

Pradeep Kumar Nehra vs Union Of India & Ors. on 23 December, 2024

Author: Amit Sharma

Bench: Prathiba M. Singh, Amit Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 29th November, 2024

Pronounced on: 23rd December, 2024

W.P.(CRL) 2332/2024

SHRI PRADEEP KUMAR NEHRA

.....Pet

Through: Ms. Sangita Bhayana, Advocate
(M: 9810026768).

Versus

UNION OF INDIA & ORS.

.....Respon

Through: Mr. Anil Soni, CGSC for UOI
(M: 8285815626).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present petition has been filed by the Petitioner - Pradeep Kumar Nehra ('detenu') under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (in short 'CrPC') seeking quashing of the preventive detention order bearing F. No. PD-12002/01/2024-COFEPOSA dated 12th April, 2024 passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'COFEPOSA Act'), by the Joint Secretary (COFEPOSA) i.e., Respondent No.2, thereby ordering the detention of the Petitioner.

2. The relevant facts for the purpose of adjudication of the present petition are as under: -

i. It is alleged that the present Petitioner arrived at Jaipur on 11th January, 2024 upon travelling from Sharjah to Jaipur by Air Arabia. On the basis of suspicious behavior of the Petitioner, a personal search was conducted by Customs officers and a notice was served upon the Petitioner under Section 102 of the Customs Act, 1962 (in short, 'Customs Act'). During the said search, certain metal was recovered from the

sandals worn by the Petitioner. Upon investigation by a valuer, the said metal was found to be gold with 99.50 purity, weighing 2466.00 grams and valued at Rs. 1,57,82,400/- (Rs. One Crore Fifty- Seven Lakhs Eighty-Two Thousand Four Hundred only) as per valuer's Report No. 02/CUST/Jan/2324 dated 11th April, 2024.

ii. Thereafter statement of the Petitioner was recorded under Section 108 of the Customs Act, and he revealed that he has been involved in the business of marble and granite and that he regularly visits Sharjah and this was the first instance when he tried to smuggle gold in order to avoid customs duty.

iii. The Petitioner in his statement also disclosed that he had bought this gold from a shop named "YASS GOLD" based in Dubai. Upon further enquiry, the Petitioner revealed that he, along with one Mr. Mustafa and Mr. Vishal Sawant, who are residents of Hyderabad, were part of a smuggling syndicate and a substantial amount of foreign origin gold was smuggled by them into India.

iv. It is alleged that upon forensic examination of the electronic devices belonging to the Petitioner which were seized by Customs officers upon his arrival at the Jaipur Airport, substantial incriminating materials were found against him. It is alleged that the Petitioner, with the aid of his trusted associates is running a well-organized network and has established an efficient mechanism of smuggling, concealing, possessing, carrying and dealing with substantial quantities of foreign- origin gold in its primary form.

v. On the basis of the alleged involvement of the Petitioner in the said activities, he was arrested on 12th January, 2024 under Section 104 of the Customs Act for committing acts in contravention of Sections 132, 135(1)(a) and 135(1)(b) of the Customs Act.

vi. Thereafter, the Petitioner filed his first bail application before the learned Economic Offences Court which was rejected vide order dated 22nd January, 2024. Subsequently, the bail application filed before the learned Sessions Court, Jaipur was also rejected vide order dated 24th January, 2024. Aggrieved by the order passed by the learned Sessions Court, the Petitioner filed a bail application before the Hon'ble Rajasthan High Court, which was rejected vide order dated 09th February, 2024.

vii. Second bail application was preferred by the Petitioner before the learned Economic Offences Court and the same was rejected vide order dated 14th March, 2024. Another bail application was filed before the learned Sessions Court, Jaipur, however, he was not granted any relief by the learned Sessions Court either. Finally, second application for bail before the Hon'ble Rajasthan High Court was moved and the same was rejected vide order dated 03rd April, 2024.

viii. Based on the proposal from the Sponsoring Authority, i.e., Commissioner of Custom (Preventive), Jodhpur, the impugned detention order was passed by the detaining authority i.e., Respondent No.2 on 12th April, 2024 and it was communicated to the Petitioner on the same day by the Jail Authorities. Thereafter, the said detention order was placed before the State Advisory Board (COFEPOSA), Rajasthan High Court for consideration.

ix. It is pertinent to note that the Petitioner had filed a representation before the said Advisory Board, however, the same was rejected. Subsequently, upon submission of the report by the Advisory Board, Central Government invoked powers conferred under Section 8(f) of the COFEPOSA Act and confirmed the detention of the Petitioner on 18th June, 2024.

3. The facts with respect to the present case have been discussed in detail by the Detaining Authority/Respondent No.2 in the impugned detention order and the same are reproduced as under: -

"i. Shri Pradeep Kumar Nehra S/o Shri Harphool Singh Nehra, R/o F-71, Industrial Area, Jaipur Road, Sikar, Rajasthan having Passport No. Z5413210 and Z3079231 i.e. you arrived from Sharjah to Jaipur by Air Arabia Flight No. G-9-435 on 11.01.2024 at about 03:30 hrs. When you approached the X-ray gate, customs officers asked you whether you had any dutiable goods with you, in reply to which you denied carrying any such goods. You had filed a Nil declaration under Section 77 of the Customs Act, 1962. Based on suspicious behaviour, Customs officers decided to conduct personal search of Shri Pradeep Kumar Nehra i.e. you and served upon a Notice under Section 102 of the Customs Act, 1962. During the personal search, nothing objectionable was found/ recovered. Thereafter, the Customs officials checked the sandals of Shri Pradeep Kumar Nehra i.e. you on the x-ray machine and saw the dark black image in your two brown colour sandals which appeared heavy in weight. Both of your sandals appeared to have a paste of metal covered in transparent polythene with black coloured tapes, one each on the bottom of the sole. Thereafter, the customs officers called valuer Shri Lokesh Kumar Kasliwal to check the type of said metal, its purity, quantity and conduct its valuation. After investigation, Shri Kasliwal declared the said metal to be gold and extracted fifteen pieces of gold of 99.50 percent purity weighing 2466.00 grams valued at Rs. 1,57,82,400/- (Rs. One Crore Fifty Seven Lakhs Eighty Two Thousand Four Hundred only) as per valuer's Report No. 02/CUST/Jan/2324 dated 11.01.2024.

