approach.

11. The Hon'ble Supreme Court in *Khudiram Das Vs. State of West Bengal*[(1975) 2 SCC 81], has held that the power of detention is not quasi-judicial power and while passing the detention order on the basis of material which the detaining authority considered relevant, having regard to the past conduct which in the light of the surrounding circumstances and other relevant materials and arrived at the conclusion that the detainee is likely to act in a prejudicial manner as contemplated in any of the sub clauses (i) (ii) (iii) of Clause 1 by sub section 1 of Section 3 (of the Act) and if so whether it is necessary to detain him with a view to prevent him from so acting. These are essentially matters which have to be administratively decided by

objective standards and they are essentially matters which is to be administratively determined for the purpose of taking administrative action.

12. In *Suman Vs. State of Tamil Nadu AIR 1986 Madras 318*, it was held that proceeding under COFEPOSA Act are neither judicial or quasi-judicial character nor are they of criminal or quasi-criminal character. The jurisdiction to detain by way of preventive detention is a jurisdiction of suspicion and not based on proof of any offence or act beyond all reasonable doubt. It is further held that there cannot be a parallel between prosecution in a Court of Law and a detention under COFEPOSA Act. Further the principles of Evidence Act is foreign to the jurisdiction exercised under COFEPOSA Act while making the order of preventive detention. Thus, it was held that none of the normal rules of criminal jurisprudence or provisions of the Evidence Act are attracted while invoking the provisions of COFEPOSA Act. No embargo can be placed on the material which the detaining authority may consider, and no artificial restriction can be placed on the so called analogy of the Evidence Act to restrict the material which the administrative authority exercising statutory power of detention may consider. Further no constitutional or statutory bar disables the detaining authority from considering the fact that the proposed detainee has made a confession under section 108 of the Customs Act. Even if the detainee had retracted the confession statement the same does not take away the power of the detaining authority to pass an order of detention as the only requirement then would be to consider both confession statement along with the retraction. Further what weight to be attached to the confession statements in the light of the other materials is a matter exclusively for the

detaining authority to determine. Further it has been held that the provision of the Evidence Act do not regulate the consideration of a material that is put before the detaining authority to determine. The detention orders can be based upon confession statements recorded under section 108 of the Customs Act from the detenue wherein the detenue admits their involvement in the previous incident of smuggling. Further it was pointed out that the facts and inferences from facts are drawn from the search and seizure and host of other facts mentioned in the grounds. Further in terms of Section 108(3) of the Customs Act enjoys on the person summoned to serve upon any subject to which he is summoned, he is not excused from speaking the truth on the premises that such statement could be used against him and in cases where there was no retraction of the confession statement made under section 108 of the Customs Act then there will be nothing wrong in the detaining authority relying on such statements as they furnish sufficient and adequate materials on the basis of which the detaining authority can form its opinion.

13. In *Gajanan Krishna Yalgi* (supra), it was pointed out that the standard of evidence required for conclusion is different from that required for a reasonable satisfaction of the necessity for detention in the interest of public safety or maintenance of public order, for the purpose of detention it is enough if the Government or any officer duly empowered is reasonably satisfied of the necessity of his detention and there can be no benefit of doubt, since the public safety and maintaining of public order are paramount concern of the Government.

14. Before we examine the factual matrix, we need to take note of the following decisions as well. In the *Radhakrishnan Prabhakaran Vs. State of Tamil Nadu*, (2000) 9 SCC 170, it has been held that there is no legal requirement that a copy of every document mentioned in the order (detention order) shall inevitably be supplied to the detainee and what is important that the copies of only such of those documents as have been relied on by the detaining authority for reaching the satisfaction that preventive detention of the detainee is necessary and shall be supplied to him. The said view was reiterated in *J. Abdul Hakeem Vs. State of Tamil Nadu* (2005) 7 SCC 70, and in *Sunila Jain Vs. Union of India* (2006) 3 SCC 321, following the said decision in the case of *Abdullah Kadher Batcha* (supra) it was held that the court has duty to see whether the non- supply of any document is in anyway prejudicial to the case of the detainee and merely because the copies of some documents have not been supplied they cannot by any stretch of imagination be called as relied upon documents. It was further held that while examining whether non- supply of a document would prejudice the detainee the Court has to examine whether the detainee would be deprived of making an effective representation in the absence of a document. The copies of the documents which form the grounds for detention are to be supplied but the documents which are merely referred to for the purpose of narration of facts cannot be termed to be documents without the supply of which the detainee is prejudiced.

