

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

% Reserved on: 24th May, 2017
Decided on: 31st May, 2017

+ **W.P.(CRL) 245/2017**

SANDHYA JAIN Petitioner
Through Mr. Ramakant Gaur, Mr. J.P. Singh,
Ms. Amrita Joshi, Advs.

versus

UNION OF INDIA & ANR. Respondent
Through Mr. Sanjeev Narula, CGSC with Mr.
Anshuman Upadhyay, Adv. for UOI.
Mr. Vineet Sharma for Mr. Satish
Aggarwala, Adv. for DRI.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. In this writ petition under Article 226 of the Constitution of India, the challenge is to the order of detention dated 10th October, 2016 passed by the Joint Secretary to Government of India against husband of the petitioner i.e. Narender Kumar Jain directing his detention under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (in short 'the COFEPOSA Act'). The detention order dated 10th October, 2016 was served on the petitioner's husband on the same day followed by the grounds of detention and relied upon documents served on 11th October, 2016.

2. Briefly the facts set out in the grounds of detention on the basis of which the detention order dated 10th October, 2016 has been passed are:

2.1 Upon receipt of a specific intelligence, the Delhi Zonal Unit (DZU) of the Directorate of Revenue Intelligence (DRI) seized 60 gold bars weighing 9955.2 grams at CELEBI warehouse, Domestic Terminal, Air Cargo Complex, New Delhi on 1st/2nd September, 2016 from one Sartaj vide Panchnama dated 1st/2nd September, 2016. The market value of the seized gold was appraised at ₹3.06 crores. The consignment was booked by M/s. Aameen Traders, Guwahati to M/s. Aameen Traders, Delhi and Sartaj was the authorized representative of M/s. Aameen Traders for collection of the said consignment sent through Jet Airways vide airway bill No.48510383 and the description of the goods in the airway bill was given as 'Bullion'. In his statement under Section 108 of the Customs Act, 1962 on 2nd/3rd September, 2016 Sartaj inter-alia stated that he was working as a driver for M/s. Rara Brothers on a salary of ₹9000/- per month and was assigned the duty to take delivery of goods from Air Cargo, New Delhi and was paid ₹500 per shipment in addition to his salary. He visited Air Cargo to take delivery of gold on directions of Narender Kumar Jain who was the owner of M/s. Rara Brothers and he has been performing this duty for approximately two years. He knew that the arrived shipment contained gold and used to go to Air Cargo complex twice or thrice a week for taking delivery of the consignment. He informed that the shop of M/s. Rara Brothers was at 1171, Kucha Mahajani, Chandni Chowk and Anoop and Harsh also worked with M/s. Rara Brothers besides Raju Arora, who is his brother-in-law.

2.2 Officers of DRI summoned and recorded the statement of Narender Kumar Jain on 2nd/3rd September, 2016 under Section 108 of the Customs Act

wherein he inter alia stated that he was born on 2^{8th} October, 1970 at Guwahati, Assam and after completing his B.A. he started sitting with his father late Shri Mahabir Prasad Jain in his firm namely M/s. Rara Brothers at 1st first floor, Shiv Market, Fancy Bazaar, Guwahati, Assam. This firm dealt in purchase of silver, gold, old utensils, jewellery and precious stones. Initially the firm was a proprietorship firm of his grandfather and thereafter of his father, however the firm was converted into a company namely M/s. Rara Brothers Pvt. Ltd. in the year 1997 with four Directors, namely Mahabir Prasad Jain, Manbhar Devi Jain, Sandhya Jain and Narender Kumar Jain. After the death of his father, he was looking after the affairs of his company and business and had one office at 1171, third Floor, Kucha Mahajani, Chandni Chowk which was looked after by Anoop Mishra, Harsh Shrivastava and one peon Chauhan. He informed about his various visits to Hong Kong, Macau, Bangkok and several other Countries on different occasions and that in the year 2014 he started procuring foreign origin gold, which was smuggled from Burma by various carriers, who used to bring 1-2 kgs of gold to his shop at Guwahati. This gold was 24 carat pure gold and most of the time he paid in cash though on some occasions through cheque. Though there was no marking on gold but he was aware that the gold was of foreign origin smuggled into India. His employee Vijay Tiwari packed the smuggled gold bars in plastic/ metal boxes and further wrapped in clothes and sent the parcels to Delhi by air declaring them as Bullion, the consignor's name being Rara Brothers Pvt. Ltd. Guwahati and consignee's name being Rara Brothers Pvt. Ltd., Delhi. He would send the Airway Bill number through Sartaj @ Panuu through SMS and gave him the document to prepare GMR entry card for going to the Cargo office for receiving the