ii. Two mobile phones recovered from Shri Pradeep Kumar Nehra i.e. you- one iPhone 13 Pro Max and one Samsung Galaxy A20s were seized under Section 110 of the Customs Act, 1962 to get them forensically examined. Gold having 2466.00 grams of 99.50 percent purity and worth of Rs. 1,57,82,400/- smuggled by Shri Pradeep Kumar Nehra i.e. you for the purpose of evading Customs duty, which was eligible for confiscation under Section 111 of the Customs Act, 1962 was seized under Section 110(1) for the Customs Act, 1962. Both the brown coloured sandals used to conceal

the gold and black tape which were in transparent polythene were also considered liable for seizure under Section 119 of the Customs Act, 1962.

iii. Thereafter, statement of Shri Pradeep Kumar Nehra S/o Shri Harphool Singh Nehra i.e. you was recorded under Section 108 of the Customs Act, 1962. In your statement dated 11.01.2024 Shri Pradeep Kumar Nehra i.e. you stated that you have been doing marble/granite work in both Sharjah and Sikar for the last fifteen years. You have a company in Sikar i.e. M/s Shri Krishna Granite, F-71, Industrial Area, Jaipur Road, Sikar which has been closed since around ten years ago. i.e. You also have two firms in Sharjah viz. M/s India Shapes Marbles and M/s APS Sports Event Management. Income from both the firms is around ten to twenty lakhs INR monthly. You further stated that you keep visiting Sharjah and for the first time you had brought the gold hidden in sandals with the intention of not paying the customs duty. This gold which was in the form of paste metal belongs to you only. You yourself bought this gold in the form of paste metal from a shop by the name of YASS GOLD which is in Dubai. Mustafa, a 42 years old resident of Hyderabad who is involved in the work of smuggling and lives in Sharjah told you about this shop. Mustafa used to take money from Shri Pradeep Kumar Nehra i.e. you and make profit by smuggling gold and gave some part of the profit back to Shri Pradeep Kumar Nehra i.e. you. You stated that Mustafa has sent gold through Hyderabad airport in India about five times and submitted that you do not know who brought the gold to Hyderabad airport because Mustafa used to do all that work. You further told that the work of receiving gold at Hyderabad airport is done by a person namely Shri Vishal Sawant (mobile No. 7889195285) aged about 42 years whom you have never met. Shri Pradeep Kumar Nehra i.e. you told that you were coming to Sikar to attend a meeting on sports matter when Mustafa told you that the person who was supposed to carry gold to Hyderabad airport refused to take the gold at the last moment. Since you were coming to India and the gold was in paste form, at Mustafa's insistence you agreed to smuggle the gold with the intention of not paying customs duty. Therefore, on Mustafa's advice, you brought the gold in paste form hiding it in the soles of both of your sandals and was caught by the Customs officials at Jaipur International Airport. Thus, Shri Pradeep Kumar Nehra i.e. you confessed in your statement that he smuggled gold to India due to your need for money and greed.

iv. Follow up search was conducted by Customs Jaipur at the ancestral residence of Sh Pradeep Kumar Nehra S/o Sh Harphool Singh Nehra i.e. you, Village Katrathal, Distt-Sikar and M/s Shri Krishna Granite, F-71, Industrial Area, Jaipur Road, Sikar, nothing incriminating was found in the aforementioned premises.

v. In your statement dated 12.01.2024, Shri Pradeep Kumar Nehra i.e. you admitted that in the last five -six months, you have smuggled gold five times through Hyderabad airport; out of which twice it was concealed in Iron (2500 grams per iron), once as paste in shoes (1500 grams) & twice 2000 grams hidden in undergarments. Shri Mustafa asked you to get involved in gold smuggling around one and half year ago. Mustafa asked to borrow some money from Shri Pradeep Kumar Nehra i.e. you on interest. Mustafa told Shri Pradeep Kumar Nehra i.e. you that he will use this amount in smuggling of gold and will return the said amount along with interest at the end of the month to you. Shri Pradeep Kumar Nehra i.e. you agreed and Mustafa borrowed money from you and returned the same from time to time for about one year. Shri Pradeep Kumar Nehra i.e. you

