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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 23rd August 2018

Decided on: 27th August 2018

+ **W.P. (CRL) 1971/2018 & CrI.M.A.12159/2018**

SANJAY AGARWAL

..... Petitioner

Through: Mr. Vikram Chaudhri, Sr. Advocate,
with Mr. Raktim Gogoi, Mr. Harshit
Sethi, Mr. Kartikeya Singh,
Mr. R.P. Saini and Mr. Rishi Sehgal,
Advocates.

versus

UNION OF INDIA AND OTHERS

....Respondents

Through: Mr. Amit Mahajan, CGSC.
Mr. Satish Agarwala, Sr. Standing
Counsel for DRI.

+ **W.P. (CRL) 1977/2018 & CrI.M.A.12179/2018**

AJAY AGARWAL

..... Petitioner

Through: Mr. Vikram Chaudhri, Sr. Advocate,
with Mr. Raktim Gogoi, Mr. Harshit
Sethi, Mr. Kartikeya Singh,
Mr. R.P. Saini and Mr. Rishi Sehgal,
Advocates.

versus

UNION OF INDIA AND OTHERS

....Respondents

Through: Mr. Amit Mahajan, CGSC.
Mr. Satish Agarwala, Sr. Standing
Counsel for DRI.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT

Dr. S. Muralidhar, J.:

Introduction

1. These are two writ petitions under Article 226 of the Constitution of India seeking the quashing of orders of preventive detention dated 1st June 2018 passed by the Joint Secretary, Government of India in the COFEPOSA Unit of the Central Economic Intelligence Bureau, Department of Revenue, Ministry of Finance, Government of India in exercise of the powers conferred under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Act 1974 ('COFEPOSA'). In both instances, the impugned orders are identically worded inasmuch as each of them states that the concerned Joint Secretary who issued the order is satisfied that each of the Petitioners is required to be prevented from "smuggling goods, abetting the smuggling of goods, or engaging in transporting, or concealing or keeping smuggled goods or dealing in smuggled goods in future".

2. In W.P. (Crl) No. 1971 of 2018, the Petitioner is Mr. Sanjay Agarwal and in W.P. (Crl) No. 1977 of 2018, the Petitioner is Mr. Ajay Agarwal, the brother of Mr. Sanjay Agarwal.

3. It must be noted at the outset that identical detention orders were passed against the above two Petitioners as well as a third Petitioner Mr. Preet Kumar Agarwal, who is the son of Mr. Sanjay Kumar Agarwal. Mr. Preet Kumar Aggarwal had filed W.P. (Crl) No. 1978 of 2018. However, the Advisory Board declined to confirm the detention order in the case of Mr. Preet Kumar Agarwal and consequently, the aforementioned writ

petition filed by him was rendered infructuous. It was disposed of as such by this Court by a separate order passed on 21st August 2018.

4. As far as the present two petitions are concerned, since the background facts are common, they are being disposed of by this common order.

Background facts

5. On 4th April 2018, the Department of Revenue Intelligence ('DRI'), Kolkata Zonal Unit, Kolkata apprehended Mr. Preet Kumar Agarwal, the son of Mr. Sanjay Agarwal from Netaji Subhas Chandra Bose International Airport ('NSCBI Airport') at Kolkata. Mr. Sanjay Agarwal, who had already boarded an Indigo Airlines flight to Hyderabad was made to de-board from that flight and was apprehended by a second team of DRI officials. On the same date, a third team of DRI officials intercepted two boxes from Indigo Airlines Domestic Cargo which contained 1194 pieces of gold bangles made of 22 carat gold. The boxes weighed 54,096 gm and were valued at Rs.16,10,43,792/-.