parcels. The authority letter was signed by him and in his absence by Anoop on his behalf. Sartaj used to hand-over the gold to Raju Arora at his office where after Raju Arora used to sell the smuggled gold with the help of staff to customers in Delhi and transfer the sale proceeds to Guwahati or through person. Raju Arora was paid ₹75,000/- per month for this work and Sartaj ₹500/- per consignment. The process continued till February, 2015 when a case of 12 kg of gold bars was booked against him by DRI, Guwahati Regional Unit wherein he was arrested in April, 2015 and released on bail in May 2015. The work was re-continued in October/ November, 2015 however the number of shipments were decreased. Due to financial crises, after March 2016 the work started in the name of the company M/s. Aameen Traders.

2.3 In view of the recovery and seizure of 9955.2 grams gold valued at ₹3,06,34,141/- from the possession of Sartaj and the admission of Sartaj and Narender Kumar Jain recorded under Section 108 of the Customs Act, they were both arrested on 3rd September, 2016 and remanded to judicial custody which was extended from time to time and last extended up to 17th October, 2016. Narender Kumar Jain and Sartaj filed their retractions before the learned CMM, New Delhi on 5th September, 2016 alleging that they were taken into custody from their hotel by force on 1st September, 2016 and the statements were extracted by threat and physical abuse. Narender Kumar Jain filed a bail application before the learned CMM on 14th September, 2016 which was dismissed on 7th October, 2016. However, Sartaj was granted bail on 7th October, 2016. Searches were conducted at six premises and during investigations summons were issued to Raju Arora who failed to comply with the summons, hence complaint under Section 174 and 175 IPC

was filed against Raju Arora before the learned CMM. Statements of officers of M/s. Jet Airways, Air Cargo complex were recorded besides Ravi Prakash and Kamal Prakash who were having their shops at Amar Market, Dariban Kalan, Delhi and were doing the work with Narender Kumar Jain and Raju and after melting the gold converted the same into 1 kg bars.

2.4 In Para 22 of the grounds of detention involvement of the petitioner's husband in smuggling of gold on numerous occasions in the past was also noted on the strength of the Orders-In-Original.

3. Assailing the detention order, learned counsel for the petitioner contends that vital and material documents which were necessary for arriving at subjective satisfaction were not placed before the detaining authority and also not supplied to Narender Kumar Jain thus seriously prejudicing him as he could not make a proper and effective representation in the absence of the documents. It is contended that in para-27 (a) of the grounds of detention, the Detaining Authority has relied upon the voluntary statements of the carriers of the smuggled gold seized by the DRI, Guwahati however, no such statements were either placed before the Detaining Authority nor supplied to Narender Kumar Jain *pari passu* the grounds of detention. He further states that though the grounds of detention noted that the bail application of Narender Kumar Jain had been rejected by the learned CMM vide order dated 7th October, 2016, however, the copy of the order dated 7th October, 2016 was not placed before the Detaining Authority. The order dated 7th October, 2016 itself shows that there was no possibility of bail being granted to Narender Kumar Jain, thus obviating the need for a detention order. Non-placement of the material document i.e. the order

dated 7th October, 2016 has materially affected the subjective satisfaction of the Detaining Authority hence the detention order is vitiated.

