2025 INSC 327

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO._____ OF 2025
(@Special Leave Petition (Crl.) No.16893 of 2024)

JOYI KITTY JOSEPH ...Appellant

VERSUS

UNION OF INDIA & ORS. ...Respondents

J U D G M E N T

Leave granted.

2. The wife of the detenu; detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling

Activities Act, 1974[1], is before us challenging the order of detention. There is no challenge to the procedural aspects which have been scrupulously complied with. The High Court, before whom the detention order and its subsequent confirmation have been assailed rejected the contentions; which decision is impugned in the above appeal. The detention order, impugned before the High Court, is produced as Annexure P-1.

3. We have heard Mr. Farook M. Razack, learned Senior Counsel for appellant and Mr. Vikramjit Banerjee, learned Additional Solicitor General for India for the respondents.

4. Essentially, three grounds are raised before us to secure the release of the detenu

[1] "the COFEPOSA Act"

who is behind bars for almost a year, the arrest being on 05.03.2024. That there is clear non-application of mind since the allegations are raised under clauses (i) to (iv) of Section 3(1) of the COFEPOSA Act, in an omnibus manner, clearly revealing the bias of the detaining officer. The attempt was to somehow obtain preventive detention of the person who was arrested on the basis of the offences alleged; in which crime he was granted bail by the jurisdictional Court, imposing very stringent conditions. Then, the Department had moved an application for cancellation of bail which was never pursued and importantly, the said application was not placed before the detaining authority. The detaining authority, thus, did not have the opportunity to consider the grounds raised for cancellation of bail and to consider as to why

preventive detention should be made when such an application for cancellation of bail was pending before the competent Court. A cancellation would have resulted in the detenu being taken back in custody, in which event there was no cause for shackling the appellant on a preventive basis. When a judicious consideration was possible, as to whether the appellant should be taken back in custody, an order for preventive detention ought to have been avoided, which would also be in violation of the salutary provisions under Article 14, 19 and 21 of the Constitution of India, 1951. The last ground urged is that the impugned order refers to a conviction in a case involving narcotics which conviction is challenged before the Hon'ble Supreme Court by way of an appeal in which the detenu is also released on bail. The

crime itself was registered way back and the incident has no live link with the order of detention. It is also urged that the proviso to Section 3(1) of the COFEPOSA Act specifically prohibited a detention under that provision if an order of detention can be made under Section 3 of the Narcotic Drugs and Psychotropic Substances Act, 1985[2].

5. To press home the contention of complete non-application of mind, the learned Senior Counsel for the appellant relied on a number of decisions. Clauses (i) to (iv) of Section 3(1) in seriatim refers to, smuggling goods (i), abetting the smuggling of goods (ii), engaging in transporting or concealing or keeping smuggled goods (iii) and dealing in smuggled goods

[2] "NDPS Act"

otherwise than by engaging in transporting or concealing or keeping smuggled goods (iv). To consider whether the allegations against the detenu falls within all these, necessarily, we have to go through the detention order detailing the allegations raised against the detenu.

6. There was intelligence gathered that the detenu along with his wife (appellant-herein) were operating a syndicate involved in smuggling foreign original gold into India and selling it in the market. There was also specific intelligence regarding the transmission of 10 kg. of smuggled gold through named persons for selling in the local Mumbai market at a specified location; a shop room, wherein a raid was conducted on 05.03.2024. Huge cache of gold bars, coins and cut pieces along with a huge quantity of Indian currency was recovered from

the premises. On enquiry with the persons present in the shop, it was disclosed that the contraband was brought in by Mohammad Rafique Noor Mohammad Razvi @ Aarif and Mahendra Jain and kept therein for sale in the local market on a cash basis without any invoice or bill. Mohammad Rafique Noor Mohammad Razvi @ Aarif and Mahendra Jain on being questioned admitted to the gold having been brought and kept at the shop on instructions from the detenu and they were stated to be acting as agents to sell the gold in the market on a commission basis. There were no documents produced pertaining to the cash and gold, to substantiate the legal sourcing of such goods and the same was seized by the officers of

the Directorate of Revenue Intelligence[3] who had conducted the raid.

