

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Pronounced On: 02.11.2022

+ W.P.(CRL) 874/2022

RAVI CHANDRA MISHRA

..... Petitioner

Versus

UNION OF INDIA AND ORS.

.....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Shubhankar Jha, Advocate.

For the Respondents: Mr. Kirtiman Singh, CGSC for UOI alongwith Mr. Waize Ali Noor and Ms. Vidhi Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE AMIT SHARMA

J U D G M E N T

SIDDHARTH MRIDUL, J

1. The present writ petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure 1973, has been instituted on behalf of Ravi Chandra Mishra (hereinafter referred to as 'the detenu'), praying for a direction in the nature of *certiorari* for quashing of the detention order bearing F.NO. PD-12001/19/2021-COFEPOSA, dated 28.12.2021, issued under

Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as “COFEPOSA”) against the petitioner/detenu; and for further directions that the detenu be set at liberty *forthwith*. At the outset, it would be pertinent to note that vide common judgment dated 02.05.2022, in the case titled **Zakir Khan vs. Union of India & Ors.**, reported as **2022 SCC OnLine Del 1284**, this Court quashed and set aside detention orders issued against the co-detenus *therein*.

FACTS OF THE CASE: -

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

2.1. The detenu is engaged in his profession as a Customs House Agent (“CHA”) and has been handling the customs clearing work for various importers/exporters at customs ports in Kolkata and other Indian ports. The investigation against the detenu emanates from an investigation initiated by Income Tax Department and thereafter by the Directorate of Revenue Intelligence (“DRI”) against one Zakir Khan whose consignments were cleared as a CHA by the detenu.

The detenu, it is alleged, cleared import consignments of Zakir Khan's firms knowingly and being fully aware of the fact that Zakir Khan used to import old and used laptops, mobile phones, computer/mobile accessories from Dubai, Hong Kong, China and USA by mis-declaration and undervaluation in order to evade customs duty. The detenu has allegedly actively abetted the commission of offences under the Customs Act, 1962 leading to the evasion of customs duty.

- 2.2. That, Zakir Khan and one Sanjeev Kumar Yadav (also a Customs house agent) were summoned to the Office of DRI, and their voluntary statements dated 18/19.10.2021 tendered under Section 108 of the Customs Act, 1962 were recorded *wherein* they allegedly admitted to their involvement in the import of electronic goods by way of mis-declaration and gross under-valuation through dummy import firms. Both Zakir Khan and Sanjeev Kumar Yadav were arrested on 19.10.2021 under the Customs Act, 1962 and remanded to judicial custody. Subsequently on 26.11.2021, detention orders were passed against Zakir Khan and Sanjeev Kumar

Yadav; pursuant to their arrest by the DRI for the commission of alleged offences, punishable u/s 132/135(1)(a)(b) of the Customs Act, 1962.

- 2.3. It is asseverated by the official respondent that, based on information received from the Income Tax Department; the DRI, Kolkata Zonal Unit initiated search proceedings on 22.10.2021 at the office premises of customs broker firm M/s Jyoti Enterprises located at Room No. 908A, Diamond Heritage Building, 16, Strand Road, Kolkata; the proprietor of which firm is allegedly the detenu *herein*. That during the search proceedings, documents of M/s Indo Fabs, M/s Viha International and M/s R. K. Overseas were resumed for further investigation; the de-facto control/ownership of which three firms allegedly vested with Mr. Zakir Khan, although they operated as dummy firms with different proprietors who served as de-jure owners. In his statement under section 108 of the Customs Act, the detenu admitted to his involvement in import of electronic goods by way of mis-declaration and gross under-valuation through the

aforementioned import firms allegedly owned/ controlled by Zakir Khan.

- 2.4. That upon further examination/ valuation of goods imported under the aegis of the aforementioned firms, purportedly owned/controlled by Zakir Khan, a Show Cause Notice (SCN) No. 01/2022 dated 08.04.2022 was issued by the DRI, wherein it has been proposed to confiscate the following goods being illegally imported by M/s Indo Fabs (IEC- FKSPM5899G) vide Container No. PCIU8689880, valued at Rs. 21,05,85,480/- (Rupees Twenty One Crore Five Lakh and Eighty Five thousand Four Hundred and Eight Only), and goods imported by M/s R K Overseas (IEC- AMHPR9196F) vide Container No. WHLU5698385, valued at Rs. 12,20,37,060/- (Rupees Twelve Crore Twenty Lakhs Thirty Seven thousand and Sixty Only) and goods imported by M/s Viha International (IEC- HMPPS4660J) vide Container No. PCIU8010617, valued Rs. 13,32,92,300/- (Rupees Thirteen Crore Thirty Two Lakhs Ninety Two thousand and Three hundred Only).