4. Learned counsel further contends that the DRI officials entered the jail premises at 10.40 AM and after serving the detention order on the husband of petitioner came out at 11.10 AM. As per the detention order and grounds of detention, both were prepared on 10th October, 2016 which is not possible as by 10.40 AM the DRI officers had reached the jail for serving the detention order. Further 8th and 9th October, 2016 were Saturday and Sunday. It is thus obvious that only the detention order was prepared in the absence of grounds of detention on 10th October, 2016 and the grounds of detention were prepared later on and ante-dated and that is why they were served on the petitioner's husband on 11th October, 2016. In the absence of formulation of grounds of detention prior to passing of the detention order, subjective satisfaction of the detaining authority is vitiated.

5. It is lastly urged that in para-33 of the grounds of detention the satisfaction of the Detaining Authority is not that there was an imminent possibility of the petitioner's husband getting bail but it is stated that there is a possibility of Narender Kumar Jain applying for bail again and continuing his activities. There being no satisfaction that the petitioner's husband was likely to be granted bail, the detention order directing preventive detention of the petitioner's husband is liable to be set aside.

6. Learned counsel places reliance on the decisions reported as 1979 (1) SCC 222 Asha Devi vs. K. Shivraj Addtl. Chief Secretary to Govt. of Gujarat, 1980 (4) SCC 531 Smt. Ichchu Devi Choraria vs. Union of India & Ors., 1986 (2) SCC 86 Sita Ram Somani vs. State of Rajasthan and Ors., 1988 (1) SCC 436 Smt. Shashi Aggarwal vs. State of U.P., 1990 (2) SCC 1

M. Ahameda Kutty vs. Union of India & Anr., 1999 (8) SCC 473 Ahmad Nasser vs. State of Tamil Nadu & Ors., 2008 (16) SCC 14 Deepak Bajaj vs. State of Maharashtra & Anr., 2008 (17) SCC 348 Union of India vs. Ranu Bhandari, 2011 (5) SCC 244 Rekha vs. State of Tamil Nadu through Secretary to Government & Anr., 2016 SCC OnLine SC 490 P.P. Rukhiya vs. Joint Secretary, Government, ILR 1988 (II) Delhi Harbhajan Singh vs. Union of India & Anr., 1993 (27) DRJ 510 Shri Umesh Bhatia vs. Union of India, 2013 SCC OnLine Del 1303: 2013 CriLJ 2683 Navpreet Kaur Chaddha vs. Union of India & Anr. vs. Punita Shakhujia vs. Union of India & Anr., 2013 SCC OnLine Del 4540: (2014) 140 DRJ 319 Sahil Jain vs. Union of India & Ors.

7. Learned Standing Counsel for Union of India rebutting the arguments of learned counsel for the petitioner contends that in para-27 (a) of the grounds of detention, the Detaining Authority noted the voluntary statements of the carriers of the smuggled gold seized by DRI, Guwahati, as enumerated in para-22 of the grounds of detention. Para-22 of the ground of detention clearly shows the role of the petitioner's husband in four earlier cases on the basis of orders in original. The four orders in original are mentioned at Sr. No.44-47 of the relied upon documents which have been duly supplied to the petitioner's husband. The petitioner's husband has admitted receiving the detention order and the grounds of detention along with the legible copies of all the documents. Hence the relied upon documents having been placed before the Detaining Authority and also supplied to the petitioner's husband, the detention order is not vitiated on this count.

8. Learned Standing Counsel for Union of India further submits that in para -33 of the grounds of detention, the Detaining Authority has mentioned

that the bail application dated 14th September, 2016 filed by the petitioner's husband before the learned CMM has been rejected vide order dated 7th October, 2016. This fact was based on the notes of proceedings dated 7th October, 2016 received from DRI's Special Public Prosecutor and by the time the grounds of detention were prepared and detention order was passed, the order dated 7th October, 2016 was not made available to either the sponsoring authority or the Detaining Authority. Hence the order dated 7th October, 2016 was neither relied upon nor copy thereof supplied to the petitioner's husband.

9. Rebutting the contention that the grounds of detention were prepared after the detention order was served, learned Standing Counsel for Union of India states that there is no presumption that the government officials do not work on Saturday and Sunday. He states that the grounds of detention were formulated prior to the passing of the detention order on 10th October, 2016 as is evident from the original file and immediately thereafter the detention order was served on the petitioner's husband who was in jail between 10.40 AM to 11.10 AM on 10th October, 2016 and the grounds of detention and the relied upon documents were served on him on 11th October, 2016.