6. On 5th and 6th April 2018, the statement of Mr. Sanjay Agarwal was recorded under Section 108 Customs Act 1962 ('Customs Act'). In that statement, he is purported to have admitted to diverting goods meant for export to the domestic market after all export formalities were completed and that his son Mr. Preet Kumar Agarwal had helped him in this task. The statements of Mr. Preet Kumar Agarwal and Mr. Ajay Agarwal were also separately recorded under Section 108 Customs Act. Mr. Preet Kumar Agarwal purportedly admitted to diverting two sealed boxes containing gold

bangles meant for export from Kolkata Airport to his father. The statement of Mr. Ajay Agarwal was also recorded in which he allegedly stated that his brother Mr. Sanjay Agarwal had invested money in his firm M/s. Kalpataru Jewellers and that he had exported 19 consignments through M/s. Kalpataru Jewellers.

7. On 5th and 6th April 2018, the premises of M/s. Ghanshyamdas Gems & Jewels (the proprietor of which is Mr. Sanjay Agarwal), Shree Ganesh Jewels (owned by Mr. Sanjay Agarwal's employee Mr. Avinsah Soni) , and PH Jewels (owned by Mr. Sanjay Agarwal's sister-in-law) were searched. The residential premises of Mr. Sanjay Agarwal at Hyderabad were also searched. Nothing incriminating was found in these searches.

8. The version of the Respondents is that Mr. Sanjay Agarwal, along with his son Mr. Preet Kumar Agarwal, were intercepted at Kolkata Airport on 4th April 2018 by the DRI, Kolkata Zonal Unit, while they were in the process of diverting a consignment of 54 kg of gold jewellery meant for export after completion of all export formalities by the customs authorities. That consignment was supposed to be carried by Mr. Preet Kumar Agarwal to Dubai. However, instead of bringing it to Dubai, Mr. Preet Kumar Agarwal passed on the boxes containing the gold jewellery to his father Mr. Sanjay Agarwal who was waiting outside the airport. Mr. Sanjay Agarwal in turn booked the consignment of the said gold jewellery with Indigo Airlines Domestic Cargo so as to transfer the same from Kolkata to Hyderabad. After booking those boxes containing the gold jewellery, Mr. Sanjay Agarwal boarded another Indigo Airlines flight to Hyderabad travelling on a ticket

booked in the name of his son Mr. Preet Kumar Agarwal.

9. According to the Respondents, even in the past, the Petitioners had followed the same *modus operandi* with boxes containing gold jewellery being booked for transport from Kolkata to Hyderabad in the names of the firms controlled by Mr. Sanjay Agarwal or his relatives or employees. The dates of these transactions were more or less coinciding with the date when identical quantity of gold jewellery was shown to have been exported or carried by hand to Dubai/UAE. According to the Respondents, this showed that even on those occasions, gold jewellery meant for export were diverted to the domestic market after completion of export formalities.

10. The exact date of the arrest of Mr. Sanjay Agarwal is disputed. According to the Respondents, Mr. Sanjay Agarwal was arrested on 6th April 2018, whereas according to Mr. Sanjay Agarwal, he was detained on 4th April 2018 itself.

11. What is, however, not in dispute is that bail applications were moved by all three detenues on various dates thereafter. On 19th April 2018, the bail application moved by Mr. Ajay Agarwal was rejected. On 3rd May 2018, the bail application filed by Mr. Sanjay Agarwal along with Mr. Ajay Agarwal was again rejected. On 16th May 2018, the bail application by Mr. Sanjay Agarwal alone was rejected. On 17th May 2018, the Kolkata High Court rejected another bail application of Mr. Ajay Agarwal.

12. On 24th May 2018, the proposal for detention was sent by the DRI to the

Detaining Authority for detention of the present Petitioners and Mr. Preet Kumar Agarwal. Meanwhile, Mr. Ajay Agarwal was granted conditional bail by an order dated 25th May 2018 of the Calcutta High Court subject to conditions, one of which was that he should regularly appear before the DRI.

13. The Central Screening Committee recommended the proposal for detention of the present Petitioners and Mr. Preet Kumar Agarwal by a written communication dated 28th May 2018. According to the Petitioners, many of the relied upon documents ('RUDs'), referred to in the grounds of detention, were dispatched only on 30th May 2018, barely two days before the issuance of the order of detention from Delhi on 1st June 2018.