15. In *Rameshwar Shaw*, it was held that in deciding the question as to whether it is necessary to detain the person, the authority has to be satisfied that the said person is not detained he may act in a prejudicial

manner and this conclusion can be reasonably reached by the authority generally in the light of the evidence about the past prejudicial activities of the said person. When evidence is placed the authority has to examine the said evidence and decide whether it is necessary to detain the said person in order to prevent him from acting in a prejudicial manner. Thus, it was held that the past conduct or antecedent history of a person can be taken into account in making the detention order and it is largely from prior events showing tendencies or inclinations of a man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. Further the past conduct or history of the person on which the authority purports to act should ordinarily be proximate in point of time and should have the rational connection with the conclusion that the detention of the person is necessary. It was pointed out, that it would be irrational to taken into account the conduct of a person which took the place 10 years before the date of detention. Further it was held that it is both inexpedient and undesirable to lay down in inflexible test about the validity of the satisfaction of the authority will have to be considered on the facts of each case.

16. In *Dimple Happy Dhakad*, it was held that the satisfaction of the detaining authority is subjective in nature and the court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. However, it does not mean that subjective satisfaction of the detaining authority is immune from judicial review and by various decision of the Hon'ble Supreme Court certain areas

have been carved out within which the validity of subjective satisfaction can be tested.

17. Bearing the above legal principles in mind we now proceed to move on and consider the arguments of the Learned Counsel for the petitioner which are under 5 heads as mentioned above.

18. The first argument was regarding the absence of a live link between the alleged incidents of smuggling activities and the date of the order of detention. The petitioner would contend that two cases have been referred to in the grounds of detention and the first case where there is an allegation of improper availment of refunds of IGST without actual physical export of goods the matter which took place one year prior to the order of detention and the same cannot be construed to have any live link with the order of detention. Further the allegations in the second case pertains to importation which had taken place in June 2019 and therefore second case also cannot be stated to have any live link with that of the order of detention which is impugned in the germane. As pointed out by the Hon'ble Supreme Court the detaining authority has to consider the gravity of the activities of the detainee and his propensity to engage in similar acts in future. On 07.10.2018 consignment of cotter pins was intercepted by DRI at the Petrapole Land Customs Station, (Petrapole LCS) and the other shipping bills were being cleared on paper without actual physical export of goods and the consignment was shown to be genuine by tagging it with a genuine shipping bill. This is one of the relied upon document supplied to the detainee. On 10.12.2018 consignment of chewing pan masala was being cleared on paper without actually export of goods and it was intercepted by

DRI found to have been allotted on the vehicle with the registration No. WB 25 A 8872 which was three- wheeler vehicle meant for carrying passengers. This is also one of the relied upon documents. On 11.12.2018 three consignments of automobile parts and sparks plugs were to be cleared without actual physical export and without any existence of vehicle goods being cleared and this was intercepted by DRI at the Petrapole LCS with no entries made in the Cross Border Register. In respect of another shipping bill dated 11.12.2018 let export order was given with vehicle No. WB 51 A 6672 which was a tractor. Further in respect of shipping bill dated 10.12.2018 no vehicle number was found in the CWC records or in the let export order. On 11.12.2018 statement under section 108 of the Act was recorded from Partha Mishra who stated that he received shipping bills from the detainee through other persons including Sovon for processing the same through customs without actual physical export of goods. Statement was recorded from Sovon under section 108 of the Customs Act wherein it is stated that the detainee had asked him to get shipping bills cleared without actual physical export of goods. The detainee was arrested on 12.12.2018 and detained and statement under section 108 of the Act was recorded wherein he has stated that he had given export document to Sovon and Partha Mishra for getting export documents cleared through customs without actual physical export of goods. Further, the detainee stated that all the exports attracted 28 % GST and that he received 40 % GST refunds on the exports as commission from Manish Jain who used to send him documents. This is also part of the relied upon documents. Similarly, statement was recorded from one Sujal Swarnakar under section 108 of the