admitted that you got involved in smuggling work with Mustafa around 4-5 months ago. On being asked about a contact No. in your phone pertaining to Shri Vishal Nayan Gold Hyderabad and your chats with Shri Vishal containing photographs of money transactions, currency notes and gold items, Shri Pradeep Kumar Nehra i.e. you stated that Shri Vishal helps Shri Mustafa in smuggling of gold. Slips of money transaction are related to smuggling of gold and photos of currency notes are related to hawala transactions related to smuggling of gold. Shri Vishal has sent the money for said gold through hawala at Dubai/Sharjah. You further admitted Shri Mustafa used to arrange people/carriers of gold smuggling who used to smuggle gold in various forms e.g. concealed in Iron, in paste form in shoes and sprayed as a powder in undergarments etc. Shri Vishal used to melt/extract said smuggled gold and sell it from his shop. The details of delivery of said smuggled gold was with Sh. Mustafa only. For the payment of the gold you used to contact Sh. Vishal and he sent the money through Hawala transactions. Shri Pradeep Kumar Nehra i.e. you further admitted that Sh. Mustafa used to share the passport copies of the gold carriers and Sh. Nehra i.e. you used to book/process their tickets and visa yourself the payment of which was adjusted in the profit with Sh. Mustafa. You stated that you were not aware who this gold (which was smuggled to Hyderabad) was delivered to. Upon perusal of your various chats showing methods of concealment of gold in photos/videos you stated that these methods of gold concealment for smuggling were shared with you by the employees of Yass Gold i.e. Shri Sahib, Mama, Sachin, Sabu.

vi. Shri Pradeep Kumar Nehra i.e. you was arrested on 12.01.2024 under Section 104 of the Customs Act, 1962 in contravention of section 132, 135(1) (a) & 135 (1) (b) of the Customs Act, 1962. Shri Pradeep Kumar Nehra i.e. you was produced before the Hon'ble Economic Offence Court, Jaipur on dated 13.01.2024 with request of 5 days' remand. The Hon'ble Court accorded remand of Shri Pradeep Kumar Nehra i.e. you to Customs till dated 16.01.2024.

vii. In your statement dated 13.01.2024, Shri Pradeep Kumar Nehra i.e. you stated about your various firms registered in Dubai as well as in India and your partners in these firms. On being asked about the pictures related to smuggling of gold, Shri Pradeep Kumar Nehra i.e. you again reiterated that you used to buy gold for smuggling from YASS gold in Dubai. The pictures showing methods of concealment of gold in machines like Iron, toaster, vacuum cleaner, juicer, nebuliser etc. have been sent by the employees of YASS gold. You reiterated that you have smuggled gold only 5 times to Hyderabad as mentioned by you earlier. Upon being asked about you ticket to Hyderabad dated. 11.09.2023 found in your phone, you stated that you have gone to Hyderabad for a meeting regarding purchase of granite.

viii. During statement dated 15.01.2024, Shri Pradeep Kumar Nehra i.e. you were shown various chats with photographs and voice notes including chats dated. 17.02.2023, 27.04.2023, 09.05.2023, 15.08.2023, 23.12.2023, 24.12.2023 & 25.12.2023 with Shri Vishal related to gold smuggling. Upon perusal of these, Sh. Nehra i.e. you admitted that the pictures and mentions in these voice notes are related to smuggling of gold and Shri Mustafa sent this gold from Dubai and Shri Vishal has sent the payment to Sharjah/Dubai through hawala. Shri Pradeep Kumar Nehra i.e. you also admitted that Shri Mustafa and yourself used to finance the gold smuggling and you are fully involved in smuggling of Gold. Upon being asked about any details e.g. contact number, photo etc. related to Sh. Mustafa, you expressed your inability to produce the same. You were shown a voice note recorded

by you in your chat dtd. 23.12.2023 wherein it was said "Main mera kaam bahut hi safety se karta hoon isliye mujhe involve rehna padta hai. Mere kisi bhi aadmi ko pata nahin rehta hai ki samaan kaise bhijwaya hai, kya kiya hai. Wahan pahunchne ke baad hi pata chalta hai. Passenger ko bhi pata nahin chalta hai. Isliye main apne hisaab se hi kaam karta hoon." You agreed with said statement.

ix. Shri Pradeep Kumar Nehra i.e. you were again produced before the Hon'ble Economic Offence Court, Jaipur on dated 16.01.2024 with request of 2 days' remand. The Hon'ble Court again accorded remand of Shri Pradeep Kumar Nehra i.e. you for one day to Customs till dated 17.01.2024.

x. During statement dated 17.01.2024, Shri Nehra i.e. you were shown your travel history wherein between 05.09.2023 to 29.12.2023 (i.e. approximately 3-4 months), you had travelled between India and UAE 32 times to and from various locations including Mumbai, Goa, Indore, Ahmedabad, Delhi, Jaipur. Embark and disembark locations in these trips were often different and your trips were in a very short span of time. You were shown your chat with Sh. Vishal dated 24.10.2023 wherein the details of five transactions in August, 2023 were there which showed 2995.560 g, 3000.820 g, 2995.450 g, 2995.350 g, 1996.670g which you admitted was related to gold smuggling. You were also shown a chat dated 01.05.23 which you agreed indicated smuggling of 2895.84 g gold which you had sent to Hyderabad.

xi. Shri Pradeep Kumar Nehra i.e. you were again produced before the Hon'ble Economic offence Court on dated 17.01.2024 and the Hon'ble Court ordered you to judicial custody.

xii. Retractions to the statements were filed by Pradeep Kumar Nehra i.e. you on 18.01.2024.

xiii. DRI Hyderabad Zonal Unit conducted the follow up action at the premises of Shri Vishal Abaso Sawant, House No. 21-5- 198, Kali Kaman, Charminar, Hyderabad Jubilee Charminar, Hyderabad, Telangana. Follow up search was conducted, however, nothing incriminating was found in the aforementioned premises.

