

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

&

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 21ST DAY OF AUGUST 2015/30TH BHADRA, 1937

WP(Crl.).No. 115 of 2015 (S)

PETITIONER:

LEEMA SEBASTIAN
M/O.VARIKKAMAKKAL SEBASTIAN HIROMASA
VARIKKAMAKKAL HOUSE, PULPALLY,
WAYANAD DISTRICT.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY PRINCIPAL SECRETARY TO
GOVERNMENT(HOME) SSA DEPARTMENT
THIRUVANANTHAPURAM-695 001.
2. GOVERNMENT OF INDIA,
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE
NEW DELHI-110 001.
3. THE SUPERINTENDENT ,
CENTRAL PRISON,
THIRUVANANTHAPURAM-695 001.

ADDL.R4 IMPEADED:

DIRECTOR OF REVENUE INTELLIGENCE,
COCHIN - 682 018.

ADDL.R4 IS IMPEADED AS PER ORDER DATED 21.8.2015 IN I.A.NO.4640
OF 2015.

R2 BY SRI.P.K.RAMKUMAR, ADDL.CGSC
R1 BY DIRECTOR GENERAL OF PROSECUTION SRI.ASAF ALI

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
30-06-2015, ALONG WITH WP(C) NO.5276/2015, THE COURT ON 21/08/2015
DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

- EXT.P1 TRUE COPY OF THE ORDER NO:17033/SS-A4/2014/HOME DATED 25.2.2014 PASSED BY THE 1ST RESPONDENT.
- EXT.P2 TRUE COPY OF THE GROUNDS ACCOMPANYING THE ORDER OF DETENTION.
- EXT.P3 TRUE COPY OF THE COVERING LETTER DATED 25.2.2014 ISSUED BY THE 1ST RESPONDENT AND ANNEXED TO THE GROUNDS OF DETENTION.
- EXT.P4 TRUE COPY OF THE LIST OF DOCUMENTS ANNEXED TO THE GROUNDS
- EXT.P5 TRUE COPY OF THE MAHAZAR DRAWN FOR THE SEIZURE OF GOLD FROM THE DETENU AS WELL AS FROM ONE RAHILA CHEERAYIIS.
- EXT.P6 TRUE COPY OF THE LETTER DATED 8.11.2013 ISSUED BY ASSISTANT COMMISSIONER, AIR CUSTOMS, KOZHIKODE AND ADDRESSED TO THE DEPUTY DIRECTOR, KOZHIKODE.
- EXT.P7 TRUE COPY OF THE STATEMENT DATED 8.11.2013 THAT IS RECORDED FROM THE DETENUE.
- EXT.P8 TRUE COPY OF THE STATEMENT DATED 8.11.2013 THAT IS RECORDED FROM THE CO-ACCUSED SMT.RAHILA CHEERAYIIS.
- EXT.P9 TRUE COPY OF THE STATEMENT DATED 21.11.2013 OF THE CO-ACCUSED SHRI.SHAHABAS MUHAMMED.
- EXT.P10 TRUE COPY OF THE ARREST MEMO DATED 9.11.2013 OF THE DETENUE.
- EXT.P11 TRUE COPY OF THE REMAND REPORT OF THE DETENUE TOGETHER WITH THE TRUE COPY OF THE REMAND ORDER DATED 9/11/2013.
- EXT.P12 TRUE COPY OF THE BAIL APPLICATION IN O.R.12/2013 FILED BY THE COUNSEL FOR THE DETENUE BEFORE THE ACJM (EO) COURT, ERNAKULAM.
- EXT.P13 TRUE COPY OF THE PETITION DATED 18.11.2013 FILED BY THE DETENUE BEFORE THE HON'BLE ACJM(EO) COURT, ERNAKULAM.
- EXT.P14 TRUE COPY OF THE PETITION FILED BY THE DETENUE BEFORE THE ACJM (EO) COURT, ERNAKULAM THROUGH THE SUPERINTENDENT, BORSTAL SCHOOL, THRIKKAKARA.
- EXT.P15 TRUE COPY OF THE BAIL ORDER DATED 21.12.2013 PASSED BY THE HON'BLE SESSIONS COURT, ERNAKULAM IN CRL.M.C.2360/2013.

- EXT.P16 TRUE COPY OF THE WRIT PETITION DATED 23.4.2014 IN WP(C) NO.8917/2014.
- EXT.P17 TRUE COPY OF THE INTERIM STAY ORDER DATED 7.4.2014 PASSED BY THE HIGH COURT IN WP(C)8917/2014
- EXT.P18 TRUE COPY OF THE EXTENSION ORDERS OF THE INTERIM STAY ORDER PASSED BY THE HIGH COURT IN WP(C)8917/2014.
- EXT.P19 TRUE COPY OF THE JUDGMENT DATED 16.7.2014 PASSED BY THE HIGH COURT IN WP(C) NO.8917/2014 AND 8946/2014.
- EXT.P20 TRUE COPY OF SLP NO.27662-27663/2014 FILED BY THE IST RESPONDENT BEFORE THE HON'BLE SUPREME COURT OF INDIA
- EXT.P21 TRUE COPY OF THE INTERIM STAY ORDER DATED 27.10.2014 IN SLP NO.27662-27663/2014.
- EXT.P22 TRUE COPY OF THE ORDER PASSED BY THE HON'BLE HIGH COURT OF KERALA IN I.A.12895/2014 IN WP(C) NO.8917/2014.
- EXT.P23 TRUE COPY OF THE ORDER PASSED BY THE HIGH COURT OF KERALA IN I.A.13231/2014 IN WP(C)NO.8917/2014
- EXT.P24 TRUE COPY OF THE ORDER PASSED BY THE HON'BLE SUPREME COURT IN SLP NO.27662-26663/2014
- EXT.P25 TRUE COPY OF THE REPRESENTATION FORWARDED BY THE PETITIONER TOGETHER WITH THE COVERING LETTER 13.12.2013.
- EXT.P26 TRUE COPY OF THE LETTER DATED 24.12.2014 ISSUED BY THE IST RESPONDENT.
- EXT.P27 TRUE COPY OF THE LETTER GO RT NO.191 OF 2015/HOME DATED 27.1.2015 ISSUED BY THE IST RESPONDENT.
- EXT.P28 TRUE COPY OF THE MEMORANDUM DATED 29.1.2015 ISSUED BY THE UNDER SECRETARY TO THE GOVERNMENT OF INDIA.