2.5. That during the forensic analysis of mobile phones resumed by the Income Tax Department, a WhatsApp group in the name “Yoga with twist” was discovered installed allegedly in the mobile phone of Zakir Khan, wherein Zakir Khan is the group administrator and the other participants of the group include Zakir Khan’s China Mobile number, one Priyanka Razdan’s two Mobile Nos. and also the Mobile No. of the detenu. In the said group, the said Priyanka Razdan shared a Bill of Lading number corresponding to container number WHLU5698385 which is allegedly indicative of the fact that the detenu was well aware of the actual quantity and description of the restricted goods being so imported.

2.6. That the detenu was summoned to the Office of DRI and his voluntary statement dated 26/27.11.2021, tendered under Section 108 of the Customs Act, was recorded. Thereupon the detenu was arrested on the 27.11.2021 and sent to judicial custody. Further, the DRI submitted a proposal for detention of the detenu under the COFEPOSA Act before the Joint Secretary, COFEPOSA on 16.12.2021; in

pursuance thereto, the impugned detention order was issued on 28.12.2021. The said detention order was statedly served on the detenu along with the grounds of detention, on the 29.12.2021 at the Tihar Jail, New Delhi, under alleged acknowledgement. Further, the COFEPOSA Advisory Board opined that there existed sufficient grounds for the detention of Sh. Ravi Chandra Mishra/the detenu. Accordingly, vide order dated 21.02.2022, the Central Government has considered the opinion/report of the Advisory Board and confirmed the impugned detention order. Accordingly, the detenu is presently detained and lodged at the Tihar Central Jail, New Delhi.

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

- (a) The detenu played a vital role in evasion of customs duty by repeatedly resorting to gross undervaluation and misdeclaration of imported goods; and that the detenu facilitated customs clearance of imported goods knowing well that the same were

mis-declared.

- (b) Investigation conducted by the DRI allegedly establishes the detenu's continued propensity and inclination to indulge in the acts of smuggling in a planned manner, to the detriment of the economic security of the country and that unless prevented the detenu will continue to do so. The detenu, in his statements under section 108 of the Customs Act and section 132(4) of the Income Tax Act, 1961, has assertedly admitted to his involvement in the illegal import of various electronic goods and accessories in the names of various dummy entities controlled by Zakir Khan and that the true value and nature of the goods were evidently not declared the Customs authorities.
- (c) Further, considering the nature and gravity of offence, in which the detenu had engaged himself in an organized manner; and upon consideration of such prejudicial activities and the detenu's role therein; all of which reflect the detenu's high potentiality and propensity to indulge in such prejudicial activities in the future; therefore, it was concluded by the sponsoring authority that there is a need to prevent the detenu from smuggling of goods.

ARGUMENTS ON BEHALF OF THE PETITIONERS: -

4. Mr. Shubhankar Jha, learned counsel appearing on behalf of the detenu vehemently assails the impugned order of detention whilst submitting that the non-supply of relied upon documents (hereinafter referred to as the 'RUDs') has jeopardized the only right available to the detenu i.e. the right of making an effective representation. Further that, it is now an admitted position with regard to the supply of illegible copies of the subject RUDs, including but not limited to, those supplied to the detenu; and the axiomatic consequential non-consideration thereof by the Detaining Authority rendering the impugned detention order as invalid; specifically in light of the decision of this Court in *Zakir Khan v. Union of India & Ors.* reported as **2022 SCC OnLine Del 1284**; and consequently, the detenu urges release from detention on the ground of parity as being better placed than the detenus in the *Zakir (Supra)* case. In this regard, counsel appearing on behalf of the detenu limits the challenge in the present petition to the solitary ground of the non-supply of certain RUDs, which clearly infringe on the detenu's constitutional guaranteed right under Article 22(5) of the Constitution of India; and that the admitted supply of illegible/dim of RUDs, undeniably vitiates

the subjective satisfaction arrived at by the detaining authority.