10. Rebutting the last contention, learned Standing Counsel for Union of India submits that in the ground of detention the Detaining Authority noted that the petitioner was in judicial custody and had filed a bail application on 14th September, 2016 which was dismissed on 7th October, 2016; earlier also the petitioner was arrested on 17th April, 2015 by DRI, Guwahati and was released on 23rd May, 2015 on medical grounds which has not deterred him from continuing his prejudicial activities. By mentioning that there was a possibility of his applying for bail again and continuing with the prejudicial

activities, it cannot be said that the Detaining Authority was not alive to the situation that there was a likelihood of the petitioner being granted bail. Hence the subjective satisfaction of the Detaining Authority on this count is not vitiated. Reliance is placed on the decision reported as 2007 (15) SCC 208 Sayed Abulala vs. Union of India & Ors., 2011 (5) SCC 244 Rekha vs. State of Tamil Nadu (Supra) and 1995 (33) DRJ 548 J.P. Gupta vs. Union of India & Ors.

11. Before dealing with the first contention of learned counsel for the petitioner that voluntary statements of the carrier of the smuggled gold seized by DRI, though relied upon, were neither placed before the Detaining Authority nor supplied to the petitioner vitiating the subjective satisfaction, it would be relevant to note paras-22, 27 (a) of the grounds of detention as under:

“22. Investigation has also revealed that you and M/s Rara Brothers Pvt. Ltd. have been involved in smuggling of gold on numerous occasions in the past as well, particularly in the eastern part of India and cases have been booked by the DRI, Guwahati Regional Unit in these instances which are detailed below:

Sl. No.	Case No.	Qty (Kg.)	Value (₹ in crores)	Order-In-Original No.	Role played by Sh. Narendra Kumar Jain
1.	04/CL/IMP/GOLD/DRI/GAU/2014-15 dated 02.11.2014	6	1.59	CCP/NER/9/2016 dated Shillong, 30.03.2016. Penalty of ₹5 Lakhs imposed on Shri Narendra Kumar Jain. An Appeal against this OIO has been filed in CESTAT, Kolkata	His name came up when the arrested accused Sh. Dipal Kundu divulged a phone number 8011582276 at that of Ramjanam, the person who was supposed to take delivery of the impugned gold on 02.11.2014 i.e. the day of seizure.

					Enquiry revealed that the said number was registered in the name of an employee of the firm M/s Rara Brothers Pvt. Ltd., the Director of which was Shri Narendra Kumar Jain. The searches conducted on 04.11.2014 at the office premises of M/s Rara Brothers Pvt. Ltd. resulted in recovery of primary gold weighing 89.8 gms. of foreign origin from the possession of Narendra Jain which were seized as he could not produce any supporting documents in respect of the said gold.
2.	05/CL/IMP/ GOLD/DRI/ GAU/2014- 15 dated 19.12.2014	7.33	2	CCP/NER/18/2015 dated Shillong, 21.12.2015. Penalty of ₹10 Lakhs imposed on Shri Narendra Kumar Jain. As per available records, neither appeal has been filed nor penalty has been paid.	Shri Parikshit Paul, the carrier of gold in his statement dated 19.12.2014 and 21.05.2015 stated that he carried the seized gold for Shri Narendra Kumar Jain. He also stated that he was working as per the direction of Narendra Kumar Jain who also borne the entire expenses towards the journey of Shri Parikshit Paul.
3.	06/CL/IMP/ GOLD/DRI/ GAU/2014- 15 dated 03.01.2015	6.66	1.79	CCP/NER/20/2015 dated Shillong, 21.12.2015. Penalty of ₹10 Lakhs imposed on Shri Narendra Kumar Jain. An Appeal against this OIO	Shri Nimitesh Paul, the carrier of seized gold in his statement dated 03.01.2015 disclosed that he was to deliver the seized gold to Ramjanam, an employee of Shri Narendra Kumar Jain at