RESPONDENTS' EXHIBITS:

- EXT.R1(a) PHOTOCOPY OF THE MAHAZAR DATED 8.11.2013.
- EXT.R1(b) TRUE COPY OF THE GOVERNMENT ORDER GO(Rt) NO.191/2015/HOME DATED 27.1.2015.
- EXT.R1(c) TRUE COPY OF THE STAY ORDER OF THE APEX COURT.

//TRUE COPY//

AHZ/

“C.R.”

**K.T.SANKARAN &
B.SUDHEENDRA KUMAR, JJ.**

**W.P.(Crl) No.115 of 2015
&
W.P.(C) No.5276 of 2015**

Dated this the 21st day of August, 2015

JUDGMENT

K.T.Sankaran, J.

Since common questions of fact and law are involved, these Writ Petitions are being disposed of by this common judgment. W.P. (Crl) No.115 of 2015 is filed by Leema Sebastian, the mother of Varikkamakkal Sebastian Hiromasa, challenging the order of detention dated 25.2.2014, passed by the first respondent under Sections 3(1)(i) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA Act'). W.P.(Crl) No.5276 of 2015 is filed by P.Rasheeda, mother of Rahila Cheerayi, challenging the order of detention dated 25.2.2014 issued by the first respondent under Sections 3(1)(i) and 3(1)(iii) of the COFEPOSA Act. Hereinafter, the detainees are referred to as Rahila and Hiromasa or as detainees.

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 2 ::

2. The order of detention was executed on 9.11.2014 and since then Rahila and Hiromasa are under detention.

3. The following facts are discernible from the grounds of detention: On the specific intelligence reports that the detenues (Rahila and Hiromasa) were indulging in smuggling gold to India through various airports acting under the instructions of a gang of Shahbas, Abdul Lais @ Abu Lais and Nabeel, the detenues were intercepted at Calicut International Airport on 8.11.2013 when they alighted by Air India Express Flight No.IX 344 at 4.55 hours. On search of the body of Rahila and Hiromasa, it was found that three gold bars each were concealed around their waist. They had not declared that any dutiable goods were being brought. Rahila was having only 10 UAE Dirham and ₹500/- with her while Hiromasa was having only ₹20/- with her. The gold bars were seized, statements under Section 108 of the Customs Act were taken from them and they were arrested. Rahila and Hiromasa were remanded to judicial custody on 9.11.2013. As per the order dated 21.12.2013, bail was granted to them with effect from 28.12.2013 on certain conditions. The grounds of detention also reveals that the allegation is that

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 3 ::

Rahila and Hiromasa smuggled gold to India from Dubai on 30.7.2013 and 19.9.2013 as well. The further allegation is that Rahila smuggled 23 Kg. of gold bars valued approximately at ₹6.90 Crores while Hiromasa smuggled 16 Kg. of gold valued approximately at ₹4.80 Crores from Dubai.

4. On 26.3.2014, Rahila filed W.P.(C) No.8946 of 2014 and Hiromasa filed W.P.(C) No.8917 of 2014 before the High Court of Kerala challenging the orders of detention dated 25.2.2014 at their pre-execution stage. Various contentions were raised by them including a contention that they were entitled to get copy of the order of detention and grounds of detention before the execution of the order of detention. A Division Bench of this Court granted interim order of stay of execution of the order of detention on conditions that they shall stay within the local limits of the police station of their residence, they shall report before the Station House Officer concerned on every day and that they shall not contact the other accused in the case. Those Writ Petitions were disposed of by the judgment dated 16.7.2014 by another Division Bench, which took note of the interim orders passed in the Writ Petitions and also the

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 4 ::

decisions of the Supreme Court in Subhash Popatlal Dave v. Union of India [(2012) 7 SCC 533], Subhash Popatlal Dave v. Union of India [(2014) 1 SCC 280] and Additional Secretary to the Government of India and others v. Alka Subhash Gadia and another [1992 Supp (1) SCC 496] and made the interim orders absolute till 31st August, 2014. It was held by the Division Bench thus:

“3. While the learned Additional Director General of Prosecution has attempted to say that the clear content of Clause 5 of Article 22 of the Constitution includes an embargo to the detaining authority issuing the detention order and grounds of detention at any point of time before the actual execution of the detention order, we think that the said issue requires deeper consideration. This cannot be concluded merely because in one of the judgments referred to above, the Lordship of the Apex Court has concluded that one cannot utilise the provisions of the Right to Information Act, 2005 to access such information. The contextual content of Article 22(5) and the guarantee extended to the detainee thereby have to be considered from different angles. However, we think that it is not necessary for us to finally speak on that now since the interim order granted to the petitioners in these cases by

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 5 ::

the Division Bench has carried the case further and decision on certain question may sometimes academic and not necessarily required to render justice to the parties in the cases in hand.

4. Obviously, without a copy of the detention order and the grounds of detention being served on the proposed detainee, it would be inconceivable that we should proceed to hear the matter on grounds as to the contents of the detention order or its grounds. The question as to whether there is due and fair application of mind by the detaining authority on the proposal of the sponsoring authority is also an issue that would fall within this class of arguments.

5. For the present, it would suffice that we treat these two cases as special situations and order that the detention orders and the grounds of detention of the petitioners be served on them on or before 31.07.2014. To enable the petitioners to seek remedy if any available to them, in accordance with law, as against the detention orders and grounds of detention, we make the interlocutory orders granted in these writ petitions absolute on the same terms until the 31st of August, 2014.”

W.P.(Cri) No.115/2015 & W.P.(C) No.5276/2015

:: 6 ::

5. The judgment of this Court in W.P.(C) Nos.8917 and 8946 of 2014 was challenged by the first respondent before the Supreme Court in S.L.P.Nos.27662 and 27663 of 2014. The Supreme Court stayed the impugned judgment of this Court until further orders, as per the order dated 27.10.2014. Thereafter, Rahila and Hiromasa were arrested in execution of the order of detention on 9.11.2014.

6. Heard Sri.C.P.Mohammed Nias and Sri.P.S.Biju, the learned counsel appearing for the petitioners in the Writ Petitions; Sri.T.Asaf Ali, the learned Director General of Prosecution, for the first respondent, Sri.C.P.Udayabhanu for respondents 2 and 3 in W.P.(Cri) No.5276 of 2015 and Sri.P.K. Ramkumar for the Central Government.