5. It is submitted in this behalf that, non-supply of vital documents, relied/referred in the grounds of detention have evidently not been served upon the detenu, despite his specific request in this behalf, to the detaining authority vide letter dated 19.01.2022 (Annexure 5); and the circumstance that the said request was rejected the very next day i.e., 20.01.2022 (Annexure 6) by the detaining authority. It is submitted that rejection of the said request further curtailed the detenu's constitutional protection under Article 22(5) of the Constitution of India read with Section 3(3) of the COFEPOSA.

6. It is further submitted that, a large number of illegible/dim/blank RUDs referred to by the detaining authority have also not been supplied to the detenu at all, despite various specific demands made on behalf of the detenu vide representation(s) dated 17.01.2022 (Annexure 7) to the COFEPOSA Advisory Board, Delhi High Court through electronic mail, and request dated 21.01.2022 (Annexure 8) to the Central Govt. through the Central Economic Bureau as well as to the Detaining Authority i.e. Joint Secretary COFEPOSA; thereby vehemently urging that the detenu's constitutional right to an effective representation was curtailed, owing

to the non-supply/supply of illegible RUDs and the same being relied upon by the detaining authority while passing the impugned detention order.

7. At this stage it is observed that in the RUDs, the following documents were found to be completely illegible: -

Sr. No. of list of RUDs	Description
4.	Documents mentioned in Panchnama dated 18.10.2021 i.e. documents/ loose papers relevant to their inquiry which has been numbered as 01 to 71 and further the documents mentioned in tabulated form.
6.	Documents mentioned in Panchnama drawn at office of Sanjeev Kumar Customs Broker wherein only list of documents has been furnished without supplying the said documents to the detenu.
15.	Documents/ emails mentioned in Panchnama dated 18.10.2021 drawn at Customs Broker M/s Sai Dutta Clearing Agency Pvt. Ltd. Mumbai. Further documents mentioned in Annexure A to Panchnama dated 18.10.2021 not supplied to the detenu.
16.	In Panchnama dated 13.10.2021 certain documents showing details of the goods found in the container and seized were enclosed as Annexure however, neither such annexure provided, nor such documents were provided to the detenu.
24.	In Panchnama dated 22.10.2021 drawn at M/s Jyoti Enterprises a list of articles with number of pages seized is given in tabulated form however, no such documents have been provided to the detenu.
28,32, 44.	Order for extension of judicial remand of Zakir Khan and Sanjeev Kumar was not supplied to the detenu.
44.	It is mentioned in letter dated 18.11.2021 issued by Sh. Satish Aggarwala Advocate that a certain application has

	been moved by the accused informing that they do not want to move any bail application and that the court directed that application kept on record. Copy of such application and court order in this regard was not supplied.
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Other documents and RUDs that are stated to be illegible/dim and had been supplied to the detenu are at the following page numbers of the RUDs, Page No. 62, 63, 64, 76, 77, 79 -81, 84-85, 94, 105, 108, 133, 135-136, 142, 146, 148 - 152, 156, 171, 186-187, 223-224, 251-254, 276, 285 287, 294-296, 355- 356, 446, 503, 517-518, 521, 524, 527, 530, 533, 536, 540, 556, 586, 695, 744, 745, 748, 783, 801, 810, 820, 910-918, 921-924, 926, 928-929, 936-938, 942, 944-947, 953, 975, 976, 995- 1496, 1500-1512, 1530, 1534, 1570, 1642, 1644 (blank page) 1646 (blank page), 1688, 1698 (blank page), 1700 (blank page), 1704 (blank page) 1706 (blank page) 1708 (blank page) 1710 (blank page), 1715- 1723, 1726-1736, 1758, 1769, 1771-1773, 1775, 1779-1780, 1801-1804, 1807-1810, 1812, 1877-1897, 2039, 2085-2094, 2165 (blank page) 2219, 220-2271, 2275-2276, 2278-2288, 2294-2295, 2300, 2303-2304, 2308-2611, 2628-2629, 2683, 2692, 2724, 2744, 2746.