xiv. Statement of Shri Vishal Abaso Sawant was recorded by DRI Hyderabad on 20.01.2024, whereunder he stated that he started work at the firm Nayan Gold, located at 22-5-198, Kali Kaman, Charminar, Hyderabad. The firm is involved in testing of gold, remelting of gold, exchange of gold and silver and bullion trading. Shri Vinod Panwar is the proprietor of Nayan Gold. On being asked about Shri Pradeep Kumar Nehra i.e. you, he stated that Shri Pradeep Kumar Nehra i.e. you were from Jaipur and approached them at Nayan Gold for selling of remelted gold. Shri Pradeep Kumar Nehra i.e. you have traded with them around 12-15 times and around 4 to 5 times you yourself came for selling gold. He stated that he does not know anyone named Mustafa. He stated that he was instructed by Shri Pradeep Kumar Nehra i.e. you to hand over the cash from the sale of gold, to the person who shows a currency note bearing certain serial number. The photo of the currency note was sent to him by Shri Pradeep Kumar Nehra i.e. you. He used to verify the serial number on the note and hand over the cash to the person carrying the currency note. He did not know what happened to that cash later and where it goes. Shri Khaleel (an associate of Sh. Nehra) used to handle the melting/remelting of gold and used to bring it to him. He used to weigh the gold and

communicate the weight to Shri Pradeep Kumar Nehra i.e. you.

xv. Bail application of Pradeep Kumar Nehra i.e.. you were rejected by the Hon'ble Economic Offence Court vide order dated 22.01.2024 and subsequently bail application also rejected by the Hon'ble ADJ III Court vide order dated 24.01.2024.

xvi. Statement of Shri Vishal Abaso Sawant was recorded on 06.02.2024, wherein he, inter-alia, stated that he resides in Hyderabad since 2006 and indulged in melting, selling, testing and exchange of gold and selling of gold Jewellery at his shop Nayan Gold. Owner of Nayan gold is Shri Vinod Panwar and he comes to shop once in 15-20 days. Shri Vishal Abaso Sawant looks after all the work of the shop. On being shown the picture of Shri Pradeep Kumar Nehra i.e. you, he identified the person in picture as Shri Pradeep Kumar Nehra i.e. you and told that Sh. Nehra i.e. you came to his shop himself 5-6 times in the years 2022 and 2023 and put his dated signature on pictures. He admitted that in last two years, Shri Pradeep Kumar Nehra i.e. you have sent the gold around 25-30 times to his shop through you or some person sent by you and the payment of the gold has been sent by him through hawala to Sharjah.

xvi. Statement of Shri Vishal Abaso Sawant was recorded on 07.02.2024, wherein he, inter-alia, stated that various audio notes retrieved from the iphone of Shri Pardeep Kumar Nehra i.e. you have been heard by him and confirmed that these notes are related to smuggling of gold and payment of gold through hawala. Various slips of due amount have been interchanged between Shri Vishal and Shri Pradeep Kumar Nehra i.e. you and Shri Vishal has confirmed that these all are related to smuggling of gold and hawala. He admitted that Shri Pradeep Kumar Nehra i.e. you have sent 25-26 kilograms of smuggled gold at Hyderabad during the months of November & December 2023. There are various transaction of gold and money in the chat of Shri Vishal Abaso Sawant and Shri Pradeep Kumar Nehra i.e. you which he admitted that the said transaction were related to smuggling of gold.

xvii. Statement of Shri Vishal Abaso Sawant was recorded on 08.02.2024 wherein he, inter-alia, stated that he has deleted various pictures of gold and transaction/accounts which were related to smuggling of gold and its payment which has been retrieved during the forensic of his phone. In the said statement it has been stated that Shri Jitu Resident of Sangli, Maharastra used to collect money on behalf of Shri Pradeep Kumar Nehra i.e. you and then send the same to Shri Pradeep Kumar Nehra through Hawala i.e. you.

xviii. Statement of Shri Vishal Abaso Sawant recorded on 09.02.2024, wherein he, inter-alia, stated that Shri Khaleel alias Murtaza Ali used to bring the gold smuggled by Shri Pradeep Kumar Nehra i.e. you to their shop Nayan Gold.

xix. Aggrieved by the order of Hon'ble ADJ Court, Pradeep Kumar Nehra i.e. you filed bail application before the Hon'ble Rajasthan High Court, bail application of Pradeep Kumar Nehra i.e. you, was rejected by the Hon'ble Rajasthan High Court order dated 09.02.2024.

xx. In his statement dated 22.02.2024, Shri Vishal Abaso Sawant confirmed that Shri Pradeep Kumar Nehra i.e. you used to purchase gold from YASS gold in which Shri Rohan/Rohit Resident of

Sangli, Maharashtra is working. Further, he stated that Shri Khaleel alias Murtaza Ali resident of Hyderabad, introduced Shri Pradeep Kumar Nehra i.e.. you to him about three years ago. Shri Vishal Abaso Sawant also stated that Shri Pradeep Kumar Nehra i.e.. you gave his mobile number to Shri Sachin resident of Sangli, Maharashtra who himself is working in YASS gold, Dubai from where Shri Pradeep Kumar Nehra i.e. you used to purchase gold for smuggling. Shri Vishal stated that Sachin used to take money in respect of smuggled gold from him in India and send it to Shri Pradeep Kumar Nehra i.e.. you in Dubai by hawala.

xxi. In his statement dated 23.02.2024, Shri Vishal Abaso Sawant confirmed that he had sent the amount of Rs. 1,99,75,340/-, Rs. 1,50,00,000/- and Rs. 24,00,000/- to Shri Pradeep Kumar Nehra i.e. you through Hawala and the said payments were related to smuggling of Gold. There is a video of opening an Iron, which Shri Vishal confirmed that the gold has been sent by Shri Pradeep Kumar Nehra i.e. you concealed in that iron xxii. In his statement dated 24.02.2024, Shri Vishal Abaso Sawant confirmed that Shri Pradeep Kumar Nehra i.e.. you has smuggled around 25-26 Kilograms of Gold during the month of November and December 2023 and handed over to him in Hyderabad.