14. On 1st June 2018, separate detention orders were passed in respect of both the Petitioners in exercise of the powers conferred under Section 3(1) COFEPOSA for the reasons mentioned hereinbefore.

15. On the next day, i.e. 2nd June 2018, when he appeared before the DRI, copies of the detention orders were served upon Mr. Ajay Agarwal. As far as Mr. Sanjay Agarwal was concerned, the impugned detention order was served upon him on 4th June 2018. On 6th June 2018, the grounds of detention and the RUDs were served upon both the Petitioners.

16. On 27th June 2018, a representation was made by the three detainees seeking the supply of the RUDs although, in the counter affidavits filed in the present petitions, the Respondents deny having received any such representation. On 5th July 2018, the present writ petitions were filed.

Submissions on behalf of the Petitioners

17. This Court has heard the submissions of Mr. Vikram Chaudhri, learned Senior Counsel appearing for the Petitioners; Mr. Amit Mahajan, learned Central Government Standing Counsel appearing for the Union of India; and Mr. Satish Agarwala, learned Senior Standing Counsel appearing for the DRI.

18. One of the first grounds urged by Mr. Chaudhri is that both in the detention orders as well as in the grounds of detention, the disjunctive ‘or’ is used in the reasons for justifying the detention of each of the Petitioners in exercise of the powers under Section 3(1) COFEPOSA. Relying on the decisions of the Supreme Court in *Jagannath Misra v. State of Orissa AIR 1966 SC 1140* and *Ananta Mukhi @ Ananta Hari v. State of West Bengal (1972) 1 SCC 580*, it is submitted that such casualness in the drafting of detention orders would vitiate them as it reflected non-application of mind by the Detaining Authority.

19. Secondly, it is contended that there is a variance in the subjective satisfaction in the impugned detention orders when compared with the grounds of detention. In respect of Mr. Sanjay Agarwal, it is pointed out that while the detention order seeks to prevent Mr. Sanjay Agarwal from, in the alternative, concealing smuggled goods, no mention of this has been made in the grounds of detention. While the detention order seeks to prevent him from abetting the smuggling of goods in addition to smuggling goods, the grounds of detention states that it is to prevent him from “smuggling goods **or** abetting the smuggling of goods”. Likewise, the detention order mentions

‘engaging in transportation’ with the prefix ‘or’ whereas the grounds of detention do not. Likewise, in the case of Mr. Ajay Agarwal, the ground of ‘abetting the smuggling of goods’ is prefixed by the word ‘or’ in the grounds but not in the detention order. Further, the detention order mentions that it has been passed to prevent Mr. Ajay Agarwal from “keeping smuggled goods or dealing in smuggled goods in future”, whereas no such mention is made in the grounds of detention at all. Such variance, according to Mr. Chaudhri, has caused confusion in the minds of the detainees and they are unclear as to under which head they are to make a representation. The phrase “dealing in smuggled goods” is also stated to be unclear. Reliance is placed on the decision of the Supreme Court in ***Vijay Kumar Dharna @ Koka v. Union of India (1990) 1 SCC 606***.

20. Thirdly, it is submitted that while passing the detention orders in respect of both Petitioners, the Detaining Authority has substituted the name of the detainee with ‘you’ and the detention orders are in fact verbatim copies of each other. It is accordingly submitted that in terms of the law explained in ***Rajesh Vashdev Adnani v. State of Maharashtra (2005) 8 SCC 390***, the detention orders having been passed in a most casual manner, deserve to be set aside.

21. Fourthly, it is submitted that the real ground of detention is the apprehension of the Detaining Authority that there was an “imminent possibility” (wrongly mentioned as “immense possibility”) that the detainee may be released on statutory bail. As far as Mr. Ajay Agarwal is concerned, since he was already on bail by the time of the passing of the detention

order, in his case, this was clearly on account of non-application of mind. It is submitted that this ground reveals that the detention orders were passed to obviate the ordinary law of the land and to substitute the prosecution under the Customs Act.