8. It is furthermore reiterated that, not furnishing or supplying the relevant material or documents despite admitted demand, is grossly violative of the fundamental rights of the detenu as enshrined and

guaranteed under Articles 14, 21 & 22(5) of the Constitution of India.

9. The learned counsel appearing on behalf of the detenu submits that the detaining authority could not have arrived at its subjective satisfaction while issuing the detention order, based upon illegible RUDs and specious allegations made by the sponsoring authority. There was no subjective satisfaction and considered formulation of grounds on the part of the detaining authority, which could warrant the passing of the detention order under Section 3(1) of the COFEPOSA. The detaining authority has relied upon certain documents, copies *whereof* were not made a part of the RUDs and those supplied, were admittedly dim/illegible. It is therefore submitted that there was a glaring non-application of mind by the detaining authority, which entirely and unequivocally vitiates the impugned order of detention, since the fundamental right of the detenu to make an effective representation has thereby been rendered nugatory and illusory.

10. In order to buttress his exhaustive submissions, Mr. Shubhankar Jha learned counsel appearing on behalf of the detenu, has pressed into reliance the following decisions: -

- i. Zakir Khan v. Union of India & Ors. reported as 2022 SCC OnLine Del 1284.
- ii. Powanammal v. State of T.N. & Anr. reported as 1999 2 Supreme Court Cases 413.

- iii. Mohd. Nashruddin v. Union of India, reported as 2021 SCC OnLine Del 4017.
- iv. Ankit Ashok Jalan v. Union of India, reported as (2020) 16 SCC 127.
- v. Tsering Dolkar v. Administrator, Union Territory of Delhi & Ors. reported as (1987) 2 Supreme Court Cases 69.

ARGUMENTS ON BEHALF OF THE RESPONDENT

11. *Per Contra*, Mr. Kirtiman Singh, the learned Central Government Standing Counsel appearing on behalf of the official respondents would submit that the impugned detention order dated 28.12.2021 was passed by the detaining authority under Section 3 (1) of the COFEPOSA only after arriving at his subjective satisfaction based on relevant and sufficient material. It is further submitted that it is settled law as held by the Hon'ble Supreme Court in a catena of judgments that if there is some material before the detaining authority to arrive at his subjective satisfaction with regard to the propensity of the proposed detenu being involved in prejudicial activities in the future, the contention of non-consideration of other documents/material cannot be a ground for vitiating the detention order.

12. It is urged that, founded on the documents and the materials placed before the detaining authority and considering the individual role of the detenu, the detaining authority satisfied himself as to the detenu's continued propensity and inclination to indulge in prejudicial

acts towards the Customs authorities in a planned manner to the detriment of the economic security of the country and concluded that there was a need to prevent the detenu from smuggling goods.

13. The learned CGSC asserted, vehemently on behalf of the Union of India, in his oral arguments that, it is incumbent upon the detenu to show that prejudice was caused to him, owing to the illegible RUDs. It is further submitted that the detenu must show that the failure to supply the RUDs or the supply of illegible RUDs had impaired or prejudiced his right, however, slight or insignificant it may be.

14. Lastly, without prejudice to other rights and contentions, learned CGSC submits that, it is well settled that by virtue of Section 5-A of COFEPOSA, when the detention order is based on more than one grounds, independent of the other, the detention order will survive whether or not one of the grounds is found to be non-existent or legally unsustainable. It is further submitted that assuming albeit not admitting the contention of the detenu that certain non-vital documents supplied to the detenu were illegible, the principle of segregation as contained in Section 5-A of COFEPOSA will be attracted, therefore making the detention order valid.

15. In support of his arguments, Mr. Kirtiman Singh, learned CGSC

appearing on behalf of the respondent has placed reliance on the following decisions: -

- i. Naresh Kumar Goyal v. Union of India and Others, reported as (2005) 8 SCC 276.
- ii. State of Maharashtra and others v. Bhaurao Punjabrao Gawande, reported as (2008) 3 SCC 613.
- iii. Sunila Jain v. Union of India & Anr. reported as 2006 (3) SCC 321.
- iv. Adishwar Jain v. Union of India & Anr. reported as 2006 (11) SCC 339.
- v. Radhakrishnan Prabhakaran v. State of Tamil Nadu reported as 2000 (9) SCC 170.
- vi. Kamarunnissa Etc. v. Union of India and Ors, reported as 1991 AIR SC 1640.