xxiii. Second bail application filed by Shri Pradeep Kumar Nehra ie, you before the Hon'ble Economic Offences court was rejected by Hon'ble Court dated 14.03.2024. Another Second Bail application was filed by Shri Pradeep Kumar Nehra i.e. you before Honourable District and Sessions Court, Jaipur District. Honourable ADJ III, District and Sessions Court, Jaipur District denied bail on 18.03.2024. Aggrieved by the order of Hon'ble ADJ Court, Shri Pradeep Kumar Nehra i.e. you have filed second bail application before the Hon'ble Rajasthan High Court and bail application was rejected by the Hon'ble Rajasthan High Court vide order dated 03.04.2024."

(emphasis supplied) SUBMISSIONS ON BEHALF OF THE PETITIONER

4. Learned Counsel for the Petitioner submitted that the latter is already in custody in connection with alleged recovery of gold and the prosecution in respect of the said case is pending before the learned Economic Offences Court, Jaipur, and therefore, there was no need to detain him under the COFEPOSA Act. Further, there was no imminent possibility of the release of the Petitioner as the successive bail applications filed by him were rejected six times by three different forums.

5. It was further submitted that the impugned detention order was passed after a substantial delay as the alleged incident took place on 11th January, 2024 and the detention order was not passed until 12 th April, 2024. Thus, the link between the prejudicial activity alleged to be committed by the Petitioner and the activities sought to be curbed by the impugned detention order stood snapped.

6. Learned Counsel for the Petitioner has assailed the impugned detention order primarily on two grounds. Firstly, there has been a substantial delay in the consideration of representation of the Petitioner signed on 06th July, 2024 forwarded through the Jail Superintendent, Jaipur Jail/Respondent No.3 to the Detaining Authority, i.e., Respondent No.2 on 09th July, 2024 which was received by the latter on 17th July, 2024 renders the detention order illegal as the same is violative of Article 22(5) of the Constitution of India. It is further submitted that the Hon'ble Supreme Court has also taken the issue of delay in forwarding the representation by the Jail

Superintendent as being a serious violation of the life and liberty of a detenu. Reliance was placed upon *Jaseela Shaji v. the Union of India & Ors.*¹, to argue that the entire detention order itself is liable to (2024) 9 SCC 53: 2024 INSC 683 be quashed due to the delay in consideration of the representation.

7. Learned Counsel for the Petitioner submitted that the entire month of July was consumed in merely forwarding the representation and receipt of comments. Reliance was placed upon the decision of the Hon'ble Supreme Court in *K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India*², to contend that even after confirmation of the detention order, a representation may be made by the detenu.

8. Reliance was placed upon the following decisions by the learned Counsel for the Petitioner: -

(i) *Aslam Ahmed Zaire Ahmed Shaik v. Union of India and Ors.*³;

(ii) *Rama Dhondur Borade v. V.K. Saraf, Commissioner of Police & Ors.*⁴;

(iii) *Rajammal v. State of Tamil Nadu & Anr.*⁵;

(iv) *Rattan Singh and Another v. State of Punjab and Others*⁶;

to argue that the delay in passing the detention order ought to be (1991) 1 SCC 476: 1991 SCC (Cri) 613 (1989) 3 SCC 277: 1989 SCC OnLine SC 33 (1989) 3 SCC 173: 1989 SCC OnLine SC 205 (1999) 1 SCC 417: 1998 SCC OnLine SC 1023 explained by the Sponsoring Authority almost on a day-to-day basis, in order to justify the passing of the detention order. It was further submitted that the Hon'ble Supreme Court has repeatedly held that treating the representation in a callous or a negligent manner would render the detention order illegal.

9. Secondly, it is submitted that the repeated rejection of the bail applications of the Petitioner, ought to have been sufficient for the Central Government not to confirm the impugned detention order as the sole ground of propensity to repeat the offence is rendered improbable. In addition, it was argued that the bail applications of the Petitioner had been rejected by three judicial forums viz, the learned Trial Court, learned Sessions Court and the Rajasthan High Court. Though these facts have been noted in the impugned Detention Order, no justifiable cause has been provided as to how the propensity to commit illegal acts would exist when, admittedly, the Petitioner is already under detention/judicial custody. Thus, it is submitted that the non-application of mind while passing the impugned detention order would also render it liable to be quashed. It was further argued that the safeguards for detention cannot be fulfilled in this manner and the impugned detention order is, thus, not sustainable. Reliance is placed upon a judgment passed by this Court in *Rizauddin @ Riyajuddin @ Pintu vs Union of India & Ors.*⁷.

2024: DHC: 6831-DB SUBMISSIONS ON BEHALF OF THE RESPONDENTS

10. Learned Standing Counsel on behalf of the Respondent Nos. 1 and 2 submitted that all the vital documents have been placed by the Sponsoring Authority before the Detaining Authority/Respondent No. 2 and the impugned detention order has been passed with a view to prevent the Petitioner from smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future. It is further submitted that this is a case where the Petitioner has repeatedly been indulged in illegal and unlawful activities under the COFEPOSA Act. The fact that he had adeptly hidden a substantial amount of gold in his sandals, in itself, makes it clear that the entire conduct of the Petitioner was deliberate and with an intention to smuggle gold. It is argued that all detention cases cannot be considered in a straitjacketed manner, in certain cases where there is a deliberate violation of law, the safeguards cannot be applied with the same force.