22. Fifthly, relying upon the decisions of the Supreme Court in ***Rekha v. State of Tamil Nadu* (2011) 5 SCC 244**, ***Munagala Yadamma v. State of Andhra Pradesh* (2012) 2 SCC 386**, and ***Yumman Ongbi Lembi Leima v. State of Manipur* (2012) 2 SCC 176**, it is submitted that there was non-application of mind by the Detaining Authority and many of the RUDs which were prepared at Barasat, West Bengal were dated 30th May 2018 but were included in the RUDs to justify the order of detention passed merely two days later. This made it doubtful that the said documents had at all been placed before the Detaining Authority, who appears to have been issuing detention orders in a tearing hurry and in undue haste without due application of mind. It is pointed out that it is not humanly possible for the Detaining Authority to have examined and applied its mind to the 761 pages of the detention proposal and a total of 2283 pages on a single day and to thereafter pass three different detention orders on the basis of the same. Whenever a document was received, the Detaining Authority was required to reformulate the grounds of detention after considering all the material together. It is submitted that the detention orders were, therefore, passed in a mechanical manner in undue haste without application of mind.

23. The detention orders and/or grounds of detention also contained factual errors. In para 15 of the grounds of detention in Mr. Ajay Agarwal's case,

the Detaining Authority has mentioned “handing over two boxes containing gold jewellery to you by Shri Preet Agarwal to his father Sanjay Agarwal”. This showed that there was a mere ‘cut and paste’ of the grounds of detention from one case to the other without any application of mind and in a tearing hurry. Likewise, in para 33 of the grounds of detention in respect of Mr. Sanjay Agarwal, the Detaining Authority mentions that his passport has been detained by the DRI whereas it was in fact deposited in the CBI Court, Hyderabad. It is accordingly submitted that the Detaining Authority has simply signed the detention orders without verifying the facts.

24. Sixthly, it is submitted that several documents submitted as part of the RUDs were illegible and this vitiated the detention. Reliance is placed upon the decision of the Supreme Court in *Manjit Singh Grewal @ Gogi v. Union of India 1990 SCC (Supp) 59* and it is submitted that there was a failure to supply the material / RUDs to the detainee. The relevant documents were not even placed before the Detaining Authority. This included the documents that would have proved the travel of the detainees to Dubai, Hyderabad, etc. However, no flight ticket or boarding pass was collected.

25. Para 11 of the grounds of detention in both cases mentions that the SDO (Departure), after receiving the sealed boxes containing the gold jewellery in question, “entered the details in the register maintained at SDO Office”. However, the said register was neither placed before the Detaining Authority nor supplied to Mr. Sanjay Agarwal. The authorization for conducting the searches of the premises of M/s. Ghansyamdass Gems & Jewels and Shree Ganesh Jewels was not placed on record. Even in the CBI case to which a

reference has been made, no charge-sheet had been filed.

26. With respect to the past conduct of Mr. Sanjay Agarwal, learned Senior Counsel Mr. Chaudhri pointed out that the show-cause notices ('SCNs') were issued to M/s. Kalpataru Jewellers and Exports Corporation and PH Jewels not under Section 135 Customs Act which talks of smuggling, but under other provisions and all the duties demanded in terms thereof, stood paid. Further, the matter was settled before the Settlement Commission and an order in that regard was passed by the Settlement Commission on 26th June 2018 according immunity from prosecution. The detention orders make no reference to the pendency of the matter of M/s. Kalpataru Jewellers and Exports Corporation before the Settlement Commission. The failure to mention this, leave alone the documents, has vitiated the detention. Even the orders granting anticipatory bail to Mr. Sanjay Agarwal were not placed before the Detaining Authority.