				<i>has been filed in CESTAT, Kolkata</i>	<i>Rara Brothers at Shiv Market, Fancy Bazar, Guwahati. In December 2014, he delivered about 2 kg. gold from Imphal on 2 occasions for that he was paid ₹10,000/- on each individual trip. Further, he also disclosed that the offer of bringing gold from Imphal to Guwahati was given to him by Shri Narendra Kumar Jain who made him believe that he could earn lots of money out of such carrying.</i>
4.	<i>07/CL/IMP/ GOLD/DRI/ GAU/2014- 15 dated 11.02.2015</i>	<i>11.9 9</i>	<i>3.31</i>	<i>CCP/NER/8/2016 dated Shillong, 22.03.2016. Penalty of ₹20 Lakhs imposed on Shri Narendra Kumar Jain. An Appeal against this OIO has been filed in CESTAT, Kolkata</i>	<i>The recovery of seizure of gold was made from Shri Biman Bhowmick and 3 others on 11.02.2015. They produced documents showing the consigner of the gold as M/s Rara Brothers. Searches were made at the premises of Rara Brothers. In the statement dated 11.02.2015, Shri Narendra Jain denied to have known the carriers. He also denied to have issued any invoices in this regard. The books of his accounts resumed also did not support such stock of primary gold prior to the detection of gold from which such quantity could be lawfully issued or dispatched. He categorically stated that</i>

					apart from the purchase and sale invoices that were resumed by DRI Guwahati on 11.02.2015 he had no other record of sale and purchase of gold. Narendra Jain and his employees did not turn up for investigation. Later he retracted his statement and furnished certain documents which were fabricated subsequently to stake his claim on the seized gold. Shri Narendra Jain was arrested in this case on 17.04.2015 and released on bail on medical grounds on 23.05.2015. It has been informed by DRI Guwahati that they have filed prosecution in this case.
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27. From the above it is clear that;

- a) You, along with Shri Raju Arora, knowingly smuggled gold into India through carriers since 2014 as per your own admission in the statement recorded on 02/09/2016 and 03/09/2016 u/s 108 of the Customs Act, 1962 and which is evident from the voluntary statements of the carriers of smuggled gold seized by DRI, Guwahati as enumerated in para 22 above.

12. As noted above para-27 (a) of the grounds of detention notes about the factum of voluntary statements of the carrier of the smuggled gold seized by DRI, Guwahati as enumerated in para-22 of the grounds of detention.

Column- 5 and 6 of the Tabular chart in Para-22 are based on the orders in original bearing numbers CCP/NER/9/2016, CCP/NER/18/2015, CCP/NER/20/2016, CCP/NER/8/ 2016 dated 30th March, 2016, 21st December, 2015, 21st December, 2015 and 22nd March, 2016 respectively. All the four orders in original are relied upon documents as per Serial No. 44-47 of the list of relied upon documents and are at pages 1209-1258 of the list of documents. The orders in original noted the voluntary statements of the carriers. Since the Detaining Authority relied upon the voluntary statements of the carriers as noted in the orders in original which were placed before the detaining authority and legible copies of the orders in original have been supplied to the petitioner's husband, the subjective satisfaction of the Detaining Authority and the detention order cannot be held to be vitiated on this ground.

13. The order dated 7th October, 2016 passed by the learned CMM dismissing the bail application of the petitioner was not available to the sponsoring authority or the Detaining Authority hence it's not being placed before the Detaining Authority does not vitiate the subjective satisfaction of the Detaining Authority. The Supreme Court in the decision reported as 1992 (1) SCC 1 Abdul Sathar Ibrahim Manik vs. Union of India & Ors. held:

“7. The next and main submission is that there was suppression of vital documents namely bail application and the order refusing bail, which are relevant documents, and had those documents been placed before the detaining authority they might have influenced the mind of the detaining authority one way or the other. Alternatively it is also contended that irrespective of the fact whether they were placed before the authority or not the copies thereof ought to have been supplied to the petitioner pari passu the grounds of detention and that failure to supply the same has deprived the petitioner of an

opportunity of making an effective representation and therefore the detention as such is illegal and violative of Article 22(5) of the Constitution of India. There is no dispute that the detenu moved for bail under Section 437 CrPC on October 29, 1990 before the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam and by an order dated November 2, 1990 the bail application was rejected. The first grievance of the petitioner is that these two documents were not placed before the detaining authority and they were suppressed. In support of this plea reliance is placed on the grounds wherein the detaining authority has stated that he was aware that the petitioner was in judicial custody and possibility of his release on bail in the near future cannot be ruled out. It is submitted that this statement itself shows that the detaining authority was not aware that a bail application in fact was made and the same has been rejected and the only inference that can be drawn is that these relevant documents were suppressed and not placed before the detaining authority. In the counter-affidavit filed by respondent 2, State of Kerala, it is categorically denied that the bail application and the order refusing bail were suppressed from the detaining authority and that at the time of sponsoring the petitioner's name the copies of the bail application and the order refusing bail were not made available to the department and therefore they were not placed before the authority. From these averments, one of the questions that arise for consideration is whether the failure to supply these two documents to the detenu or alternatively whether the failure to place the bail application and the order refusing bail before the detaining authority does in any way affect the detention order. The learned counsel in this context sought to place reliance on some of the judgments of this Court. In M. Ahamedkutty v. Union of India [(1990) 2 SCC 1: 1990 SCC (Cri) 258] the contention was that the bail application and the order granting bail which were relied upon by the detaining authority were not supplied to the detenu and therefore the detention was illegal. A Division Bench of this Court noticed that in the grounds it was clearly mentioned that the detenu

was remanded to judicial custody and was subsequently released on bail. Therefore these documents were in fact placed before the detaining authority and were relied upon by it and therefore the non-supply of these relevant documents to the detenu disabled him to make an effective representation. Therefore there was violation of Article 22(5) of the Constitution. In arriving at this conclusion, the Division Bench relied on several other decisions and observed that all the documents relied upon by the detaining authority must be pari passu supplied to the detenu. In the instant case, the facts are different. In the counter-affidavit it is clearly stated that the bail application and the order refusing bail were not there before the sponsoring authority. Therefore they were not placed before the detaining authority. The grounds do not disclose that the detaining authority has relied upon any of these two documents. On the other hand as already noted the detaining authority mentioned in the grounds that it was aware that the detenu was in custody but there is every likelihood of his being released on bail. This itself shows that these documents were not before the authority. Therefore it cannot be said that the documents referred to and relied upon in the grounds were not supplied to the detenu and the ratio in Ahamedkutty case [(1990) 2 SCC 1 : 1990 SCC (Cri) 258] on this aspect does not apply to the facts in the instant case. It is not necessary to refer to in detail various decisions of this Court wherein it has been clearly laid down that the documents referred to or relied upon in the grounds of detention only are to be supplied. This has been settled by a long line of decisions: Ramachandra A. Kamat v. Union of India [(1980) 2 SCC 270 : 1980 SCC (Cri) 414] , Frances Coralie Mullin v. W.C. Khambra [(1980) 2 SCC 275 : 1980 SCC (Cri) 419] , Icchu Devi Choraria v. Union of India [(1980) 4 SCC 531 : 1981 SCC (Cri) 25] , Pritam Nath Hoon v. Union of India [(1980) 4 SCC 525 : 1981 SCC (Cri) 19] , Tushar Thakker v. Union of India [(1980) 4 SCC 499 : 1981 SCC (Cri) 13] , Lallubhai Jogibhai Patel v. Union of India [(1981) 2 SCC 427 : 1981 SCC (Cri) 463] , Kirit Kumar Chaman Lal Kundalia v. Union of India [(1981) 2 SCC 436 :

1981 SCC (Cri) 471] and Ana Carelina D'Souza v. Union of India [1981 Supp SCC 53 (1) : 1982 SCC (Cri) 131] . At this juncture it is also necessary to note that such of those documents which are not material and to which a casual or passing reference is made in the grounds, need not be supplied. In Mst L.M.S. Ummu Saleema v. B.B. Gujral [(1981) 3 SCC 317 : 1981 SCC (Cri) 720] , after referring to some of the earlier decisions of this Court, it was held thus: (SCC p. 320, para 5)

“It is, therefore, clear that every failure to furnish copy of a document to which reference is made in the grounds of detention is not an infringement of Article 22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation, that amounts to a violation of the fundamental rights guaranteed by Article 22(5). In our view it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention.”