7. The DRI officers then, based on the statements under Section 108 of the Customs Act, 1962[4], raided the residential premises of the detenu. The attempt made by the inmates to prevent entry was thwarted by the officers and the premises were found to be in complete disarray clearly indicating attempts to conceal contraband and other evidence regarding the smuggling activities carried on by the residents therein. The mobile phones and contraband, thrown away, were recovered from the office bearers of the Society of the residential complex and further contraband was also recovered from the residential premises of the detenu. The

[3] "DRI"
[4] "Customs Act"

statements under Section 108 of the Customs Act reveal that continued smuggling activities involving gold bars and cut pieces of foreign origin was carried on by a syndicate headed by the detenu, in which Mohammad Rafique Noor Mohammad Razvi @ Aarif and Mahendra Jain acted as commission agents, the actual sale having been carried out through Ummed Singh and Mahipal Vyas, employees of the agents. All of them confirmed their involvement in the smuggling activities carried on by the detenu, who was the kingpin of the operation. Mohammad Rafique Noor Mohammad Razvi @ Aarif confessed to his involvement of smuggling gold bars acting as an agent for the detenu at a commission of Rs. 2000/- per kilogram. According to him, the detenu used to send 2 to 3 kilograms of smuggled gold, with foreign

markings, every day for sale, upon which, the agent used to contact Mahendra Jain at his shop; which was the subject matter of the raid from which premises, the sale was effected. On the basis of the statement recorded of the aforesaid persons which was confirmed by the statement of the detenu under Section 108 of the Customs Act, the *modus operandi* of smuggling gold from Dubai to India through carriers, receipt of the same at Mumbai Airport at a pre-determined location by the detenu and his wife, the subsequent delivery to Mohammad Rafique Noor Mohammad Razvi @ Aarif and sale through him on a commission basis has been detailed in the order of detention. We are convinced that the above facts reveal that the detenu has not only been involved in smuggling of goods, but also has abetted such smuggling

of goods through carriers, engaged in receiving the same, dispatching it to middle-men for keeping it concealed in their premises and effecting sale through them; who were paid a commission. This definitely brings in the ingredients of each of the clauses under (i) to (iv) of Section 3(1)[1].

8. *Narendra Purshotam Umrao v. B.B. Gujral*[5], held that the different grounds mentioned in Section 3(1) are all regarding smuggling of goods and the word smuggling includes abetting smuggling activities. Therein also, the contention of non-application of mind was held to be not sustainable since there is always, on facts, overlapping of smuggling and its abetting. As was noticed above, in the

[5] (1979) 2 SCC 637

present case it has been clearly substantiated that the detenu was at the helm of affairs of the smuggling of gold, a continuing activity, wherein he had engaged carriers to carry out the act of smuggling, from whom the smuggled goods were received either by him or his wife, alone or together and then transmitted to the agents who would sell them in the market on a cash basis without invoices or bills; the proceeds of which minus the commission is received by the detenu. There is a complete chain of activity revealed which commences with the detenu and ends with him, bringing in the ingredients of all the four provisions.

9. We, further, notice from the detention order, which has been extracted in the judgment of the High Court, from paragraph 3 to 9 where the satisfaction has been entered by

the detaining authority. The detenu was found to be a habitual offender and a key person of the well-organized syndicate involved in smuggling and disposal of foreign gold brought illegally into India, which activity was habitually carried out through his associates without declaration before the customs authorities and without payment of applicable duties. The smuggling of gold was for the purpose of illegal profiteering putting the national economy into danger which activity was sought to be curbed by the detention order. The detenu was found to have indulged in the activities amounting to smuggling under both the Customs Act and the COFEPOSA Act. The detenu was also found to have an innate propensity to devise ways and means to smuggle foreign gold into India which was done through a well-organized smuggling

network and an established mechanism operated through trusted associates. The habitual indulgence in such fraudulent activities by way of smuggling goods, abetting of smuggling of goods, engaging in transporting and concealing or keeping the smuggled goods and dealing in such smuggled goods at the cost of government revenue and national security was found to be with a clear motive of illegal enrichment with no concern to the general economy and national security interests. The detenu was found to have played a vital role in smuggling foreign original gold through the organized network and executing disposal of such smuggled goods with meticulous planning and deliberate design, regardless of the consequences to the society at large. The detaining authority not only has detailed the

various aspects of smuggling carried out by the detenu but has also brought out the ingredients of each of clauses (i) to (iv) of Section 3(1) for the purpose of ordering preventive detention, validated further by the huge seizures made from different locations.