27. Mr. Chaudhri then submitted that the claim of the Detaining Authority that prosecution could not have been lodged prior to a show cause notice being issued to the detainee was fallacious. He relied on the decision in ***Standard Chartered v Directorate of Enforcement (2006) 4 SCC 278***.

Submissions on behalf of the Respondents

28. In reply, learned CGSC Mr. Mahajan referred to Section 5A COFEPOSA and submitted that even if there was any defect in the grounds for detention, it would not render the detention order invalid. He placed reliance on the decision in ***Gautam Jain v. Union of India*** [decision dated 18th March 2014 of a Division Bench of this Court in W.P. (Crl) 2060/2013

and affirmed in *Gautam Jain v. Union of India* (2017) 3 SCC 133] and the decision in *T.P. Moideen Koya v. Government of Kerala* (2004) 8 SCC 106. He submitted that merely because Mr. Sanjay Agarwal was already in custody did not mean that order of preventive detention could not be passed. Since the period of 60 days after his detention was coming to an end on 6th June 2018 and his being released on bail was imminent, it was considered justified to issue the order of preventive detention.

29. Mr. Mahajan further submitted that the past conduct of Mr. Sanjay Agarwal disentitles him to any relief as prayed for by him. In particular, he referred to an instance where despite being on bail and having surrendered his passport, Mr. Sanjay Agarwal travelled abroad under a fake passport using another name. Mr. Mahajan also referred to other instances where there has been diversion of goods meant for export to the domestic market. Mr. Mahajan submitted that even if the word 'or' had been used, the detention order had to be seen in the context of several acts committed by the detainees which constituted one or more of the grounds specified in Section 3(1) COFEPOSA. Therefore, according to Mr. Mahajan, the detention orders were not bad in law.

Case of Mr. Sanjay Agarwal

30. The Court would first like to consider the grounds of detention in respect of Mr. Sanjay Agarwal, the Petitioner in W.P. (CRL) 1971/2018. The grounds of detention in that case specifically advert to the fact that at NSCBI Airport, Kolkata on 4th April 2018, DRI officials spotted Mr. Preet Kumar Agarwal as he approached Gate No.11. They asked him about the

consignment of gold bangles which was supposed to be in his possession for export to Dubai on a hand-carry basis. According to the grounds of detention, after initially being hesitant, Mr. Preet Kumar Aggarwal admitted that “he had diverted the export consignment of gold bangles to his father Shri Sanjay Agarwal”.

31. Another team of DRI officers intercepted Mr. Sanjay Agarwal while he had already boarded an Indigo Airlines flight to Hyderabad. He too purportedly admitted to having received the boxes containing gold bangles from Mr. Preet Kumar Agarwal.

32. This Court posed a pointed query to Mr. Mahajan as to the effect of the Advisory Board not confirming the detention order of Mr. Preet Kumar Agarwal. In the narration of the facts discernable from the grounds for detention, it is apparent that Mr. Preet Kumar Agarwal was himself involved in the act of diverting gold meant for export to the domestic market and he was clearly acting in consort with Mr. Sanjay Agarwal. If Mr. Preet Kumar Agarwal is removed out of the picture on account of the non-confirmation of his detention, the case against Mr. Sanjay Aggarwal is considerably weakened.

33. The grounds of detention do notice that all three of them, i.e. Mr. Sanjay Agarwal, Mr. Ajay Agarwal and Mr. Preet Kumar Agarwal, were arrested under the Customs Act and were in judicial custody with their bail applications having been rejected.

34. Paras 33 and 34 of the grounds of detention in respect of Mr. Sanjay

Agarwal read as under:

“33. I am aware that you are at present under judicial custody and your passport is detained by the DRI, Kolkata. However, there is an immense (*sic*) possibility that you may be released on statutory bail and thereby you may continue to indulge in such prejudicial: activities of smuggling of goods by way of diverting gold meant for export and therefore, there is a need to issue a Detention Order against you under the COFEPOSA Act, 1974 with, a view to prevent you from smuggling of goods, abetting the smuggling of goods, engaging in transporting of smuggled goods, or dealing in smuggled goods in future.