Act on various dates from 17.12.2018 to 23.02.2020, he has spoken about the tagging of the shipping bill with other documents for clearance without actual physical exports of goods. On 25.09.2019 another statement was recorded from the detainee under section 108 of the Act wherein he has candidly accepted that he has gone through the statement made by him under section 108 of the Act on 12.12.2018 and signed the statement. Further the detainee accepted that he has been investigated by the DRI in five cases by during 2010, 2012, 2017, 2018, and 2019. This statement of the detainee forms part of the relied upon documents. Statement was recorded from Arvind Rana under section 108 of the Act from 25.06.2019 to 31.10.2019 who has stated that he had opened the doors of the Nepal Bound Container without tampering the customs seals and replaced the black pepper with plywood and then closed the doors of the container. He had further stated that one Dharambir Kumar Mahato has instructed him to arrange for a godown to carry out these activities. Statement was recorded from the said Mahato between 05.12.2019 and 24.10.2019 who has stated that it is the detainee who has instructed him to arrange for clearance and transport of black pepper to be imported to Nepal. He is aware of the modus operandi adopted and that he had carried out the instructions of the detainee. The detainee was arrested on 24.10.2019 for smuggling black pepper and enlarged on bail on 02.11.2019. The adjudication of the case under the Customs Act was completed and an order was passed on 25.11.2020 wherein the penalty of Rs. 5,00,000/- under section 112 (a) (ii) and a penalty of Rs. 5,00,000/- penalty under section 114A of the Customs Act has been imposed on the detainee. On 15.01.2021 the order of detention

was passed and the detaining authority has recorded that detainee was likely to be engaged in the Act of smuggling for making illegal profits at the cost of Government revenue. The detaining authority has also mentioned about the gravity of the detainee activities and the propensity to engage in the same in future based on his antecedents.

19. The chain of event which we have referred to above will amply demonstrate that the detaining authority was justified in recording the satisfaction that the detainee had to be detained so as to prevent him from engaging with the same activities as he had done in his past. Hence, the contention of the Learned Counsel for the petitioner that the cases which are basis for the detention to have no live link has to be rejected. Of the two cases black pepper case has concluded holding the detainee guilty for violating the provisions of Customs Act. With regard to illegal availments of IGST refunds it appears that it is large scale conspiracy where several persons are involved and the detaining authority was satisfied from the materials available and the statements recorded under section 108 not only from the detainee but other co-accused that the detainee was the main person in the entire illegal operation. Furthermore, the case of illegal availment of refunds of IGST is in the process of investigation. The detainee has himself admitted that he was investigated by the DRI from 2010 onwards on more than 5 occasions. Therefore, we can safely hold that there is sufficient live link available on record so as to indicate that all the past events are sufficient to form an opinion by the detaining authority to pass the order of preventive detention against the detainee.

20. The cases which have been noted in the Grounds of detention are proximate in time, especially when in one of the cases the investigation is still in progress. Hence the ground cases referred are neither stale nor irrelevant and are proximate. The other argument was that though in the order of detention it has been stated that the detainee has been detained to prevent him from doing smuggling activities there is no such averment/allegation in the grounds of detention. The said contention is liable to be rejected on several grounds. Firstly, the definition of smuggling as defined under section 2(39) cannot be read in isolation. The same has to be read along with section 111 and 113 of the Act. Clause (a) (g) (h) (i) (j) of Section 111 brings within its ambit unloading of dutiable goods when being transported etc. which would fall within the detention of smuggling as defined under section 2(39). The second case, namely black pepper case, is a clear case of smuggling. Similarly, Clauses (h) and (i) of Section 113 would include within the meaning of smuggling an act of entering goods for exportation which did not correspond in respect of value or any material particular with the entry made under the Act and clause (k) of Section 113 includes the act of not loading any goods for exportation when the same has been cleared due to wilful act of the exporter to fall within the meaning of smuggling. Section 113 of the Customs Act deals with confiscation of goods attempted to be improperly exported etc. Clause (k), there under, states that any goods cleared for exportation which are not loaded for exportation on account of wilful act, negligence or default of the exporter his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer is liable for confiscation. Hence

if there is violation of Section 113(k) of the Customs Act, it is an act of smuggling as defined under Section 2(39).