7. The learned counsel appearing for the petitioners raised several points and submitted that the orders of detention are liable to be quashed or atleast the continued detention of Rahila and Hiromasa should be held vitiated. The contentions put forward by the writ petitioners are discussed below.

8. It is submitted that a person sought to be detained under the COFEPOSA Act would be entitled to get copy of the order of detention and the grounds of detention before he/she is arrested and detained so that the order of detention could be challenged at its pre-execution stage effectively and with full knowledge of the facts and circumstances. We are of the view that this contention is unsustainable. In **Subhash Popatlal Dave v. Union of India** [(2012) 7 SCC 533], the Supreme Court held that a person against whom an order of detention is passed is not entitled to get copy of the grounds of detention before the order of detention is executed. In **Mariamman Antony v. State of Kerala** [2014 (1) KLT Suppl. 100 (Ker.) = ILR 2014 (1) Ker. 90], a Division Bench of this Court (in which Justice K.T.Sankaran was a member) took the view that a person sought to be detained under Section 3 of the Kerala Anti Social Activities (Prevention) Act, 2007, is not entitled to get a copy of the order of detention, grounds of detention or document relied on by the detaining authority, before execution of the order of detention. In **Nazarudeen v. State of Kerala** [2015 (3) KLT 148], a Division Bench of this Court (in which Justice K.T.Sankaran was a member) held that the person against whom an order of detention under the

COFEPOSA Act is passed is not entitled to get a copy of the order of detention at its pre-execution stage. In ***Nazarudeen's case***, the Division Bench held thus:

“5. In **SubhashPopatlal Dave v. Union of India and another** ((2012) 7 SCC 533)), the Supreme Court held that a person against whom an order of detention is passed is not entitled to get the grounds of detention before execution of the order of detention. On the same principle, we are of the view that a person against whom an order of detention is passed is not entitled to get a copy of the order of detention under the Right to Information Act or otherwise. Section 4 of the COFEPOSA Act provides that a detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973. Clause (1) of Article 22 of the Constitution of India mandates that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. In view of clause (3) of Article 22 of the Constitution, this mandate shall not apply to any person who is arrested or detained under any law providing for preventive detention. Clause (5) of Article 22 of the Constitution provides that 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 an earliest opportunity of making a representation against the order. There is no mandate under the Constitution that a person against whom an order of detention has been passed under the preventive detention laws should be supplied with a copy of the order of detention before the order is executed. In the nature of the scheme of the preventive detention laws and in the nature of the object sought to be achieved by such preventive detention, it cannot be assumed that a person against whom an order of detention is passed is entitled to get a copy of the order of detention before he is arrested. The Right to Information Act does not enable the person concerned to get copy of the order of detention at its pre-execution stage.

6. When an order of detention is challenged at its pre-execution stage, the Court can consider that challenge and, for that purpose, can direct production of a copy of the order of detention by the respondent concerned. That is for the purpose of satisfying whether the challenge against the order of detention at the pre-execution stage can be entertained. A party against

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 10 ::

whom an order of detention is passed cannot insist that he should get a copy of the order of detention before he is arrested, in order to enable him to challenge the same under Article 226 of the Constitution of India and for the purpose of production of the same before Court. There is no such right vested in the person against whom an order of detention is passed.”

9. In view of the principles laid down in the aforesaid decisions, we do not find any merit in the contention put forward by the petitioners that they were prejudiced by not supplying the copy of the order of detention and the grounds of detention before execution of the order of detention.

10. The learned counsel for the petitioners submitted that the passports of Rahila and Hiromasa were seized/surrendered and, therefore, there is no likelihood of their going abroad for the purpose of smuggling contraband to India. As per the order of bail granted by the Sessions Court, Ernakulam, the detenues were prevented from leaving the State of Kerala without previous permission of the learned Magistrate, till final report is submitted in the case. The detenues were also restrained from entering into any of the

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 11 ::

international airports in the State of Kerala during that period. The detenues contended that the detaining authority did not properly take note of the conditions of bail, surrender of passport etc. and, therefore, the subjective satisfaction arrived at by the detaining authority is vitiated.

11. We have gone through the grounds of detention. The grounds of detention gives all the details regarding the bail applications, the bail orders, the conditions imposed while granting bail, the surrender of passports and the statements given by the detenues under Section 108 of the Customs Act. The detaining authority after considering all these facts and circumstances, arrived at the subjective satisfaction that the detenues would continue to engage in prejudicial activities in future also, despite the conditions imposed while granting bail. It is to be noted that the conditions of bail are specifically made operative only till the final reports are filed. The detaining authority took note of the previous instances of smuggling of huge quantities of gold by the detenues under the instructions of a powerful gang, who also smuggled huge quantities of gold to India. It cannot be held that the subjective satisfaction

arrived at by the detaining authority is vitiated. The Court is not entitled to substitute its views to the views taken by the detaining authority, particularly when the detaining authority has considered all the relevant materials and arrived at a reasonable conclusion that detention of the detenues is required in spite of the stringent conditions imposed while granting bail including surrender of passports. The learned counsel for the petitioners relied on the decisions of the Supreme Court in **Rajesh Gulati v. Govt. of NCT of Delhi and another** [(2002) 7 SCC 129], **Vijay Narain Singh v. State of Bihar and others** [(1984) 3 SCC 14], **Gimik Piotr v. State of Tamil Nadu and others** [(2010) 1 SCC 609] and **Moulana Shamshunnisa and others v. Additional Chief Secretary and others** [(2010) 15 SCC 72] in support of their aforesaid contention.

12. In **Rajesh Gulati v. Govt. of NCT of Delhi and another** [(2002) 7 SCC 129], the detenu had allegedly smuggled 40 mobile telephones. According to the detenu, he was only an employee of M/s.B.D.Denim. The passport of the detenu was seized. The Supreme Court held that the conclusion that despite the absence of his passport the detenu could or would be able to continue his

activities is based on no material but was a piece of pure speculation on the part of the detaining authority.

13. In **Vijay Narain Singh v. State of Bihar and others** [(1984) 3 SCC 14], the Supreme Court held that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention is not intended for the purpose of keeping a man under detention when under the ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court.