34. Considering the nature and gravity of offence and the planned manner in which you have engaged yourself in such prejudicial activities and your role therein, all of which reflect your high potentiality and propensity to indulge in such prejudicial activities in future, I am satisfied that there is a need to prevent you from smuggling gold in future, you ought to be detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA, 1974) with a view to preventing you from smuggling goods, **or** abetting the smuggling of goods, engaging in transporting **or** keeping smuggled goods, **or** dealing in smuggled goods in terms of Section 3(1) of the COFEPOSA Act, 1974.” (emphasis supplied)

35. As already noticed, the word ‘immense’ occurring in para 33 of the grounds should be read as ‘imminent’. The fact remains that Mr. Sanjay Agarwal was in fact not granted bail. In fact, all his bail applications were rejected. With there being no bail application pending as such, the only reason for the apprehension of his release was the fact that the statutory period of 60 days after his arrest was coming to an end which meant that under Section 167 Cr PC, he would be entitled to a statutory bail.

36. The question, therefore, is whether that is a sufficient ground for invoking the extraordinary measure of preventive detention. In light of the decision in ***Rekha*** (*supra*), this question is no longer *res integra*. It was observed therein that preventive detention is not meant to be punitive and should only be used in exceptional cases and not as a substitute for the regular criminal law.

37. That the customs authorities were inefficient in ensuring that the *challan* against the detainee is filed in time, i.e. within 60 days after his arrest, will not mean that the power of preventive detention could be exercised. This would otherwise encourage an undesirable practice of the law enforcement agency allowing the detention of a detainee to continue till the statutory period under Section 167 Cr PC is set to expire, and then after failing to file a *challan*, mechanically invoke the power of preventive detention in the eleventh hour.

38. The Supreme Court in ***Moideen Koya*** (*supra*) has no doubt observed that a preventive detention order may be passed even against a person already in custody but as noted therein, the law in this regard has been explained in ***Rameshwar Shaw v. District Magistrate AIR 1964 SC 334*** as under:

“As an abstract proposition of law, there may not be any doubt that Section 3(1) (a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail, but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail.”

39. The Supreme Court in ***Moideen Koya*** (*supra*) also made reference to the

decision in *Vijay Kumar v. State of Jammu and Kashmir* (1982) 2 SCC 43

wherein it was observed:

“If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. Maybe, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made.”

40. Therefore, it is incumbent upon the Respondents to make out the ‘compelling reasons’ that necessitated a preventive detention order to be passed in respect of Mr. Sanjay Agarwal even though all his previous bail applications had been rejected and there was no pending bail application *qua* him. In the considered view of the Court, the imminent possibility of the detenu being entitled to statutory bail was not a ‘compelling’ reason to invoke the extraordinary power of preventive detention.

41. Now turning to the next point about non-application of mind by the detaining authority, it may be observed that the observations in *Gautam Jain* (*supra*) were in a converse context of the grounds of detention not being segregated. There the Court referred to Section 5A COFEPOSA and to the decision in *Vashisht Narain Karwaria v. State of Uttar Pradesh* (1990) 2 SCC 629 and held that even if one of the grounds was vague, non-existent, or not relevant and was not connected to other reasons or grounds, it would not vitiate the order of detention.

42. However, that is not the case here. It is apparent to the Court that the Detaining Authority was unclear about the grounds on which it should authorise the detention of Mr. Sanjay Agarwal. This is evident from the reading of para 34 where repeatedly the word ‘or’ is used to separate out the different grounds. This is suggestive of two things: first, the Detaining Authority was unsure if the facts brought on record constituted one or more of these grounds; and second, there was in fact non-application of mind as simply taking the wording of the Section 3(1) COFEPOSA and repeating it as part of the grounds would not constitute a finding arrived at after an application of mind.