The Learned Counsel referred to the decision of the High Court of Delhi in the case of the co-detenu Naveen Kasera alias Naveen Agarwal. The Hon'ble Court in paragraph 10 and 11 of the judgment dated 30.09.2021 has held the aforementioned act of the co-detenu to prima facie be an act of smuggling. On going through of the relevant provisions of the Customs Act we are fully satisfied that the acts committed by the detenu are undoubtedly acts of smuggling, squarely falling within the definition of "smuggling" as defined under the Section 2(39) of the Customs Act.

21. Therefore, it can be safely held that the antecedent activities of the detenu is clearing export of goods on paper without actual physical exports of goods would undoubtedly fall within the ambit of a smuggling activity and therefore alleged illegal availment of IGST would fall within the definition of "smuggling". Thus, the contention raised by the Learned Counsel in Ground No. (i) and (ii) are answered against the detenu.

22. We now move on to consider the contention that there was no consideration of the relevant material and non- disclosure of relevant material before the detaining authority. This argument is based upon the contention that the statement given by the detenu under section 108 has been retracted before the Learned Chief Metropolitan Magistrate and such retraction was not placed by the sponsoring authority or before the detaining authority. In this regard, the Learned Counsel for the petitioner had elaborately referred to various petitions presented by the detenu as

well as petition presented on his behalf and the orders passed by the Learned Chief Metropolitan Magistrate. To examine the correctness of the said contention advanced on behalf of the detainee, we have to note certain facts. The order passed by the Learned Chief Metropolitan Magistrate dated 13.12.2018 clearly shows that there was no petitions filed by the detainee for retraction of the statement given by him on 12.12.2018 under section 108 of the Act. The Court has recorded that the detainee along with other accused would be at liberty to file appropriate petition for retraction of the statement. Therefore, as on 13.12.2018 there was no petition on the file of the Court below recording any retraction. If such is the factual position, the detainee has to demonstrate before us that the retraction petition was filed and the date of filing of such petition and more importantly that the retraction petition was served on the detaining authority or the sponsoring authority. If that has not been established by the detainee the detainee can never plead that there has been a retraction of his statement recorded on 12.12.2018. On going through the voluminous record placed before us we are fully satisfied that there is no material referred to by the detainee to establish that the alleged retraction petition was served on the DRI nor there is any record to show that such petition was taken on file by the Court of Learned Chief Metropolitan Magistrate and any orders passed. Even in respect of alleged retraction petition stated to have been filed by the co-accused Manish Kumar Jain, the Court has only recorded in its order dated 04.11.2009 that the same shall be taken on record for future reference. Therefore, it is evidently clear that there was no valid retraction available on record and duly served on DRI so as to enable the detainee to argue before us that the

statement recorded on 12.12.2018 was retracted. That apart the conduct of the detainee subsequently will also be fatal to the case. On 25.09.2019 another statement was recorded from the detainee under section 108 of the Act in which he has candidly and clearly accepted that he has gone through the statement recorded on 12.12.2018 under section 108 and signed the same. Apart from that he has also admitted that he has been investigated by the DRI on five earlier occasions from 2010. There is no whisper of any alleged retraction of the statement dated 12.12.2018. Therefore, the contention raised that the statement has been retracted is not established and therefore the said contention has to necessarily fail. That apart the co-accused in the black pepper case have given statement under section 108 on 13.06.2019, 17.06.2019, 25.06.2019, 02.07.2019, 24.07.2019 and 31.10.2019. In all these statements the detainee has been implicated. These statements have not been withdrawn or retracted. Therefore, the detaining authority was fully justified in recording his satisfaction by relying on the two statements recorded from the detainee one in the year 2018 and the other in the year 2019 where the detainee does not disclose that the statement recorded from him on 12.12.2018 was retracted. Therefore, the third contention raised by the Learned Counsel for the detainee stands rejected.