11. Learned Standing Counsel for the Respondent Nos. 1 and 2 submitted that the pendency of prosecution is not a bar to preventive detention. Reliance was placed upon the judgment of the Hon'ble Supreme Court in Haradhan Saha v. State of West Bengal and Ors.⁸

12. It was argued that the delay in considering the representation made by the Petitioner is explainable as the same was forwarded by (1975) 3 SCC 198.

the Jail Authorities on 09th July, 2024 and it was received by Respondent No. 2 on 19th July, 2024. Comments of the Sponsoring Authority were called for on the same day by Respondent No. 2 and immediately upon receiving the comments from the Sponsoring Authority on 31st July, 2024, the representation made by the Petitioner was considered and rejected on the very next day, i.e., 01st August, 2024 by Respondent No.2. Hence, it can be said that the matter was considered in an expeditious manner. Insofar as the delay of forwarding the representation by the Jail Authorities is concerned, it is argued that it is for the Jail Superintendent/Respondent No.3 to explain as to why the representation was forwarded in a delayed manner.

ANALYSIS AND FINDINGS

13. Heard learned Counsels for the parties and perused the records.

Non-application of mind by the Detaining Authority

14. For the purposes of the present petition, the following dates are relevant: -

12th January, 2024 The Petitioner was arrested 22nd January, 2024 First bail application before the learned Economic Offence Court was rejected.

24th January, 2024 First application before the learned Sessions Court was rejected.

09th February 2024 Application for bail was dismissed by the Hon'ble Rajasthan High Court.

14th March, 2024 Second bail application was rejected by the learned Economic Offence Court 18th March, 2024 Second bail application rejected by the learned Session Court 03rd April, 2024 Second application for bail rejected by the Hon'ble Rajasthan High Court 03rd April, 2024 Proposal sent by Sponsoring Authority 05th April, 2024 The proposal was received by the Office of Detaining Authority 08th April, 2024 The said Proposal placed before the Central Screening Committee for consideration 12th April, 2024 Impugned order of detention was passed 17th April, 2024 Order of detention was executed on the Petitioner 1st April, 2024 Case referred to the Advisory Board, Hon'ble Rajasthan High Court 22nd May, 2024 The Advisory Board, Hon'ble Rajasthan High Court, after hearing the detenue/Petitioner, recommended the confirmation of the detention order 18th June, 2024 Confirmation order passed by the competent authority

15. The learned Counsel for the Petitioner has submitted that since successive bail applications of the Petitioner have been rejected by three forums, i.e., learned Trial Court, learned Sessions Court and the Hon'ble High Court, therefore, there was no justifiable cause for passing the impugned order of detention. It was submitted that there was no live link, at the time passing of the impugned detention order, which would have shown the propensity of the Petitioner for the future commission of the prejudicial activities. Reliance is placed on the decision of this Court in *Rizauddin @ Riyajuddin @ Riyajudden @ Pintu v. Union of India & Ors* (supra).

16. The competent authority in the impugned detention order has noted the fact that the successive bail applications of the Petitioner had been rejected by the concerned Courts including the Hon'ble Rajasthan High Court as on 03.04.2024 in the following manner: -

"8. I am aware that you i.e. Shri Pradeep Kumar Nehra filed retractions dated 18.01.2024. Similar allegations were also raised by you in your bail applications filed in Economic Offence wing/ADJ Court/Hon'ble High Court, Rajasthan. These allegations were strongly denied in reply filed by Sponsoring Authority i.e. Customs (Preventive), Jodhpur against these bail applications. Your bail applications were rejected by Hon'ble Courts. I am satisfied that retractions of statement filed by you are nothing but an afterthought and devoid of merits.

9. I am aware that you i.e. Shri Pradeep Kumar Nehra are in judicial custody at present. However, there is a possibility of your release from judicial custody and if you are released on bail, you are likely to continue to indulge in the prejudicial activities 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 gold in future.

10. I am aware that prosecution under Section 135 of the Customs Act, 1962 has been launched against you i.e. Shri Pradeep Kumar Nehra and adjudication proceedings are also likely to be initiated soon, which are however, punitive in nature and independent of the preventive detention provided under the COFEPOSA Act, 1974. However, considering Shri Pradeep Kumar Nehra's i.e. your high propensity to indulge in the prejudicial activities, I am satisfied that in the meantime you should be immobilised by detention under the COFEPOSA Act, 1974 with a view to prevent you from smuggling goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future."

(emphasis supplied) The above observation made by the detaining authority to the extent that the Petitioner was likely to be released from judicial custody, is without any material. This is in view of the fact that the bail applications of the Petitioner had already been dismissed twice by the Hon'ble Rajasthan High Court by that time, and admittedly, no other application seeking bail was pending at that time when the impugned order was passed.

17. The Hon'ble Supreme Court in Binod Singh v. District Magistrate, Dhanbad⁹, while setting aside the detention order against the Petitioner therein, who was already in jail at the time of service of the detention order, has observed and held as under: -

"7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great (1986) 4 SCC 416: 1986 SCC OnLine SC 335 deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence.

If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. In the affidavits on behalf of the detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody. Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration.

8. It may be mentioned that in the petition it is nowhere stated that the detenu has since been released or that the prospect of his imminent release was properly and with seriousness considered by the detaining authority."