DISCUSSION

16. Having heard learned counsel appearing on behalf of the parties and after due consideration of the rival submissions in the context of the present facts and circumstances, as well as the relevant provisions of law and the decisions relied upon by the parties; and having perused the material on record the following issues arise for the consideration of this Court in these proceedings: -

- A) Whether the supply of illegible RUDs vitiates the subjective satisfaction of the detaining authority thereby rendering the impugned detention order invalid.
- B) Whether in the event that issue (A) is answered in the affirmative, the argument premised on S.5A of the COFEPOSA Act, in the facts and circumstances of the

present case will have the effect of saving the detention order from invalidation.

- C) Whether the present detenu is similarly placed as the detenus in the *Zakir (supra)* case so as to attract the ground of parity.

17. We find it apposite at this stage to consider and reiterate the observations made by the Hon'ble Supreme Court in a recent decision in *Mallada K. Sri Ram vs. The State of Telangana & Ors.* in **Criminal Appeal No. 561 of 2022 (Arising out of SLP(Crl) No. 1788 of 2022,** reported as **LQ/SC/2022/476**, specifically paragraph 15 as is reproduced hereunder: -

"15. A mere apprehension of a breach of law and order is not sufficient to meet the standard of adversely affecting the maintenance of public order. In this case, the apprehension of a disturbance to public order owing to a crime that was reported over seven months prior to the detention order has no basis in fact. The apprehension of an adverse impact to public order is a mere surmise of the detaining authority, especially when there have been no reports of unrest since the detenu was released on bail on 8 January 2021 and detained with effect from 26 June 2021. **The nature of the allegations against the detenu are grave. However, the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a draconian and**

arbitrary exercise of state authority. The case at hand is a clear example of non-application of mind to material circumstances having a bearing on the subjective satisfaction of the detaining authority. The two FIRs which were registered against the detenu are capable of being dealt by the ordinary course of criminal law."

18. Insofar as the issue, as to whether the non-supply of certain RUDs and the supply of illegible RUDs, vitiates the subjective satisfaction arrived at by the Detaining Authority; and whether the detention order resultantly passed is vitiated on the ground of non-application of mind, is concerned; we have considered the rival submissions made before us in the backdrop of the perusal of the record as well as the material placed before us in the present proceedings.

19. In this regard it is pertinent to note that, in connected writ petitions being W.P.(CRL) No. 72/2022 & W.P.(CRL) No. 73/2022 instituted on behalf of similarly situated individuals i.e. Zakir Khan and Sanjeev Kumar Yadav, this Court vide order dated 03.03.2022 observed as follows: -

"Mr. Vikram Chaudhri, learned senior counsel appearing on behalf of the petitioners in these writ petitions has handed over in Court today the original set of relied upon documents RUDs furnished to the detainees at the time of their detention.

The Court has perused the said documents. The Court has further asked Mr. Sumit Kumar, Senior Intelligence Officer, Directorate of Revenue Intelligence to examine the said original documents and inform this court as to whether they are the set of documents that were served upon the detainees.

The said official appearing on behalf of DRI confirms that the set of documents produced in court on behalf of the detenues are the originals, which were served upon them at the time of their detention.”

20. It is observed that the Ld. CGSC in the present petition has fairly admitted in oral submissions that the RUDs supplied to the detenu were the same as those supplied in the *Zakir (Supra)* case as the present petition arose from the same investigation. Therefore, several RUDs supplied to the detenu, as well as those on the record with the detaining authority were admittedly illegible/dim/blank pages. In this regard this Court’s in *Mohd. Nashruddin v. Union of India & Ors.*, reported as **2021 SCC OnLine Del 4017** observed as follows: -

“47. It is trite to say that a person detained in pursuance of an order for preventive detention, has a constitutional right to make an effective representation against the same. The authorities are constitutionally charged with the responsibility to ensure that the grounds of detention, including all relevant documents that are considered whilst forming the subjective satisfaction, W.P.(CRL.) 1924/2020 Page 52 of 86 are provided to the detenu by the Detaining Authority, so as to enable the detenu to make an effective representation to the Advisory Board, as well as to the Detaining Authority. **Therefore, the non-supply of legible copies of all relevant documents inspite of a request and representation made by the detenu for the supply of the same, renders the order of detention illegal and bad; and vitiates the subjective satisfaction arrived at by the Detaining Authority.**

48. In our considered view, therefore, the supply of the following documents namely, a) Passport, b) Identity Cards of codetenu’s, c) WhatsApp chats, d) bill of entry, e) invoice, f) the statement of Mr. Rohit Sharma who is alleged to have defaced the gold bars imported illegally etc. **was critical, in order to enable the detenu to make a comprehensive, holistic and effective representation against the**

impugned detention order, both before the Advisory Board, as well as before the Detaining Authority.