14. In **Gimik Piotr v. State of Tamil Nadu and others** [(2010) 1 SCC 609] the detenu was a Polish citizen having business

in Singapore. When he was intercepted at the Chennai International Airport, it was found that he was having a large amount of foreign currency. It was contended that the detention of the detenu was based on a single, solitary and isolated act of smuggling activity. It was also contended that the passport of the detenu was also seized. The Supreme Court held, on facts, that there was no basis to conclude that the person concerned will again resort to smuggling activities or abetting such activities by staying in the country. However, the Supreme Court held that it is a well settled principle of law that even a single incident is enough to prove the propensity and potentiality of the detenu so as to justify the order of preventive detention. The decisions in *Pooja Batra v. Union of India* [(2009) 5 SCC 296] and *Attorney General of India v Amratlal Prajivandas* [(1994) 5 SCC 54] were relied on by the Supreme Court.

15. In **Moulana Shamshunnisa and others** v. **Additional Chief Secretary and others** [(2010) 15 SCC 72], the Supreme Court held that the facts of the case would not justify a detention since the passport of the detenu was seized.

16. The learned Director General of Prosecution referred to the details given in the counter affidavit filed by the first respondent and submitted that indisputable documents would reveal that during the period from 8.1.2013 to 8.11.2013, Rahila and Hiromasa made more than twenty trips to Dubai and from there to India. They were having only tourist visa. Hiromasa was a cabin crew of Air India Express. It is submitted that on various occasions, Rahila unauthorisedly brought 23 kg. of gold while Hiromasa brought 16 kg. of gold to India from abroad. The learned Director General of Prosecution also made a distinction between surrender/seizure of a passport of a foreign national and an Indian citizen. If the passport of a foreign national is seized, that would completely be a check on his smuggling activities whereas an Indian citizen who is regularly indulged in smuggling activities could continue to do so even after seizure/surrender of the passport. It is submitted that impounding of passports of the detainees will not hamper the activities of the detainees under Section 3(1)(iii) of the COFEPOSA Act. The learned Director General of Prosecution also relied on the decision of the Supreme Court in Sitthi Zuraina Begum v. Union of India and others [AIR 2003 SC 323].

17. In **Sitthi Zuraina Begum v. Union of India and others**

[AIR 2003 SC 323], the Supreme Court held thus:

“9.The stand of the department is that whether there can be detention on a solitary instance would depend on the facts and circumstances of each case, on the magnitude of the case and other attendant circumstances. In the present case, it is stated that detenu's passport disclosed that he had made several trips abroad and he was not a man of such affluence as to make so many trips out of the country unless they be in the context of his business activities. Therefore, considering the number of trips he had made out of the country, the volume of goods seized now and the prima facie misdeclaration of value, an inference can be drawn that the detenu was a part of bigger network in bringing the goods for commercial distribution inside the country by avoiding the payment of duty. In this background, absence of passport will not be a handicap to the detenu for his activities in the present case in which the fact situation is different from the one available in Rajesh Gulati's case (AIR 2002 SC 3094). Nor can we confine the meaning of the word 'smuggling' only to going out of country and coming back with goods which are contraband or to evade duty but may encourage such activities as well by dealing in such goods.”

18. The specific allegation against the detenues is that they indulged in repeated smuggling activities of similar nature on earlier occasions also within a short span of time and smuggled huge quantities of gold from Dubai to India. Hiromasa is a person who knew things about aircrafts and activities going on in the airports. She was a cabin crew of Air India Express. Rahila is her close friend and she travelled along with Hiromasa during various trips. The allegation is that the detenues have connection with a racket involved in smuggling of huge quantity of gold to India. It is true that the passports of the detenues were seized/surrendered. That would only restrict their travel abroad. That would not restrict their movements within the State of Kerala. The conditions of bail would be in operation only till final report is filed. Therefore, after final report is filed, the detenues could freely travel anywhere in India. Section 3(1)(iii) of the COFEPOSA Act is with respect to “engaging in transporting or concealing or keeping smuggled goods”. Even assuming that by seizing the passport, the detenues would not be able to travel abroad and smuggle goods, it cannot be said that by that act alone, the activity contemplated under Section 3(1)(iii) of the COFEPOSA Act could be restricted or curtailed. So, the mere fact

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 18 ::

that the passport was seized or it was surrendered is not a ground to hold that the subjective satisfaction arrived at by the detaining authority that the detenues are likely to indulge in prejudicial activity of similar nature and that with a view to preventing them from engaging in transporting or concealing or keeping smuggled goods an order of detention is required, is vitiated.

19. The petitioners contended that the representations dated 16.12.2014 submitted by the detenues were disposed of on 28.1.2015 and 29.1.2015 and there is unexplained delay in the matter of disposal of the representations. It is submitted that the orders of detention were passed by the Principal Secretary, Home and Vigilance, who is also the Additional Chief Secretary. The representations were submitted to the detaining authority, but they were disposed of by the Additional Secretary for and on behalf of the Additional Chief Secretary. On this ground, it is submitted that the continued detention of the detenues is vitiated. The petitioners relied on the decisions in **Kamleshkumar Ishwardas Patel v. Union of India and others** [(1995) 4 SCC 51], **Smt.Santhosh Anand v. Union of India and others** [(1981) 2 SCC 420], **Pabitra N. Rana v.**

Union of India and others [(1980) 2 SCC 338], Julia Jose Mavelly v. Union of India and others [AIR 1992 SC 139], K.M.Abdulla Kunhi and B.L.Abdul Khader v. Union of India and others [(1991) 1 SCC 476], Ummu Sabeena v. State of Kerala and others [(2011) 10 SCC 781], Rashid Kapadia v. Medha Gadgil and others [(2012) 11 SCC 745], Smt.Icchu Devi Choraria v. Union of India and others [(1980) 4 SCC 531], Lekha Nandakumar v. Government of India [2004 KHC 724] and Babu.M. v. State of Kerala and others [2010 (1) KHC 214].

20. In **Smt.Santhosh Anand v. Union of India and others [(1981) 2 SCC 420]**, the Chief Secretary was the detaining authority. A representation was submitted by the detenu to the Chief Secretary. The Chief Secretary submitted the same for orders to the Administrator, his higher authority, who rejected the representation. The Supreme Court held that the representation was not rejected by the detaining authority and as such the constitutional safeguard under Article 22(5) cannot be said to have been strictly observed or complied with. In the case on hand, the representations were not forwarded to any higher authority as occurred in **[(1981) 2 SCC 420]**

and, therefore, the dictum laid down therein would not apply to the present case.

21. In Kamleshkumar Ishwardas Patel v. Union of India and others [(1995) 4 SCC 51], the Supreme Court held thus:

“38. Having regard to the provisions of Article 22 (5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered: Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly

considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation.”