22.(A). The Learned Counsel for the petitioner would vehemently contend that the documents sought for by the detainee were not furnished, certain documents were illegible, the representations given by the detainee and his son were mechanically rejected, therefore, the order of detention is bad in

law. From the copies of the documents which was sought for by the detainee we find that he had sought for certain copies of shipping bills in accordance with Section 65B of the Evidence Act. Such provision is inapplicable in case of preventive detention as has been held in decisions we have noted above. Therefore, no such certification under section 65B is required. The demand for copies of summons appears to be irrelevant as, what was relied on is the statement and not the summons. Therefore, non-supply of copies of summons can cause no prejudice to the detainee. With regard to the material which was seized from Global Exim Logistics is concerned we find that the panchnama and seizure list forms part of the relied upon documents and further in the grounds of detention the detaining authority has made only a narrative of the facts based on the seized documents and they are not documents based on which the subjective satisfaction has been recorded. However, we find that the seized shipping bills relating to the detainee's case are part of the relied upon documents. Similarly, the enquiry report of the officers who verified the photocopies of the Cross Border Register is not material as it appears to have not been the basis for recording satisfaction by the detaining authority. The detaining authority has referred to the register only with regard to the case that there was no actual physical export of goods. Therefore, we find that the plea of non-supply of documents to be not sustainable. That apart what is relevant to note is the conduct of the detainee. The detainee while submitting the representations dated 18.02.2021 has not mentioned about the non-supply of any documents or that the certain documents which were supplied were illegible. Nothing prevented the detainee to state the same immediately after

he received the documents, which was furnished on 23.01.2021. The representation dated 25.03.2021 is nearly after a month after receipt of the document. Therefore, it is clear that the representation made by the detainee is an afterthought, with a view to delay the proceedings. With regard to the representation dated 27.02.2021 the detainee alleged certain documents to be illegible. Admittedly these documents are hand written and the detainee does not specifically point out which of the copies which he claims to be illegible. The Learned Additional Solicitor General is right in his submission that merely because the document is hand written it will not become illegible. Further, before the Advisory Board on 05.03.2021 the detainee had made a representation which reveals that he was fully conversant with all facts and the documents including those which he claimed to be illegible. Thus, it is clear that the contention of the detainee that the certain documents were illegible is a clear after thought, more particularly that at the earliest point of time the detainee never pointed out which of those documents which are illegible and merely because the documents are hand written it cannot ipso facto become illegible. The written submissions given by the counsel that representation was made based on legible material alone stands rejected.

22.(B). We are satisfied that the representation dated 18.02.2021 was with an intension to delay the proceedings before the Advisory Board. Further the representation dated 27.02.2021 was submitted by the detainee only after the detaining authority addressed a letter dated 17.02.2021 to the detainee that he has not received any representation from the detainee. Even after

receipt of the letter dated 17.02.2021 from the detaining authority, the detainee submitted his representation only on 27.02.2021. The delay on the part of the detainee remains unexplained and would work against the detainee. This is also amplified from the fact that the representation dated 27.02.2021 is after more than a month after the relied upon documents were served on the detainee. As noted the representation does not refer to any alleged retraction of the statements recorded under Section 108 of the Customs Act either by the detainee or the co-accused in both cases. Therefore, the fourth contention raised on behalf of the detainee stands rejected.

23. The fifth and the last contention raised by the Learned Counsel for the petitioner is with regard to the manner in which the representations were considered. The concerned authority has taken note of the representations and has sent reply to the detainee as well as to the son of the detainee that the same are not feasible of consideration. Obviously, the authority cannot be accepted to write a judicial order and if the reply sent to the detainee shows application of mind on the part of the authority that would suffice. The Hon'ble Supreme Court in *Haradhan Saha* (supra) has held that the opinion of the board as well as the order of the board rejecting the representation of the detainee must be after proper consideration and there need not be any speaking order and there is no failure of justice by the order not being a speaking order, and what is necessary is real and proper consideration by the Government and the Advisory Board. On going through the reply given to the representation we find that there is nothing improper

in the manner in which the representations have been considered and the replies cannot be termed as being duly devoid of reasons or an outcome of non-application of mind.

23. (A) In the reply given by the authorities dated 03.03.2021 and 05.03.2021 it has been stated that the representation of the detenue and the petitioner were carefully examined and considered. Similarly, the reply of the authority dated 09.04.2021 rejecting the representation dated 22.03.2021 also records careful consideration of the representation. The representations were examined and disposed of within a reasonable time, and the detenue can never raise a plea of delay, as it is he who is guilty of delay and laches while raising a plea of non-supply/supply of illegible copies.