It will therefore be seen that failure to supply each and every document merely referred to and not relied upon will not amount to infringement of the rights guaranteed under Article 22(5) of the Constitution. We may of course add that whether the document is casually or passingly referred to or whether it has also formed the material for arriving at the subjective satisfaction, depends upon the facts and grounds in each case. In the instant case we are satisfied that these two documents were not placed before the detaining authority nor they were referred to or relied upon.”

14. In order to deal with the contention of the learned counsel for the petitioner that the grounds of detention were ante dated and prepared only after the detention order was served on the petitioner, this Court had called for the original file of the detaining authority. A perusal of the original file shows that after preparation of the grounds of detention and based thereon the Detaining Authority passed the detention order on 10th October, 2016. The contention that the grounds of detention were ante dated is required to be rejected on perusal of the original file. Further there is no presumption that official duty is not performed on Saturdays and Sundays. Hence, this contention of learned counsel for the petitioner that the grounds of detention were ante dated is also liable to be rejected.

15. Coming to the last contention raised by learned counsel for the petitioner that there is no satisfaction of the Detaining Authority that there was an imminent possibility of the bail being granted, it would be relevant to note para-33 of the grounds of detention as under:

“33. I am aware that you are still in judicial custody and that your bail application dated 14.09.2016 filed before the Hon’ble CMM has been rejected vide order dated 07.10.2016. However, taking into account the magnitude and the protracted pre-judicial activities carried out by you in the past two years and the fact that you have already been arrested earlier on 17.04.2015 by DRI, Guwahati in connection with a case mentioned in Para 22 above and released on bail on 23.05.2015 on medical grounds has not deterred you from continuing your pre-judicial activities, I am of the view that there is a possibility of you applying for bail again and continue your activities.” (Emphasis supplied)

16. As noted above the Detaining Authority has not noted that there is any imminent possibility of the petitioner being granted bail except that it noted

that earlier also when interim bail was granted on medical grounds, it did not deter the petitioner's husband from continuing his prejudicial activities. The satisfaction of the Detaining Authority is on the propensity of committing the prejudicial activity and not the imminent possibility of grant of bail.

17. Learned Standing Counsel for Union of India in this respect relying upon the decision in Sayed Abulala (Supra) contends that while arriving at the satisfaction the Detaining Authority was conscious of the fact that the petitioner's husband was in actual custody and there was reason to believe on the basis of reliable material placed before him that there was real possibility of his being released on bail and on being released, he would in all probability indulge in prejudicial activities. Thus, it was essential to detain him. The three essential ingredients having been satisfied, merely non-mentioning of the fact that there was an imminent possibility of the petitioner's husband being released on bail would not vitiate the detention order.

18. In Sayed Abulala (Supra) Supreme Court laid down the three essential conditions required for passing the detention order as under:

26. No doubt antecedents of the detenu would be a relevant factor but the same by itself may not be sufficient to press an order of detention inasmuch as the principles which govern the field so as to enable the court to arrive at a decision that the order of detention can be validly passed despite the detenu being in custody are:

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he had a reason to believe on the basis of reliable material placed before him

(a) that there is a real possibility of his being released on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities; and

(3) it is felt essential to detain him to prevent him from so doing.

27. Yet again, our attention has also been drawn to the decision of this Court in Azra Fatima v. Union of India [(1991) 1 SCC 76 : 1991 SCC (Cri) 641] wherein a Bench of this Court while considering the validity of an order of detention under the said Act had held that the likelihood of the detenu to be released on bail together with other relevant factors, namely, his antecedents as well as his likelihood of involvement and in continuing to commit similar offences are to be borne in mind. But therein two of the co-detenus had already been released on bail and thus, the detaining authority could arrive at his subjective satisfaction. However, in this case, the co-accused of the appellant had not been released on bail and in that view of the matter the detaining authority was required to apply his mind on the material on record to arrive at its subjective satisfaction.”