The Supreme Court also noticed that in one of the cases considered therein, in the grounds of detention, the detenu was only informed that he could make a representation to the Central Government or the Advisory Board. The detenu was not informed that he could make a representation to the officer who had made the order of detention. As a result, the detenu could not make a representation to the officer who made the order of detention. It was held that the order of detention is, accordingly, liable to be set aside.

22. In **Lekha Nandakumar v. Government of India [2004 KHC 724 = 2004 (2) KLT 1094]**, the representation was made by the detenu to the Central Government addressing it to the Secretary to Government of India as directed in the detention order. The

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 22 ::

representation was rejected and it was stated that the representation was carefully considered by the Joint Secretary, Central Economic Intelligence Bureau, Department of Revenue, Ministry of Finance, New Delhi. The order passed by the Joint Secretary was not sent to the detenu, but a communication was sent stating about the factum of rejection of the representation. It was held that there was no proper disposal of the representation and, on that ground, the continued detention was illegal.

23. In **Babu.M. v. State of Kerala and others [2010 (1) KHC 214]**, the decision in **Lekha Nandakumar v. Government of India [2004 KHC 724 = 2004 (2) KLT 1094]** was distinguished and it was held thus:

“13. The observations extracted above understood properly in the context, according to us, can only mean and insist that the order must be communicated effectively and not that the order as such must be communicated or that the authority which passed the order must himself communicate the order.”

In Babu's case, it was also held thus:

“26. Quality and nature of consideration that a

representation should receive must certainly depend upon the facts and circumstances of the case. But the irreducible minimum is that it must receive a real and proper consideration. The consideration must not be casual or mechanical. It is desirable 'that a brief expression of the principal reasons is made' (see -- Bhut Nath Mete - para. 23 (supra)). Such consideration must be revealed from the order ordinarily. Of course by production of the relevant files etc. when the order is challenged in judicial review, the requisite satisfaction can be induced in the mind of the Court that the representation had received a real and proper consideration. There cannot be any dispute that essentially the real and proper consideration must be revealed from the order. The question again is whether the order in the instant case reveals such consideration."

In Babu's case, the representation was rejected simply stating "Request does not deserve consideration. Rejected."

24. In **Smt.Masuma v. State of Maharashtra and another** [(1981) 3 SCC 566], cited by the learned Additional Director General of Prosecution, the contention before the Supreme Court was that the representation of the detenu must be considered by the same

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 24 ::

person who passed the order of detention and that non-consideration of the representation by a person other than the person who passed the order of detention would be illegal and invalid. Answering the contention, the Supreme Court held that the order of detention would indicate that it was not made by the particular officer in his individual capacity but as an officer of the State Government representing the State Government. That officer was authorised to act for and on behalf of and in the name of the State Government under the Rules of Business. The Supreme Court further held thus:

“2. It was the State Government which made the order of detention and not P. V. Nayak in his individual capacity. The representation made by the detenu against the order of detention was also therefore required to be considered by the State Government and either it could be disposed of by P. V. Nayak acting for the State Government under the earlier Standing Order dated 18th July 1980 or the Minister of State for Home could dispose it of under the later Standing Order dated 18th July 1980. Whether P. V. Nayak considered the representation and disposed it of or the Minister of State for Home did so would be immaterial, since both had authority to act for the State Government and whatever

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 25 ::

be the instrumentality, whether P. V. Nayak or the Minister of State for Home, it would be the State Government which would be considering and dealing with the representation. The only requirement of Art. 22 (5) is that the representation of the detenu must be considered by the detaining authority which in the present case is the State Government and this requirement was clearly satisfied because when the Minister of State for Home considered the representation and rejected it, he was acting for the State Government and the consideration and rejection of the representation was by the State Government. There is no requirement express or implied in any provision of the COFEPOSA Act that the same person who acts for the State Government in making the order of detention must also consider the representation of the detenu. In fact, as pointed out by Chinnappa Reddy, J. in Smt. Kavita v. State of Maharashtra [(1981) 3 SCC 558], "Government business can never get through if the same individual has to act for the Government in every case or proceeding or transaction, however advantageous it may be to do so." Moreover it would really be to the advantage of the detenu if his representation is not considered by the same individual but fresh mind is brought to bear upon it. We do not therefore see any constitutional or legal infirmity in the

W.P.(Cri) No.115/2015 & W.P.(C) No.5276/2015

:: 26 ::

representation having been considered by the Minister of State for Home.”

25. In the present case, the order of detention states that:

“Whereas the Government of Kerala is satisfied with respect to the person known as

Now, therefore, in exercise of powers conferred by section 3(1)(i) and 3(1)(iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act, 52 of 1974), the Government of Kerala direct that be detained and kept in custody in the Central Prison, Thiruvananthapuram.”

The order of detention is passed by the State Government.

Paragraph 64 of the grounds of detention makes the position clear.

Paragraph 64 reads thus:

“64. You have the right to make representation against your detention to the Detaining Authority, (Government of Kerala), or to the Central Government as well as before the Advisory Board. If you wish to avail your right of making representation, you may submit your representation through the jail authorities where you are detained in the manner indicated below:

W.P.(Cri) No.115/2015 & W.P.(C) No.5276/2015

:: 27 ::

- a. Representation meant for the Detaining Authority, (Govt. of Kerala), should be addressed to the Principal Secretary to the Govt. of Kerala, Home (SSA) Dept., Govt. Secretariat, Trivandrum;
- b. Representation meant for the Central Government, should be addressed to the Secretary to the Govt. of India, Ministry of Finance, Dept. of Revenue, 6th Floor, "B" Wing, Janpath Bhavan, Janpath, New Delhi 110 001; and
- c. Representation meant for the Advisory Board should be addressed to the Chairman, COFEPOSA Advisory Board, High Court of Kerala, Ernakulam and the same should be forwarded through the jail authorities. You are further informed that you shall be heard by the Advisory Board in due course if the Board considers it essential to do so or if you so desire. You may engage a friend or advocate for appearing before the Advisory Board on your behalf, subject to permission from the Advisory Board."

26. There is no dispute that the representations were rejected by detailed orders. The facts and circumstances of the case were considered in the orders rejecting the representations. The orders

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 28 ::

rejecting the representations are not cryptic orders. The representations were rejected and the communications were signed by the Additional Secretary for the Additional Chief Secretary to the Government. The from address shown in the orders rejecting the representations shows that it was from the Additional Chief Secretary. There is no dispute that the Principal Secretary, Home and Vigilance, who signed the order of detention, is also the Additional Chief Secretary.