10. The further contention taken by the appellant is of there being no live link insofar as the reference to the case under the NDPS Act; the subject matter of which cannot also be proceeded with under the COFEPOSA Act, due to the prohibition in the proviso to Section 3(1). True, there is a reference to the crime under the NDPS Act as one in which the appellant was involved. However, the same was only in relation to the specific ground taken by the detaining authority that after release of the detenu from jail in Baroda, in October, 2013; pursuant to the

bail granted by this Court, the detenu had officially changed his name from 'Afzal Haroon Batatawala' to 'Sameer Haroon Marchant', in which name he was arrested in a case of gold smuggling in the year 2017. We do not find any reference made to the allegations in the narcotics case in the operative portion of the detention order. It cannot be disputed that there is no live link with the arrest in the narcotics case, in which, by the year 2013, he had spent nine years of the sentence awarded. The subject matter of a narcotics case cannot also be a ground for preventive detention under Section 3(1) of the COFEPOSA Act. Be that as it may, we do not find either of these points, vitiating the impugned order, since, neither is the subject matter of offence under the NDPS Act referred to in the detaining order nor is the involvement

in the said crime a ground taken for detention under the COFEPOSA Act. As is noticed above, reference to the NDPS case is only to emphasise the propensity of the detenu to involve in such illegal activities by even changing the name officially, to supress his real identity. We do not find any reason to hold the detention to be illegal on the ground of a mere reference to the NDPS case; which we reiterate is only to emphasise the change in name resorted to by the detenu after being released on bail.

11. The decision in *Khaja Bilal Ahmed* v. *State of Telangana*[6] deprecated the order of the detaining authority which merely referred to a pending criminal case, without any clear indication and casual connection to hold it as

[6] (2020) 13 SCC 632

the basis of an order of detention. We have already found that, here, the involvement in a case under the NDPS Act, was not raised as a ground, anywhere in the detention order. The incidents which led to the impugned detention order commenced on a raid in the premises of the detenu's associates followed up with successive raids at the residence of the detenu and other associates, from all of which locations there was recovery of huge cache of contraband; commending us to uphold the subjective satisfaction entered into by the detaining authority.

12. The last contention raised is with respect to the application for cancellation of bail having not been placed before the detaining authority. The impugned judgment has specifically considered the said ground and

finds that the application for cancellation of bail was filed on 06.05.2024 and the detention order was passed on 09.05.2024. There was no possibility of placing the said document before the detaining authority and the same would not amount to non-supply of a vital document, since the cancellation of bail cannot be considered as an alternative to a detention order. We would, rather, emphasise on the undisputed fact that both the parties are in agreement that the cancellation of bail has not been pursued by the department. The grounds for cancellation of bail could not have swayed the detaining authority this way or that way; since it was not competent on the authority to speculate as to whether the jurisdictional Court would permit such cancellation. In fact, if the application for cancellation of bail was allowed

then probably the situation would have been different. We are also of the opinion that the non-supply of the application for cancellation of bail would not be a compelling circumstance to find the order itself to be vitiated. We find absolutely no reason to interfere with the preventive detention order on the grounds stated herein above.

13. However, as the sentinel on the *qui vive* we cannot, but, notice a compelling ground, which was not argued before us. Admittedly, after the successive raids and the arrest of the accused, including the detenu, the accused were remanded to judicial custody. The original confessional statements were retracted when they were produced before the Additional Chief Metropolitan Magistrate at the 19th Court, Esplanade, Mumbai. The detenu was initially

placed in judicial custody till 19.03.2024 and an extension was subsequently granted till 01.04.2024 by the jurisdictional Magistrate who further extended the judicial custody till 15.04.2024. The bail application dated 01.04.2024 before the jurisdictional Magistrate was replied to by the DRI, Mumbai on 15.04.2024.

14. The jurisdictional Magistrate released the detenu on bail *vide* order dated 16.04.2024 on certain conditions. The order of the Magistrate is extracted in the impugned judgment. The contentions raised by the DRI regarding the all-pervasive role of the detenu and his propensity to indulge in such smuggling activities, detrimental to the interest of the nation was considered in juxtaposition with the contention raised by the accused; on the basis

of the investigation carried out thus far. The specific ground raised by the prosecution of apprehension of involvement in similar type of smuggling activity was reckoned by the jurisdictional Magistrate while granting bail and imposing conditions to prevent the detenu from engaging in such smuggling activities. The various conditions are revealed from the order extracted and have been referred to in paragraph-(xxii) of the detention order. However, nothing is stated by the detaining authority as to why the conditions are not sufficient to prevent the detenu from engaging in further activities of smuggling; which was the specific ground on which the conditions were imposed while granting bail.