49. In the present case, the denial by the official respondent to supply legible copies of the relevant documents to the detenu, despite his express request to do so, tantamount to denial of his constitutional right, thereby vitiating the detention order, founded on the said relevant material.

50. In this regard the Hon'ble Supreme Court has, in *Dharmistha Bhagat V State of Karnataka & Ors* reported as 1989 Supp (2) SCC 155 and in particular paragraph 5 thereof, observed that non-supply of legible copies of vital documents would render the order of detention illegal and bad. The relevant portion has been extracted hereinbelow:

5. The learned counsel appearing on behalf of Respondent 1, Union of India has contended that even though legible copy of panchnama referred to in the list of documents mentioned in the grounds of detention has not been supplied to the detenu yet the fact that five gold biscuits of foreign marking were recovered from the possession of the detenu was sufficient for subjective satisfaction of the detaining authority in making the said order of detention. So the detention order cannot be termed as illegal and bad for non-supply of legible/typed copy of the said document i.e. panchnama dated 12-2-1988. The panchnama dated 12-2-1988 which had been referred to in the list of documents referred to in the grounds of detention and a copy of which had been given to the detenu along with the grounds of detention, **is not at all legible as is evident from the copy served on the detenu. It is also not in dispute that on receiving the documents along with the grounds of detention the detenu had made a representation to Respondent 1 stating that some of the documents including the panchnama which had been supplied to him are illegible and as such a request was made for giving typed copies of those documents to enable the detenu to make an effective representation against the same. The detaining authority on receipt of the said representation sent a reply denying that the copies of those documents were illegible and refusing to supply typed copies of the same. It is clearly provided in sub-article (5) of Article 22 of the Constitution of India that:**

“(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest

opportunity of making a representation against the order.”

Therefore, it is imperative that the detaining authority has to serve the grounds of detention which include also all the relevant documents which had been considered in forming the subjective satisfaction by the detaining authority before making the order of detention and referred to in the list of documents accompanying the grounds of detention in order to enable the detenu to make an effective representation to the Advisory Board as well as to the detaining authority. Therefore, the non-supply of legible copy of this vital document i.e. panchnama dated 12-2-1988 in spite of the request made by the detenu to supply the same renders the order of detention illegal and bad. This Court in *Mehrunissa v. State of Maharashtra* [(1981) 2 SCC 709 : 1981 SCC (Cri) 592 : AIR 1981 SC 1861] has observed that: (SCC p. 710)

“The detenu was entitled to be supplied with copies of all material documents instead of having to rely upon his memory in regard to the contents of the documents. The failure of the detaining authority to supply copies of such documents vitiated the detention, as has been held by this Court in the two cases cited by counsel. The detenu is, therefore, entitled to be released. He is accordingly directed to be released forthwith.”

51. To the similar effect are the observations recorded in the judgment of the Apex Court in *Manjeet Singh Grewal vs. UOI & Ors.* reported as 1990 Supp SCC 59.”

21. Further, in *Union of India vs. Ranu Bhandari*, reported as (2008) 17 SCC 348, the Hon’ble Supreme Court has observed as follows: -

“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.”**

22. In view of the admitted position by the official respondents and the above extracted decision of this court, we are of the opinion that, the RUDs supplied to the detenu, as well as, relied upon by the Detaining Authority in arriving at its ‘subjective satisfaction’ were admittedly illegible, therefore, grossly violating the constitutional right of making an effective representation, guaranteed to the detenu under Articles 14,21 and 22(5) of the Constitution of India.

23. In this behalf, the contention made on behalf of the official respondents is to the effect that, it is incumbent upon the detenu to show that prejudice was caused to him owing to the supply of illegible RUDs; the specific contention being that, the detenu must establish that the failure to supply the RUDs or the supply of illegible RUDs had impaired or prejudiced his right.