23. (B) Therefore, the said contention raised on behalf of the detenue has to fail. The reliance placed on the decision of the High Court of Delhi in the case of the co-detenue with regard to non-existence of “live-link” is clearly distinguishable on facts. Firstly the co-detenue Naveen Kesara alias Naveen Agarwal has not been shown to be involved in the “black pepper case”. As the grounds of detention are severable, the detenue before us cannot place reliance on the said decision. That apart the Court proceeded that the incident/case which was the ground case for detaining the co-detenue was registered two years before the order of detention, and on going through a time-chart filed by the respondents the Court came to the conclusion that there is no single reference to any other or further business or transaction that the co-detenue may have indulged in between 11.12.2018 and

15.01.2021 that may be termed as “prejudicial activity”. On the contrary in the case of the detenue the chain of events shows his propensity to engage in the same illegality in future. The detenue was under investigation by DRI since 2010. The statements of the co-acused which remain untouched clearly implicate the detenue. The role of the co-detenue based on which he was detained are distinguishable. In any event it is not for this Court to substitute its views to that of the satisfaction recorded by the detaining authority. On careful examination of the facts before us, we are of the clear view that the decision in the case of *Naveen Kasera alias Naveen Agarwal*, rendered by the High Court of Delhi can be of no assistance to the detenue before us. The Learned Counsel for the detenue placed reliance on the decision in *Pooja Batra* (supra) on the issue of subjective satisfaction. In the said case the Hon’ble Supreme Court found that on the date of passing the detention order the import of the subject consignment was at the stage of notice calling for re-opening the issue, which was held to be not valid material for passing an order of detention. The facts of the present case, which we have elaborately set out above presents a different picture altogether. More importantly, in the case on hand the investigation of one of the ground cases, is in progress. Hence the detention is distinguishable on facts.

23.(C). The decision in *Moulana Sham Shunmisa* is also distinguishable on facts, as it was a case where the passport of the detenue was seized, and even then he would continue his smuggling of gold within the country was held to be not sufficient material to detain him. The factual matrix before us

is entirely different and this decision can render no support to the case of the detainee.

23.(D). The decision in *Sita Ram Somani* was a case where there was material on record to show that the earlier confessional statements were retracted in the bail application filed by the detainee therein. This decision is wholly inapplicable to the facts before us. Equally the decision in *Ahmed Nassar* cannot help the detainee as we are satisfied on facts that all relevant materials were placed before the detaining authority.

23.(E). The decision in *Ranu Bhandari* the Hon'ble Supreme Court quashed the order of detention as some of the vital documents which have a direct bearing on the detention order were not placed before the detaining authority. This decision is wholly inapplicable to the case before us, more particularly for reasons recorded by us. So also, is the decision in *Ayya alias Ayub* wherein the Hon'ble Supreme Court held that relevant material (telegram) was not placed before and considered by the detaining authority. Hence the decision is distinguishable on facts.

23.(F). In *Palavi Vinod Patni*, decision of the High Court of Bombay the sponsoring authority placed before the detaining authority the show cause notice issued under Sections 112(a) (b) and 114(1) of the Customs Act but did not place the reply to the show cause; therefore held the same to have vitiated the subjective satisfaction. Before us the show cause notice, after considering the reply has culminated in an order of adjudication, imposing penalty on the detainee. It goes without saying that the allegations in the show cause notice as well as the reply of the detainee in the "black pepper"

case were forming part of the order of adjudication, which as on date remains as such, as according to the detainee he has sufficient time to challenge the same by way of appeal. Hence the decision cannot be made applicable to the case before us.

23.(G). The Learned Counsel place reliance on the decision in *Smt. Dharmistra Bhagat* to support his contention that non-supply of legible copies or non-supply of documents sought for is a ground to set aside the order of detention. In the said decision the Hon'ble Supreme Court on facts found refusal to supply relevant documents prevented him from making an effective representation, thereby infringing his right under Article 22(5) of the Constitution. In the preceding paragraph we have assigned reasons as to how the documents sought for by the detainee are irrelevant as they are not documents based on which the detaining authority recorded satisfaction. The demand for legible copies has also been, on facts, held to be not justified, particularly noting the conduct of the detainee. Hence this decision is distinguishable on facts.