18. The Hon'ble Supreme Court in N. Meera Rani v. Government of Tamil Nadu and Another¹⁰, has observed and held as under: -

"11. The contents of the detention order and its accompanying annexure clearly show that the detaining authority was aware and conscious of the fact that the detenu was already in custody in connection with the Bank dacoity at the time of making the detention order. The fact that the detenu's application for grant of bail in the dacoity case had been rejected on 22-8-1988 and he was remanded to custody for the offence of bank dacoity punishable under Section 397 IPC is also evident from the record. The detention order came to be made on 7-9-1988 on the above grounds in these circumstances. In the detention order the detaining authority recorded its satisfaction that the detenu's preventive detention was necessary to prevent him from indulging in activities prejudicial to maintenance of public order in which he would indulge if he was allowed to remain at large. The above quoted paras 18 and 19 of the Annexure to the detention order clearly disclose the factual position. However, it may be pointed out that the detention order read along with its annexure nowhere indicates that the detaining authority apprehended the likelihood of the detenu being released on bail in the dacoity case and, therefore, considered the detention order necessary. On the contrary, its contents, particularly those of the above quoted para 18 clearly mention that the detenu had been remanded to custody for being proceeded against in due course and even though his name was not mentioned in the FIR as one of the dacoits who participated in the commission of the armed Bank dacoity yet the documents clearly revealed that the detenu was an active participant in the conspiracy to loot the bank in furtherance of which the dacoity was committed; and that considerable booty of that crime including weapons, bombs and hand grenades were recovered from his possession pursuant to the detenu's confession made after his arrest. These averments in the detention order indicate the satisfaction of the detaining authority that in its view there was ample material to prove the detenu's active participation in the crime and sharing the booty for which offence he had already been taken into custody. This view of the detaining authority negatives the impression of likelihood of detenu being released on bail.

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21. A review of the above decisions reaffirms the position which was settled by the decision of a Constitution Bench in Rameshwar Shaw case [AIR 1964 SC 334 : (1964) 4 SCR 921 : (1964) 1 Cri LJ 257] . The conclusion about validity of the detention order in each case was reached on the facts of the particular case and the observations made in each of them have to be read in the context in which they were made. None of the observations made in any subsequent case can be construed at variance with

the principle indicated in Rameshwar Shaw case [AIR 1964 SC 334 : (1964) 4 SCR 921 : (1964) 1 Cri LJ 257] for the obvious reason that all subsequent decisions were by Benches comprising of lesser number of Judges. We have dealt with this matter at some length because an attempt has been made for some time to construe some of the recent decisions as modifying the principle enunciated by the Constitution Bench in Rameshwar Shaw case [AIR 1964 SC 334 : (1964) 4 SCR 921 : (1964) 1 Cri LJ 257] .

22. We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc. Ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us, to be the correct legal position.

23. Applying the above settled principle to the facts of the present case we have no doubt that the detention order, in the present case, must be quashed for this reason alone. The detention order read with its annexure indicates the detaining authority's awareness of the fact of detenu's jail custody at the time of the making of the detention order. However, there is no indication therein that the detaining authority considered it likely that the detenu could be released on bail. In fact, the contents of the order, particularly, the above quoted para 18 show the satisfaction of the detaining authority that there was ample material to prove the detenu's complicity in the Bank dacoity including sharing of the booty in spite of absence of his name in the FIR as one of the dacoits. On these facts, the order of detention passed in the present case on 7-9-1988 and its confirmation by the State Government on 25-10-1988 is clearly invalid since the same was made when the detenu was already in jail custody for the offence of bank dacoity with no prospect of his release. It does not satisfy the test indicated by the Constitution Bench in Rameshwar Shaw case [AIR 1964 SC 334 : (1964) 4 SCR 921 : (1964) 1 Cri LJ 257] . We hold the detention order to be invalid for this reason alone and express no opinion on merits about the grounds of detention."

(emphasis supplied)

19. In the present case, apart from the impugned detention order, even in the counter affidavit dated 17th September, 2024 filed on behalf of the Respondent Nos. 1 and 2, it has not been demonstrated that there was a possibility of the Petitioner being released from the judicial custody to justify the impugned order of detention.

20. As already noted above, the proposal of the Petitioner's detention was moved on 03rd April, 2024 when his second application for bail was rejected by the Hon'ble Rajasthan High Court. In these circumstances, it was incumbent upon the detaining authority to demonstrate "subjective satisfaction" with regard to the possibility of Petitioner being likely to be released on bail. A mere statement to that effect cannot satisfy the test as laid down in the judicial precedents cited above. The allegations against the Petitioner are no doubt serious, for which he is facing prosecution. However, the fact that his repetitive efforts to secure bail had been unsuccessful till the High Court demonstrates that he was not likely to be released on bail when the impugned order of detention was being passed.

21. The Courts would normally hesitate to substitute the "subjective satisfaction" with its own opinion and interfere with the order of detention, however, such satisfaction should be after proper application of mind. In case, the Court finds the same being passed on account of non-application of mind, then the same can be set aside by this Court while exercising its power under Article 226 of the Constitution of India.

22. The Hon'ble Supreme Court in *Ameena Begum v. State of Telangana and Others*¹¹ while referring to various judgments with respect to judicial reviewability of a detention order, has observed and held as under: -

"15. In *Rameshwar Shaw v. District Magistrate, Burdwan* [*Rameshwar Shaw v. District Magistrate, Burdwan*, 1963 SCC OnLine SC 33 : AIR 1964 SC 334], a Constitution Bench speaking through Hon'ble P.B. Gajendragadkar, J. (as the Chief Justice then was) in course of interdicting an order of detention passed under Section 3 of the Detention Act held as follows : (AIR p. 337, paras 7-8) "7. There is also no doubt that if any of the grounds furnished to the detenu are found to be irrelevant while considering the application of clauses (i) to (iii) of Section 3(1)(a) and in that sense are foreign to the Act, the satisfaction of the detaining (2023) 9 SCC 587 authority on which the order of detention is based is open to challenge and the detention order liable to be quashed.