24. In our opinion, the aforementioned contention raised on behalf on the official respondents is untenable in light of the Hon’ble Supreme Court’s decision in *Mrs. Tsering Dolkar vs. Administrator,*

Union Territory Of Delhi & Others reported as (1987) 2 SCC 69 and

in particular paragraph 12, wherein it was observed as under: -

“12. The learned Additional Solicitor General relied upon the feature that the petitioner-wife knew both English and Tibetan languages and an effective representation as a fact had been made. There can be no two opinions that the requirement of law within the provisions of Article 22(5) of the Constitution is that the detenu has to be informed about the grounds of detention in a language which he understands. The fact that the detenus wife knew the language in which the grounds were framed does not satisfy the legal requirement. Reliance was placed by the learned Additional Solicitor General on a decision of this Court in *Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Ors.*, [1985] 3 SCR 679 in support of his contention that unless the detenu was able to establish prejudice on account of the fact that the grounds of detention and the documents accompanying the grounds were not in a language known to the detenu the order would not be vitiated. There is no clear indication of the test of prejudice being applied in that case. On the facts relevant before the Court, a conclusion was reached that the detenu was merely reigning ignorance of English and on the footing that he knew English, the matter was disposed of. **We must make it clear that the law as laid down by this Court clearly indicates that in the matter of preventive detention, the test is not one of prejudice but one of strict compliance with the provisions of the Act and when there is a failure to comply with those requirements it becomes difficult to sustain the order.** (See AIR 1975 SC 1513, [1975] 2 SCR 832 , AIR 1975 SC 245).”

25. It is trite to say that when a person is detained in pursuance to an order of preventive detention, the statutory authorities are constitutionally charged with the responsibility of ensuring that the grounds of detention, **including legible copies of all RUDs** and other relevant documents that are considered whilst forming the subjective satisfaction, are provided to the detenu by the detaining authority; so as to enable the detenu to make an effective representation to the advisory board, as well as to the detaining authority. Therefore, the

failure and non-supply of legible copies of all RUDs despite of a request and representation made by the detenu for the supply of the same, renders the order of detention illegal and bad in law; and vitiates the subjective satisfaction arrived at by the detaining authority.

26. The decision of the Hon'ble Supreme Court in **Kamarunnisa vs. Union of India**, reported as (1991) 1 SCC 128, does not come to the aid of the official respondents, since in the present case, we agree with the submissions made on behalf of the detenu, that the present is a case of non-placement of vital facts and documents before the Detaining Authority owing to their illegibility and that the 'subjective satisfaction' is vitiated since the latter was not in possession of vital RUDs. The ratio in *Kamarunnisa (supra)* is, therefore, distinguishable on the facts thereof. Therefore, we have no hesitation in holding that, the Detaining Authority fell into error in relying upon illegible documents which is the equivalent of non-placement of RUDs, by the act of omitting them from consideration, thereby vitiating its subjective satisfaction, for suffering from the vice of non-application of mind.

27. The reliance placed by the respondent upon the decision of **Gautam Jain v. Union of India**, reported as (2017) 3 SCC 133, does

not come to their assistance, since in the present case we are in agreement with the submissions made on behalf of the detenu. The Hon'ble Supreme Court enunciated therein, the undisputed legal position that, if the detention order is based on more than one grounds, independent of each other, then the detention order will still survive even if one of the grounds is found to be non-existing or legally unsustainable. However, it must be observed that, on the other hand, if the detention order is founded substantially on one composite ground, though containing various species or sub-heads, the detention order would be vitiated if such ground is found fault with.

28. The present petition does not attract the *dictum* enunciated in *Gautam Jain (Supra)*, since the grounds of detention in the present petition are not severable, in view of the patent and palpable vice of non-application of mind by the detaining authority antecedent and attendant in the passing of the detention order. Premised on averments made of behalf of the Respondents, it is found that illegible documents supplied to the detenu were clearly and categorically admitted to have been relied upon by the detaining authority. Therefore, the present petition is distinguishable from the aforementioned case; as the very grounds of detention in these impugned orders are not severable in the

peculiar facts and circumstances of the present petition.