43. The differences in the wording used between the order of detention and the grounds of detention are too stark to simply be dismissed as typographical errors. The casualness in this kind of an approach has been earlier adversely commented upon by the Supreme Court in **Jagannath Misra** (*supra*). In that case too there was confusion as to the use of the conjunctive ‘and’ and the disjunctive ‘or’ and the Court, in that regard, observed as under:

“Where a number of grounds are the basis of a detention order, we would expect the various grounds to be joined by the conjunctive "and" and the use of the disjunctive "or" in such a case makes no sense. In the present order however we find that the disjunctive "or" has been used, showing that the order is more or less a copy of S. 3 (2) (15) without any application of the mind of the authority concerned to the grounds which apply in the present case.”

44. Section 5A COFEPOSA would not come to the aid of the Respondents where they themselves are unclear as to which of the grounds would apply.

This is not an issue of mere vagueness, but of absolute non-application of mind.

45. Apart from the fact that the grant of statutory bail to Mr. Sanjay Agarwal is imminent, there were no real “compelling reasons” as to why the preventive detention order should have been passed. The instances of past conduct referred to have also not been adverted to with any specificity. When this Court pointedly asked whether in relation to the transactions of 2017, any SCN had been issued to Mr. Sanjay Agarwal or the firms connected with him, the answer was in the negative. In other words, it is still not clear whether those transactions in fact constituted an act of ‘smuggling’.

46. Further, the counter affidavit cites past instances of failure by the firms of Mr. Sanjay Agarwal to fulfil certain conditions that pertained to the import of gold for the purposes of export. The mere non-fulfilment of such conditions would not amount to smuggling for the purposes of preventive detention under the COFEPOSA. Even as regards the instances where Mr. Sanjay Agarwal is supposed to have travelled abroad, despite his passport being detained, by using a fake passport, Mr. Mahajan states that there was no case against him under the Passport Act 1967. Therefore, it is not even clear whether Mr. Sanjay Agarwal was in fact involved in that incident.

47. The Respondents also do not have any satisfactory answer as to the error on facts pointed out with regard to detention order mentioning that the passport of Mr. Sanjay Agarwal had been detained by the DRI when in fact

it was detained by the CBI Court in an unrelated case registered against him under Section 420 IPC. This Court is, therefore, not satisfied that the past conduct of Mr. Sanjay Agarwal was such that would warrant his preventive detention in terms of Section 3(1) COFEPOSA.

48. For all of the aforementioned reasons, this Court is not satisfied that the impugned detention order dated 1st June 2018 issued *qua* Mr. Sanjay Agarwal is sustainable in law.

Case of Mr. Ajay Agarwal

49. Now turning to the detention order *qua* Mr. Ajay Agarwal. One stark fact is that even prior to the passing of the detention order, Mr. Ajay Agarwal obtained anticipatory bail. The apprehension that as a result of that anticipatory bail, he would continue indulging in smuggling is belied by the fact that again in his case, there was clearly no application of mind with there being variations between the order of detention and the grounds of detention. In his case, the fact that he had been granted anticipatory bail is noted in para 33 of the ground of detention:

“33. I am aware that you are presently on bail and you may continue to indulge in such prejudicial activities of smuggling of goods by way of diverting gold meant for export or otherwise in similar fraudulent activities in future and therefore, there is a need to issue a Detention Order against you under the COFEPOSA Act, 1974 with a view to prevent you from smuggling of goods, abetting smuggling of goods in future.”

50. However, it was not noted that Mr. Ajay Agarwal had in fact been complying with the conditions of his anticipatory bail. There is no known instance of his indulging in smuggling during that time. In fact, it is when he

came to attend the hearing before the DRI pursuant to the notice issued to him, and in compliance with the conditional anticipatory bail application, that the grounds of detention were served upon him.