19. Further in Rekha vs. State of Tamil Nadu (supra) relied upon by learned Standing Counsel for Union of India, the Supreme Court held:

“10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail.

However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.”

20. As noted in para-33 of the grounds of detention as reproduced above, the satisfaction of the authority is not based on the fact that the co-accused has been granted bail or that there is a parity in the role of the co-accused who has been granted bail and the petitioner’s husband. Satisfaction is in respect of the propensity to continue to indulge in prejudicial activity and that there was a possibility of applying for bail again. No satisfaction was arrived at that there was an imminent possibility of grant of bail to the petitioner’s husband either because the co-accused was granted bail or that in such like cases bail is granted or that he was earlier granted bail.

21. The issue whether in the absence of the satisfaction of the detaining authority that there was an imminent possibility of grant of bail, detention order is vitiated, which arises in the present petition, came up for consideration before the Supreme Court in the decision reported as 1994 SCC (Cri) 354 Rivadeneyta Ricardo Agustin vs. Government of The National Capital Territory of Delhi & Ors. wherein it was held:

“7. In the grounds of detention, the following statement occurs in para 9:

“The Administrator of the National Capital Territory of Delhi is aware that you are in judicial custody and had not moved any bail application in the Court(s) after June 9, 1992 but nothing prevents you from moving bail applications and possibility of your release on bail cannot be ruled out in the near future.

Keeping in view your modus operandi to smuggle gold into India and frequent visits to India, the Administrator of the National Capital Territory of Delhi is satisfied that unless prevented you will continue to engage yourself in prejudicial activities once you are released.”

8. *The above statement merely speaks of a “possibility” of the detenu's release in case he moves a bail petition. It neither says that such release was likely or that it was imminent. Evidently, the statement falls short of the requirement enunciated by this Court in Kamarunnissa [(1991) 1 SCC 128: 1991 SCC (Cri) 88]. Even in the return filed in this petition, the authority has not stated (in response to Ground ‘B’ of the writ petition) that there was material before him upon which he was satisfied that the petitioner was likely to be released or that such release was imminent. In Ground ‘B’ of the writ petition, the petitioner had alleged:*

“[T]hat the respondent knew perfectly well that a complaint has already been filed in Court against the petitioner. He also knew that his two applications for bail were rejected by the Court. Between June and August, the petitioner had made no attempt whatsoever to secure any bail either from the trial court or from any superior court. Without any application of mind to this aspect of the matter, the respondent acted perversely in coming to the conclusion that the petitioner was ever likely to indulge in any offence of smuggling, to prevent which the respondent found it necessary to pass the order Annexure ‘A’ hereto.”

22. Similar view was expressed by this Court in Umesh Bhatia (Supra) as under:

“15. The above para reveals that the detaining authority was undoubtedly aware of the petitioner being in actual custody at the time of passing the detention order but it has not disclosed

any material on the basis of which it could be said that there was a real possibility of the petitioner being released on bail.

16. It is not disputed by the learned counsel for the respondent that in fact no bail application was moved by the petitioner. In the counter-affidavit of the respondent, there is not even a whisper about the stand which is now being taken before me by the learned counsel for the respondent that the complaint had not been filed even on the 54th day and the petitioner was likely to be released after expiry of period of 60 days. Besides para 12 of the grounds of detention avers that there was merely a possibility of the petitioner being released on bail. It is nowhere stated that there was an imminent likelihood of the petitioner being released on bail.”

23. Considering that the satisfaction of the Detaining Authority was based on the fact that there was a possibility of the petitioner’s husband applying for bail again and not that there was an imminent likelihood of the petitioner’s husband being released on bail, the subjective satisfaction of the Detaining Authority and the consequent detention order dated 10th October, 2016 are vitiated. The detention order dated 10th October, 2016 is thus set aside. Narender Kumar Jain be released forthwith, if not required in any other case.

24. Writ Petition is disposed of.

(MUKTA GUPTA)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 31, 2017/‘ga’/‘vn’