27. The representations submitted by the detainees were considered by the proper authority. The facts and circumstances were considered in detail and the detaining authority did not find any reason to accept the representations and to revoke the order of detention. We do not find any illegality, irregularity or impropriety in the manner in which the representations were rejected by the first respondent.

28. In the decisions of the Supreme Court in **Pabitra N. Rana v. Union of India and others** [(1980) 2 SCC 338], **Julia Jose Mavelly v. Union of India and others** [AIR 1992 SC 139], **Ummu**

Sabeena v. State of Kerala and others [(2011) 10 SCC 781],
Rashid Kapadia v. Medha Gadgil and others [(2012) 11 SCC 745]
and Smt.Icchu Devi Choraria v. Union of India and others [(1980)
4 SCC 531], the Supreme Court emphasised the need for considering the representation of the detenu as expeditiously as possible. The right of the detenu to make a representation and to have it considered expeditiously is a constitutional right under Article 22(5). Any unreasonable or unexplainable delay in considering the representation would be fatal to the continued detention of the detenu. These decisions were relied on by the learned counsel for the petitioners to contend that the representations dated 16.12.2014 were disposed of by the Central Government on 29.1.2015 (in the case of Hiromasa) and on 28.1.2015 (in the case of Rahila) and that there is inordinate delay in disposing of the representations.

29. In **K.M.Abdulla Kunhi and B.L.Abdul Khader v. Union of India and others [(1991) 1 SCC 476]**, a Constitution Bench of the Supreme Court considered the requirement of considering the representation without delay and held as follows:

“12. The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal. This has been emphasised and re-emphasised by a series of

decisions of this Court. (See : Jayanarayan Sukul v. State of West Bengal, 1970 (1) SCC 219: AIR 1970 SC 675; Frances Coralie Mullin v. W. C. Khambra, 1980 (2) SCC 275; Rama Dhondu Borade v. V. K. Saraf, Commissioner of Police, 1989 (3) SCC 173; and Aslam Ahmed Zahire Ahmed Shaik v. Union of India, 1989 (3) SCC 277.”

30. In **Abdulla Kunhi's case**, the Supreme Court also considered the question whether the Government should consider and dispose of the representation before confirming the detention. Answering this question, the Supreme Court held thus:

“19. There is no constitutional mandate under Cl, (5) of Article 22, much less any statutory requirement to consider the representation before confirming the order of detention. As long as the Government without delay considers the representation with an unbiased mind there is no basis for concluding that the absence of independent consideration is the obvious result if the representation is not considered before the confirmation of detention. Indeed, there is no justification for imposing this restriction on the power of the Government. As observed earlier, the Government's consideration of the representation is for a different purpose, namely, to find out whether the detention is in conformity with the power

under the statute. This has been explained in Haradhan Saha case, where Ray, C.J., speaking for the Constitution Bench observed that the consideration of the representation by the Government is only to ascertain whether the detention order is in conformity with the power under the law. There need not be a speaking order in disposing of such representation. There is also no failure of justice by the order not being a speaking order. All that is necessary is that there should be real and proper consideration by the Government.”

31. Sri.P.K.Ramkumar, the learned counsel appearing for the Central Government produced the relevant files before us for perusal. With reference to the files, it is submitted that the Central Government received the file from jail on 29.12.2014, the Advisory Board gave its opinion on 17.1.2015, the order of detention was confirmed on 27.1.2015, the file was put up for consideration on 28.1.2015 and the representation was disposed of on 28.1.2015 in the case of Rahila and on 29.1.2015 in the case of Hiromasa. It is also submitted that at page 44 of the file which contains the comments from the detaining authority, it is stated that the opinion from the Advisory Board is awaited. Sri.P.K.Ramkumar submitted

that immediately after the opinion of the Advisory Board was communicated, the representation was disposed of. He relied on the Constitution Bench decision of the Supreme Court in **K.M.Abdulla Kunhi and B.L.Abdul Khader v. Union of India and others [(1991) 1 SCC 476]** and submitted that in the light of this factual data, there is no unexplainable delay in the matter of consideration of the representations by the Central Government.

32. Sri.P.K.Ramkumar also relied on the decision in **Ujagar Singh and another v. State of Punjab [AIR 1952 SC 350]** to contend that the communication of the grounds need not be made directly by the authority making the order. It is submitted that it is sufficient if the communication addressed to the detenu states that the representation was rejected.

33. In **Vinod K. Chawla v. Union of India and others [(2006) 7 SCC 337]**, while dealing with the question of delay in the matter of disposal of representation, the Supreme Court held thus:

“13. The contention raised cannot be judged by any straight jacket formula divorced from facts. This has to be examined with reference to the facts of each case having regard to the volume and contents of the grounds of detention, the documents supplied along with the grounds, the inquiry to be made by the officers of different departments, the nature of the inquiry, the time required for examining the various pleas raised, the time required in recording the comments by the authorities of the department concerned, and so on.

14. In *L.M.S. Ummu Saleema v. B.B. Gujaral* [(1981) 3 SCC 317] it was held that there can be no doubt that the representation made by the detenu has to be considered by the detaining authority with the utmost expedition but as observed in *Frances Coralie Mullin v. W.C. Khambra*, [(1980) 2 SCC 275 at p.279, para 5], "the time-imperative can never be absolute or obsessive." In *Madan Lal Anand v. Union of India* [(1990) 1 SCC 81], the representation dated 17.1.1989 of the detenu who was detained under COFEPOSA was rejected after more than a month on 20.2.1989. After referring to *L.M.S. Ummu Saleema* [(1981) 3 SCC 317] it was held that the detaining authority had explained the delay in disposal of the representation and accordingly the order of detention cannot be faulted on that ground.