51. Further as already noted, in para 15 of the grounds of detention in Mr. Ajay Agarwal's case, the Detaining Authority has mentioned "handing over two boxes containing gold jewellery to you by Shri Preet Agarwal to his father Sanjay Agarwal". Ajay Agarwal was not, even according to the Respondents, in the Kolkata airport at the relevant time on 4th June 2018. This showed that there was a mere 'cut and paste' of the grounds of detention from one case to the other without any application of mind and the detention order was issued in a tearing hurry.

52. The detention order in respect of Ajay Aggarwal sites past instances but nothing in the present. The absence of any live link with any present instance is nowhere discernible on a reading of the grounds of detention. Further, by not referring to the conditions attached to the grant of anticipatory bail, to simply state that Mr. Ajay Aggarwal would continue to indulge in activities related to smuggling demonstrates a non-application of mind by the Detaining Authority to the facts governing his case.

Conclusion

53. For all of the aforementioned reasons, this Court finds both the detention orders dated 1st June 2018 passed in respect of each of the Petitioners, i.e. Mr. Sanjay Agarwal and Mr. Ajay Agarwal, to be unsustainable in law and they are accordingly hereby quashed. Both the Petitioners shall be released

forthwith from custody.

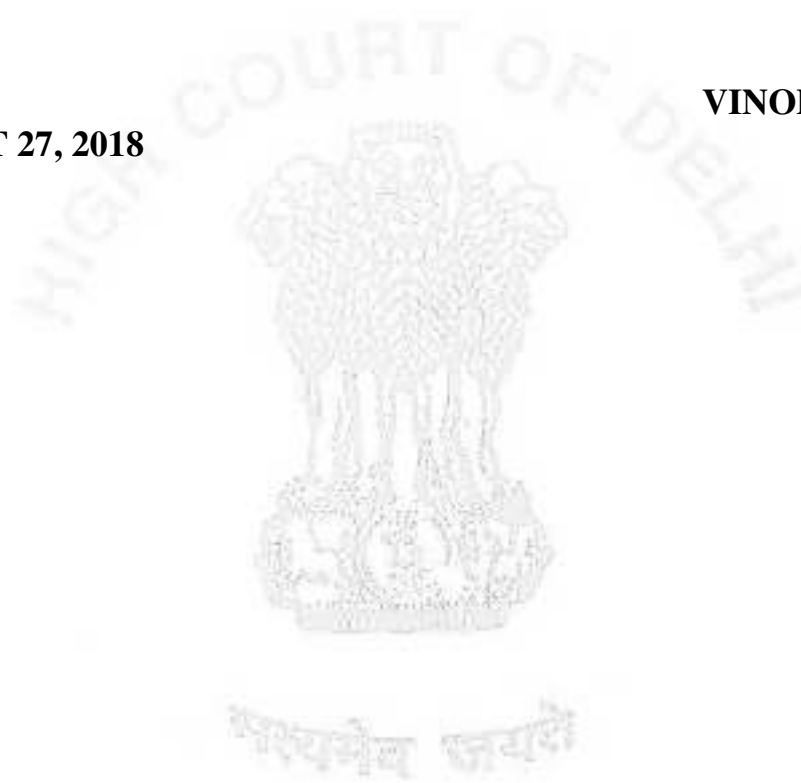
54. Both the writ petitions are accordingly allowed in the above terms but, in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

VINOD GOEL J.

AUGUST 27, 2018

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+ **W.P.(CRL) 1971/2018 & Crl.M.A.No 12159/2018**

SANJAY AGARWAL

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Sharma, Advocates for DRI

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VINOD GOEL

ORDER

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27.08.2018

1. The judgments have been pronounced today. Copies thereof be given to the parties under the signatures of the Court Master. The

Registrar General of this Court will communicate this order as well as the judgment through E-mail, Fax and telephone to the Superintendent of Dum Dum Central Jail, where the Petitioners are presently lodged.

S.MURALIDHAR, J.

VINOD GOEL, J.

AUGUST 27, 2018

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