23.(H). Similarly the decision in *Thahira Haris* is also distinguishable on facts wherein admittedly relied upon documents were not supplied to the detainee, which is not the case before us. Equally the decision of this Court in *Ruma Moitra* would not apply to the case on hand, as on facts the court concluded that the entire factual material considered by the detaining authority were not furnished to the detainee but only the inferences of the facts arrived at by the detaining authority.

23.(I). Now we deal with the decision relied on by the Learned Counsel for the detinue with regard to live-link between the ground cases and the order of detention.

- (i) In *T.A Abdul Rahman* the Hon'ble Supreme Court pointed out that the test of proximity is not a rigid or mechanical test by merely counting number of months between 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 scrutinize whether the detaining authority has satisfactorily examined such a delay and afforded tenable and reasonable explanation as to why such a delay has occasioned, further the Court has to investigate whether the casual connection has been broken in the circumstances of each case.
- (ii) In *Pradeep Nilkanth Paturkar*, the delay of five months from the date of registration of the last case and after four months from submission of proposal for detention was held to be unexplained, vitiating the detention order.
- (iii) In *Rajendra Arora*, the unexplained delay of ten months in passing the order of detention was held to be a ground to set aside the order.
- (iv) In *Adishwar Jain*, on facts, Hon'ble Supreme Court though found the delay to some extent was explained as it was not clear on facts as to why there was a delay of four months in passing the order of detention. In the said decision it was found in the interregnum (i.e) within the four months period DRI had directed the bank to defreeze

the bank accounts of the detainee. Hence, it was held that the delay was unexplained leading to setting aside the order of detention.

- (v) In *Sama Aruna* the correctness of the order of detention passed under Telangana Prevention of Dangerous Activities of Bottleggers, Dacoits Drug Offenders, Goondas, Immoral Traffic Offenders and hand Grabbers Act 1986 (1986 Act) was tested. It was pointed out that, only those activities so far back in the past which lead to the conclusion that the detainee is likely to engage in or prepare to engage in such activities in the immediate future can be taken into account. It was held that incidents which are said to have taken place nine to fourteen years earlier, cannot form the basis for being satisfied that the detainee is going to engage in, or make preparations for engaging in such activities. On the scope of judicial review of order of detention, it was held that a Court does not substitute its judgment for the decision of the executive nonetheless the Court has a duty to enquire that the decision of the executive is made upon matters laid down by the statute as relevant for reaching such a decision.

- (vi) In *Khaja Bilal Ahmed*, the order of detention was quashed as on facts it was found there was absence of a clear indication of a casual connection, a mere reference to pending criminal cases cannot account for the requirements of Section 3 of the Customs Act.

23.(J). In the earlier part of the judgment we have in extenso set out the facts which undoubtedly go to show that the order of detention impugned in this writ petition is based on a reasonable prognosis of the future behavior of

the detainee and the surrounding circumstances. The live and proximate link is writ large on the face of the materials placed before the detaining authority which clearly shows that considering the past conduct of the detainee even after the first case there is imperative need to detain him under Section 3 of the Act. Hence the decisions relied, on facts, does not in any manner assist the case of the detainee.

24. In the result we hold that there exists live link between the alleged incidents referred in the grounds of detention, which are undoubtedly smuggling activities, with regard to the date on which the order of detention was passed the by the detaining authority who has validly recorded satisfaction for issuing the order of detention under section 3(1) of the Act and while doing so he has taken note of the relevant material and antecedent of the detainee and his propensity to commit the same in future and the detainee has not been prejudiced in any manner as relevant documents which formed basis of the order of detention have been supplied. Furthermore, the Learned Counsel had contended that the bail order is a concocted document. This argument deserves to be rejected as we are fully satisfied that the copy of the bail order which has been furnished to the detainee is a typed copy and that has been clearly demonstrated before us by the Learned Additional Solicitor General by producing both the hand written order as well as the typed order. Therefore, such contention also stands rejected.

25. In the result the writ petition is dismissed and the order of detention is affirmed.

(T.S. SIVAGNANAM, J)

I agree.

(HIRANMAY BHATTACHARYYA, J)

(P.A- SACHIN)