In *Kamarunnissa v. Union of India* [(1991) 1 SCC 128], the representation made by the detenu on 18.12.1989 was rejected on 30.1.1990 and it was contended that there was inordinate delay in consideration of the representation. In the explanation given in the counter-affidavit filed in reply, it was submitted that considerable period of time was taken by the sponsoring authority in forwarding its comments. It was contended on behalf of the detenu that the views of the sponsoring authority were totally unnecessary and the time taken by that authority could not be taken into consideration. The contention was repelled by this Court and it was observed that consulting the authority which initiated the proposal can never be said to be an unwarranted exercise. It was further emphasized that whether the delay in considering the representation has been properly explained or not would depend upon the facts of each case and cannot be judged in vacuum. Similarly, in *Birendra Kumar Rai v. Union of India* [(1993) 1 SCC 272], the petitioner made a representation against his detention on 22.12.1990 which was rejected by the Central Government after a month on 25.1.1991. It was observed that the explanation offered for the delay in consideration of the representation was not such from which an inference of inaction or callousness on the part of the authorities could be inferred and accordingly the

challenge on the ground of delay was rejected. The subsequent decisions of this Court are also on the same lines and we do not consider it necessary to refer to them as the principle is well settled that there should be no inaction or lethargy in consideration of the representation and where there is a proper explanation for the time taken in disposal of representation even though it may be long, the continued detention of the detenu would not be rendered illegal in any manner.”

34. In the light of the dictum laid down by the Constitution Bench in **K.M.Abdulla Kunhi and B.L.Abdul Khader v. Union of India and others** [(1991) 1 SCC 476] and the decision in **Vinod K. Chawla v. Union of India and others** [(2006) 7 SCC 337] and in the facts and circumstances available in the present cases, we are of the view that there is no unexplainable delay in considering the representations by the Central Government.

35. Sri.C.P.Mohammed Nias, the learned counsel appearing for the petitioner in W.P.(Crl) No.115 of 2015, submitted that the decision of the three Judge Bench of the Supreme Court in **Pabitra N. Rana v. Union of India and others** [(1980) 2 SCC 338] is an

authority for the proposition that the detaining authority is not entitled to wait for the opinion of the Advisory Board but it has to take its decision on the representation without the least possible delay. The Government is not obliged to wait for the decision of the Advisory Board and it has to consider the representation independently of what the Advisory Board might say. In answer, the learned counsel appearing for the Central Government submitted that in view of the dictum laid down in **K.M.Abdulla Kunhi and B.L.Abdul Khader v. Union of India and others [(1991) 1 SCC 476]**, the contention put forward by the petitioners that there was inordinate delay cannot be upheld. In **K.M.Abdulla Kunhi and B.L.Abdul Khader v. Union of India and others [(1991) 1 SCC 476]**, the Constitution Bench approved the dictum laid down in *Frances Coralie Mullin v. W. C. Khambra*, [(1980) 2 SCC 275] and held thus:

“16. We agree with the observations in *Frances Coralie Mullin case [(1980) 2 SCC 275]*. The time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not

be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must also be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu is referred to the Board. Even in this situation the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board. Nor it could be said that the Government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of the Board. If the Board finds no material for detention on the merits and reports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention, the Government after considering the representation could revoke the detention. The Board has to submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or persons qualified to be Judges of the High

Court. It is therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible.”

36. It is true that the dictum laid down in paragraph 16 of the decision in *Abdulla Kunhi's case* relates to the consideration of the representation by the State Government. However, the Central Government would be justified in calling for the remarks of the detaining authority and taking into account the developments in respect of the case including the opinion of the Advisory Board. If the Central Government disposes the representation after considering all these materials, it cannot be faulted. It is true that in that process, there occurred some delay but that delay is explained. The representation was considered in a meaningful manner by the Central Government. Therefore, the detenues cannot contend that their constitutional right under Article 22(5) has been infringed.

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 40 ::

37. It is submitted that the alleged prejudicial activity was on 8.11.2013, that the order of detention was passed only on 25.2.2014 and it was executed only on 9.11.2014. According to the petitioners, there is delay in passing and executing the order of detention. In the counter affidavit filed by the first respondent, it is stated that the proposal for detention under the COFEPOSA Act was made on 7.1.2014, there was meeting of the Screening Committee on 18.1.2014 and the detention order was issued on 25.2.2014. Rahila and Hiromasa went into hiding on 25.2.2014. On 11.3.2014, directions were issued to execute the detention order and to furnish action taken report by the District Police Chief. On 17.3.2014, he was also directed to constitute a special investigation team to execute the detention order. On 24.3.2014, Writ Petitions were filed by Rahila and Hiromasa challenging the detention orders at their pre-execution stage. On 31.3.2014, this Court issued orders not to arrest them. On 16.7.2014, final judgment was passed in the Writ Petitions. On 27.10.2014, the first respondent filed Special Leave Petitions before the Supreme Court challenging the judgment of the High Court and on getting stay, the orders of detention were executed on 9.11.2014. It is submitted that there is no delay in

passing the order of detention as well as in executing the order of detention. After passing the order of detention, the orders could not be executed only because Rahila and Hiromasa approached the High Court and got interim orders staying execution of the orders of detention. Only on getting stay order from the Supreme Court, the orders of detention could be executed. The detenues being responsible for the delay in executing the orders of detention, they cannot be allowed to take advantage of their own actions in delaying the execution of the orders of detention. Having taken advantage of the writ proceedings before the High Court and having got immunity from arrest and detention in execution of the orders of detention, the detenues or the writ petitioners cannot be heard to say about the delay in execution of the orders of detention.

38. The learned counsel for the petitioners submitted that bail was granted to the detenues on stringent conditions; stringent conditions were also imposed by the High Court while granting interim orders in the Writ Petitions filed by the detenues challenging the orders of detention at the pre-execution stage. It is submitted that the conditions were being complied with by the detenues.

These circumstances were not taken note of by the detaining authority before executing the order of detention.

39. In Haradhan Shah v. The State of W.B. and others [(1975) 3 SCC 198 = AIR 1974 SC 2154], a Constitution Bench of the Supreme Court laid down the principles with respect to the circumstances under which the order of detention can be passed pending criminal proceedings or while the person sought to be detained is on bail, and held thus:

“34. The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal Court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third,

where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances.”

40. In the light of the decision of the Constitution Bench in **Haradhan Shah v. The State of W.B. and others [(1975) 3 SCC 198 = AIR 1974 SC 2154]**, the contention put forward by the petitioners that whether the detenues have complied with the conditions on which bail was granted should have been considered before executing the order of detention, is without any substance. The grounds of detention mentions about the arrest of the detenues, the fact that bail applications were moved by the detenues and they

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 44 ::

were released on bail on conditions. That the detenues surrendered their passports and that they were restrained from moving out of the State was also considered by the detaining authority, as evident from the grounds of detention. The fact that the detenues complied with the conditions of bail or the orders passed in the Writ Petitions is not a matter to be considered by the detaining authority after passing the order of detention and before executing the order of detention, and that too when the detenues tried their best to avoid execution of the orders of detention. We are not inclined to accept the contentions put forward by the petitioners in this regard.