Similarly, if some of the ground supplied to the detenu are so vague that they would virtually deprive the detenu of his statutory right of making a representation, that again may introduce a serious infirmity in the order of his detention. If, however, the grounds on which the order of detention proceeds are relevant and germane to the matters which fall to be considered under Section 3(1)(a), it would not be open to the detenu to challenge the order of detention by arguing that the satisfaction of the detaining authority is not reasonably based on any of the said grounds.

8. It is, however, necessary to emphasise in this connection that though the satisfaction of the detaining authority contemplated by Section 3(1)(a) is the subjective satisfaction of the said authority, cases may arise where the detenu may challenge the validity of his detention on the ground of mala fides and in support of the said plea urge that along with other facts which show mala fides, the Court may also consider his grievance that the grounds served on him cannot possibly or rationally support the conclusion drawn against him by the detaining authority. It is only

in this incidental manner and in support of the plea of mala fides that this question can become justiciable; otherwise the reasonableness or propriety of the said satisfaction contemplated by Section 3(1)(a) cannot be questioned before the Courts."

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22. On a conspectus of the decisions referred to above and other decisions on preventive detention, we may observe here that the argument commonly advanced on behalf of detaining authorities in the early days of the Constitution was that the Court's enquiry ought to be confined to whether there is an order of detention or not and the moment such an order, good on its face, is produced, all enquiry into good faith, sufficiency of the reasons or the legality or illegality of the action comes to an end. However, with passage of time, and expansion and development of law, it is no longer the law that a preventive detention action, howsoever lawful it might appear on its face, cannot be invalidated by the constitutional courts. This is so, as at present, there is no administrative order affecting rights of the subjects that can legitimately claim to be impregably guarded by a protective shield, which judicial scrutiny cannot penetrate.

23. Apart from the aforesaid decisions, multiple decisions have been rendered by this Court over the years which provide suitable guidance to us to complete the present exercise; however, we wish to conclude this discussion by referring to one decision of this Court delivered [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] little in excess of a decade back by a Bench of 3 Judges.

24. In Rekha v. State of T.N. [Rekha v. State of T.N., (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596] , this Court observed that :

(SCC pp. 253-55, paras 21 & 29) "21. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of one year (or any other period) is a punishment of one year's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive?

* * *

29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the Rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal." [Ed. : It would appear that this entire extract from paras 21 and 29 of Rekha, (2011) 5 SCC 244 : (2011) 2 SCC (Cri) 596, and in particular the observation in para 29, that preventive

detention is not permissible when the ordinary law of the land can deal with the situation, is per incuriam paras 19 and 32 to 34 of the Constitution Bench in Haradhan Saha v. State of W.B., (1975) 3 SCC 198 : 1974 SCC (Cri) 816, as held para 26 of the present judgment herein below. Paras 19 and 32 to 34 of Haradhan Saha have been set out in the Headnote at SCC pp. 589-90.] (emphasis in original)

25. There could be little doubt with the thought process that although the executive would pass an order under the preventive detention laws as a preventive or a precautionary measure, its effect viewed strictly from the standpoint of the detenu is simply and plainly punitive. Significantly, an order of detention is not relatable to an alleged commission of offence which a court is seized of and, thus, the conduct of the accused complained of, is yet to be found blameworthy; on the contrary, since it relates to an anticipated offence based on past conduct, the detenu could well feel that he is at the receiving end of a subjective satisfaction of the executive despite he not being proved to be on the wrong side of the law on any previous occasion. If someone loses his liberty and lands up in prison not having a semblance of a chance to resist or protest, the very circumstance of being put behind bars for such period as specified in the order of detention based on an anticipation that an offence is likely to be committed by him seems to be an aspect which does not sync with the norms and ethos of our very own Constitution and the decisions of this Court in which the concept of "life" has been explained in such a manner that "life" has been infused in the letters of Article 21 (see Common Cause v. Union of India [Common Cause v. Union of India, (1999) 6 SCC 667 : 1999 SCC (Cri) 1196]). Nonetheless, so long clause (3) of Article 22 of the Constitution itself authorises detention as a preventive measure, there can be no two opinions that none can take exception to such a measure being adopted and it is only a limited judicial review by the constitutional courts that can be urged by an aggrieved detenu wherefor too, in examining challenges to orders of preventive detention, the Courts would be loath to interfere with or substitute their own reasoning for the subjective satisfaction arrived at by the detaining authority. Since the object of a preventive detention law is not punitive but preventive and precautionary, ordinarily it is best left to the discretion of the detaining authority."

(underline supplied)

23. In view of the above-said reasons, this Court is of the considered opinion that the impugned order of detention was passed mechanically without any due application of mind and is liable to be set aside. Accordingly, the present Petition is partly allowed and the impugned order of detention dated 12th April, 2024 and confirmation order dated 18th June 2024 are set aside.

24. In view of the aforesaid findings, this Court need not examine the ground of delay which had allegedly occurred in placing and considering the representation moved by the Petitioner on 06 th July 2024.

25. The Present Petition stands disposed of along with all pending applications.

26. Needless to state that observations made herein are only with respect to the disposal of the present Petition and the same will not have any bearing in respect of the pending trial or

prosecution under any other law against the Petitioner.

27. Judgment be uploaded on the website of this Court forthwith.

AMIT SHARMA, J.

PRATHIBA M. SINGH, J.

DECEMBER 23, 2024/nk