29. Thus, insofar as the issue, as to whether the argument premised on S.5A of the COFEPOSA Act by the official respondents has the effect of saving the detention order; in the facts and circumstances of the present case is concerned; we are of the considered opinion that, in cases where the order of detention fails on the ground that the ‘subjective satisfaction’ of the detaining authority is vitiated, owing to non-application of mind; the protection afforded qua severability of grounds stipulated under the provision of 5A of the COFEPOSA Act, are neither attracted nor available, in law.

30. It is well settled and not in dispute that under the provisions of Section 3 of COFEPOSA, it is only the detaining authority, which can ultimately decide to pass or not, a detention order against any person, and that too, after perusing each and every document and material placed before it. It is also not in dispute that the ‘subjective satisfaction’ of the detaining authority itself is to be arrived at after perusing all the relevant documents and material produced. This is a constitutionally provided **condition precedent** for passing a valid order of detention. It is also an admitted position that many of the RUDs placed before the detaining authority were illegible/dim/blank

pages. We, therefore, find considerable force in the contention that had the detaining authority itself perused the RUDs for arriving at its 'subjective satisfaction' and formulation of grounds, it would have been alive to the fact that many of the RUDs placed before it were wholly illegible.

31. In view of the foregoing discussion, this issue is resultantly decided in favour of the detenu and against the respondent.

32. Insofar as the issue, as to whether the detenu in the present case is similarly placed with the detenu in the case of *Zakir (Supra)* is concerned, our attention has been invited to the fact that the impugned detention order is arising out of the same investigation, and that the detenu was brought under the scanner owing to his abetment in offences committed by the detenus in the *Zakir case (Supra)*. It is an admitted position on behalf of the official respondents that the RUDs supplied to the detenu were the same as those supplied to the detenus in the case of *Zakir (Supra)*. It is also pertinent to observe that the sponsoring authority i.e. the DRI in their impleadment application have averred as follows:-

“4. That it is further respectfully submitted, the present matter emanates from an investigation initiated by the Income Tax Department (ITD) and thereafter by the applicant herein i.e., DRI, DZU. The investigations were initiated first against one Mr. Zakir Khan whose

consignments were cleared by the petitioner above named. During investigations, it was revealed that Mr. Zakir Khan engaged himself in mis-declaration and under valuation of imported consignment leading to outright smuggling and these consignments were got cleared by the petitioner who was fully aware of the illegal activities being carried out Mr. Zakir Khan. The petitioner has therefore actively abetted with Mr. Zakir Khan in the commission of offences under the Customs Act thereby leading to evasion of huge amount of Custom duty.

5. That, Mr. Zakir Khan alongwith one Mr. Sanjeev Kumar Yadav (CHA) were arrested by the applicant /DRI on 19.10.2021 and subsequently the applicant/ DRI, as a sponsoring authority, brought to the notice of respondent no. 2, the various offences committed by Mr. Zakir Khan and Mr. Sanjeev Kumar Yadav under the Customs Act and the fact that the said persons had been indulging in smuggling activities in terms of the provisions of the Customs Act read with COFEPOSA which ultimately lead to their detention under the COFEPOSA.

6. That, **the petitioner is similarly placed alongwith Mr. Zakir Khan and Mr. Sanjeev Kumar Yadav** and in the above criminal writ petition, the petitioner has challenged his detention under the COFEPOSA.”

Therefore, in view of the admitted position by the sponsoring authority, as well as, the detaining authority, we find force in the argument that the present detenu is similarly placed as the detenus in the case of *Zakir (Supra)* and would consequently, attract the ground of parity.

33. In view of the foregoing discussion and having accorded our thoughtful consideration to the facts and material on record, the issues that arose for consideration hereinabove are decided in favour of the detenu and against the respondents. Resultantly, the impugned

detention order stands invalidated.

34. The present writ petition accordingly succeeds. In the result, the detention order bearing No. PD-12001/19/2021-COFEPOSA, dated 28.12.2021 passed against the detenu is hereby set-aside and quashed. The detenu is directed to be set at liberty *forthwith*; unless his custody is required in connection with any other case.

35. A copy of this Judgment be provided to the learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court *forthwith*.

**SIDDHARTH MRIDUL
(JUDGE)**

**AMIT SHARMA
(JUDGE)**

NOVEMBER 02, 2022

dn/ak