41. In **Union of India v. Amrit Lal Manchanda** [AIR 2004 SC 1625], the Supreme Court held that a person against whom an order of detention was passed and who got an order of stay of operation of the detention order cannot take advantage of the passage of time and contend that the detention has become unnecessary or irrelevant by passage of time. The detenu cannot take advantage of the benefit of his own action which resulted in the delay of execution of the detention order.

42. In **Noor Salman Makani v. Union of India and others** [AIR 1994 SC 575], the Supreme Court considered the question whether the conditions on which bail was granted to the detenu should be considered while declaring the detention order. The Supreme Court held:

“6. The detention order itself was passed when the detenu was in jail and the detaining authority noted this fact and being satisfied that there was every possibility of his being released on bail, passed the detention order. If subsequently the detenu is released on bail even subject to certain conditions that does not bring about any material change. On the other hand, release on bail is a stronger ground showing that the detenu who is not in custody is likely to indulge in the prejudicial activities again. The conditions imposed would show that the detenu could move about freely in the vast area of Calcutta Municipal Corporation and therefore this order of release on bail with conditions cannot be said to be a vital document.”

43. When the persons involved in the smuggling activities were arrested and they were granted bail, they were bound to comply with the conditions of bail. That they complied with the

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 46 ::

conditions of bail is not a virtue on their part which is to be favourably taken note of by the detaining authority while passing the order of detention or while executing the order of detention. If they violate the conditions of bail, the consequences would follow. That the detenues complied with the conditions of bail and also the conditions imposed in the interim orders passed in the Writ Petitions, would not in any way deter the authorities from executing the order of detention. It is not necessary to revoke the order of detention on that ground before the order of detention is executed. In the present case, the orders passed in the Writ Petitions were stayed by the Supreme Court. Therefore, those orders could be ignored while executing the orders of detention.

44. Sri.P.S.Biju, the learned counsel appearing for the petitioner in W.P.(C) No.5276 of 2015, submitted that Rahila is undergoing detention since 9.11.2014 and the High Court exercising the jurisdiction under Article 226 of the Constitution of India would be justified in holding that the period already undergone in detention would be sufficient to meet the purpose. We are of the view that the submission made by the learned counsel for the petitioner cannot be

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 47 ::

entertained. The order of detention is passed under Section 3 of the COFEPOSA Act. The period of detention would not be fixed while passing the order of detention. Within five weeks from the date of detention of a person under a detention order, the appropriate Government shall make a reference in respect thereof to the Advisory Board, as provided in Section 8(b) of the COFEPOSA Act. Within eleven weeks from the date of detention of the person concerned, the Advisory Board has to prepare and submit its report specifying its opinion as to whether or not there is sufficient cause for the detention of the person concerned, as provided in clause (c) of Section 8 of the COFEPOSA Act. Clause (f) of Section 8 provides that in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith. Section 10 of the COFEPOSA Act provides that the maximum period

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 48 ::

for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 do not apply and which has been confirmed under clause (f) of Section 8 shall be a period of one year from the date of detention or the specified period, whichever period expires later. A detention order may, at any time, be revoked or modified, as provided in Section 11 of the COFEPOSA Act. Section 12 provides for temporary release of the persons detained. The scheme of the COFEPOSA Act shows that the Court has no authority to revoke an order of detention. The Court can exercise its jurisdiction under Article 226 of the Constitution of India to hold that the order of detention is illegal on various grounds, namely, that the detaining authority did not apply its mind to the relevant factors while arriving at the subjective satisfaction, that the relevant materials were not placed before the detaining authority, that there is no live-link between the prejudicial activity and the order of detention and that the live-link has been snapped, etc. etc. The Court can also hold that the continued detention of the detenu is illegal in certain circumstances, for eg., when the representation of the detenu is not considered expeditiously. However, the High Court does not have the jurisdiction to limit the duration of the detention

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 49 ::

while disposing of a writ petition challenging the validity of the order of detention or challenging the continued detention under the COFEPOSA Act. Therefore, we reject the submission made by the learned counsel for the petitioner in W.P.(C) No.5276 of 2015 in this regard.

45. Learned Director General of Prosecution submitted that Rahila and Hiromasa were found to have indulged in various smuggling activities within a short duration and that is a relevant consideration in the matter of arriving at the subjective satisfaction by the detaining authority. In **Attorney General for India and others v. Amratlal Prajivandas and others [(1994) 5 SCC 54]**, the Supreme Court held in paragraph 48 as follows:

“48. Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-

breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and pre-meditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.”

46. In **Sitthi Zuraina Begum v. Union of India and others**

[AIR 2003 SC 323], the Supreme Court noticed that the detenu's passport disclosed that he had made several trips abroad and he was not a man of such affluence as to make so many trips out of the country unless they be in the context of his business activities. It was held that considering the number of trips the detenu had made out of the country, the volume of goods seized and the prima facie mis-declaration of value, an inference can be drawn that the detenu was a part of the bigger network in bringing the goods for commercial distribution inside the country by avoiding payment of duty.

47. In the counter affidavits filed by the first respondent, the details of the various trips made by Rahila and Hiromasa to Dubai and from there to India for the period from 8.1.2013 to 8.11.2013 have been given. At the time when they were arrested, they were not having sufficient money to pay duty. They were not employed abroad. They did not stay abroad for the required period to enable them to bring gold to India. Rahila and Hiromasa did not produce any document to show that the gold brought by them was by lawful means. The inference possible from these circumstances is that it is

W.P.(Crl) No.115/2015 & W.P.(C) No.5276/2015

:: 52 ::

likely that they are part of a smuggling racket. Of course, at this stage, the Court is not expected to arrive at any conclusive finding as to whether the detenues are guilty. But, at the same time, the Court is not entitled to shut its eyes to certain hard realities. The sharp increase in the smuggling activities in the State of Kerala is also a relevant factor to be taken note of. The propriety and legality of the subjective satisfaction arrived at by the detaining authority is to be tested taking into account these factors as well.

For the reasons mentioned above, we do not find any ground to hold that the orders of detention against Rahila and Hiromasa are illegal or their continued detention is illegal. Accordingly, the Writ Petitions are dismissed.

K.T.SANKARAN
Judge

B.SUDHEENDRA KUMAR
Judge

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