15. We are not examining the conditions imposed by the Magistrate since it was for the

detaining authority to look into it and enter into a subjective satisfaction as to whether the same was sufficient to avoid a preventive detention or otherwise, insufficient to restrain him from further involvement in similar smuggling activities. As has been held in *Rameshwar Lal Patwari* v. *State of Bihar*[7] :

> *"The formation of the opinion about detention rests with the Government or the officer authorised. Their satisfaction is all that the law speaks of and the courts are not constituted an Appellate Authority. Thus the sufficiency of the grounds cannot be agitated before the court. However, the detention of a person without a trial, merely on the subjective satisfaction of an authority however high, is a serious matter. It must require the closest scrutiny of the material on which the decision is formed, leaving no room for errors or at least avoidable errors. The very reason that the courts do not consider the reasonableness of the opinion formed or the sufficiency of the*

[7] AIR 1968 SC 1303

material on which it is based, indicates the need for the greatest circumspection on the part of those who wield this power over others.'

[underlining by us for emphasis]

16. If there is a consideration, then the reasonableness of the consideration could not have been scrutinised by us in judicial review, since we are not sitting in appeal and the provision for preventive detention provide for such a subjective satisfaction to be left untouched by the Courts. However, when there is no such consideration then we have to interfere.

17. *Ameena Begum* v. *State of Telangana and others*[8] held that the observations in *Rekha* v. *State of T.N.*[9]*;* that preventive detention is impermissible when the ordinary law of the land

[8] (2023) 9 SCC 587
[9] (2011) 5 SCC 244

is sufficient to deal with the situation was *per incuriam* to the Constitution Bench decision in *Haradhan Saha* v. *State of W.B.*[10], in the limited judicial review available to constitutional courts in preventive detention matters. The Courts would be incapable of interference by substituting their own reasoning to upset the subjective satisfaction arrived at by the detaining authority, especially since preventive detention law is not punitive but preventive and precautionary.

18. In *Ameena Begum*[8], this Court was concerned with the true distinction between a threat to "law and order" and acts "prejudicial to public order", which was not to be determined merely by the nature or quality of the act

[10] (1975) 3 SCC 198

complained of, but was held to lie, in the proper degree and extent of its impact on the society. It was held that there could be instances where "disturbance of public order" would not be attracted but still, would fall within the scope of maintenance of "law and order". It was held that :- *"preventive detention laws—an exceptional measure reserved for tackling emergent situations—ought not to have been invoked in this case as a tool for enforcement of "law and order" (sic para 47),* especially when the existing legal framework to maintain law and order is sufficient to address the offences under consideration.

19. Likewise, in the present case, we are not concerned as to whether the conditions imposed by the Magistrate would have taken care of the apprehension expressed by the

detaining authority; of the detenu indulging in further smuggling activities. We are more concerned with the aspect that the detaining authority did not consider the efficacy of the conditions and enter any satisfaction, however subjective it is, as to the conditions not being sufficient to restrain the detenu from indulging in such activities.

20. *Ameena Begum*[8], noticed with approval *Vijay Narain Singh v. State of Bihar* [11] and extracted paragraph 32 from the same:

> "*It is well settled 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 not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when*

[11] (1984) 3 SCC 14

> *under 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."*
>
> [*underlining by us for emphasis*]

21. The criminal prosecution launched and the preventive detention ordered are on the very same allegations of organised smuggling activities, through a network set up, revealed on successive raids carried on at various locations, on specific information received, leading to recovery of huge cache of contraband. When bail was granted by the jurisdictional Court, that too on conditions, the detaining authority ought to have examined whether they were

sufficient to curb the evil of further indulgence in identical activities; which is the very basis of the preventive detention ordered. The detention order being silent on that aspect, we interfere with the detention order only on the ground of the detaining authority having not looked into the conditions imposed by the Magistrate while granting bail for the very same offence; the allegations in which also have led to the preventive detention, assailed herein, to enter a satisfaction as to whether those conditions are sufficient or not to restrain the detenu from indulging in further like activities of smuggling.

22. We, hence, allow the appeal and set aside the order of detention. The detenu shall be released forthwith, if still in custody.

23. Pending application(s), if any, shall stand disposed of.

....., J.
[SUDHANSHU DHULIA]

....., J.
[K. VINOD CHANDRAN]

NEW DELHI;
March 06, 2025.