Adarsh Pal Singh vs Union Of India & Anr. on 21 August, 2014

Author: Vipin Sanghi

Bench: S. Ravindra Bhat, Vipin Sanghi

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*     IN THE HIGH COURT OF DELHI AT NEW DELHI

                Judgment reserved on:        05.08.2014

%               Judgment delivered on:       21.08.2014

+     W.P.(CRL) 1208/2013 and Crl. M.A. No.11152/2013
      ADARSH PAL SINGH                                  ..... Petitioner
                  Through:            Mr. Sunil Dalal, Mr. Himanshu
                                      Agarwal & Ms. Surabhi Sharma,
                                      Advocates.

                          versus

      UNION OF INDIA & ANR                               ..... Respondents
                   Through:           Mr. Anil Soni, CGSC along with
                                      Mr.Naginder Benipal & Ms. Sakshi
                                      Aggarwal, Advocates.

      CORAM:
      HON'BLE MR. JUSTICE S. RAVINDRA BHAT
      HON'BLE MR. JUSTICE VIPIN SANGHI

                              JUDGMENT
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VIPIN SANGHI, J.

1. The petitioner has preferred the present writ petition under Article 226 of the Constitution of India to seek a writ of Habeaus Corpus and Certiorari, for his release from detention and to seek the quashing of the detention order dated 12.12.2012 passed under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) by the Secretary to the Government of India, and the confirming order dated 05.03.2013 passed on the advice of the Advisory Board.

2. We may notice that the period of detention has expired on 12.12.2013. Consequently, the relief of Habeaus Corpus sought by the petitioner to seek his release from detention has become infructuous. However, the petitioner has pursued the petition to avoid other adverse consequences arising from the impugned detention order.

3. The petitioner was preventively detained under Section 3 (1) of the COFEPOSA Act. The order of detention dated 12.12.2012 stated that the detaining authority is satisfied that the petitioner be

detained "with a view to prevent him from engaging in smuggling, transporting, concealing and keeping the smuggled goods in future ....".

4. The case of the petitioner is that he came from Bangkok on 20.05.2012, when he checked in hotel "My Inn" at 904, Chandiwali, Main Bazaar, Pahar Ganj, Delhi. The petitioner states that on the same day, some persons - identifying themselves as Directorate of Revenue Intelligence (DRI) Officers, came to the petitioner's room and alleged that he is carrying Fake Indian Currency Notes (FICN). The petitioner was arrested upon a case being registered against him under the Customs Act, 1962. On information from the DRI, the Central Bureau of Investigation (CBI) also registered First Information Report (FIR) under Sections 489B and 489C of Indian Penal Code (IPC) against the petitioner.

5. On 29.06.2012, the petitioner moved an application for grant of bail, which was dismissed. On 22.09.2012, another bail application of the petitioner was dismissed. The petitioner states that with inordinate delay of seven months from the date of petitioner's arrest, the respondent No.1, i.e. the Union of India (UOI) passed the detention order on 12.12.2012, which was served on the petitioner, while in custody. The petitioner's representation before the Advisory Board was rejected, whereupon the order of detention was confirmed on 05.03.2013.

6. The Grounds of Detention (GoD), which accompanied the detention order recite that specific information was received by the DRI to the effect that the petitioner would arrive from Bangkok on 20.05.2012 and would stay at Room No.105 at Hotel "My Inn", and that the petitioner would be carrying FICN on his person or in his baggage. Import of FICN is absolutely prohibited under the Customs Act and is liable for confiscation under Section 111 of the Customs Act. Consequently, officers of the DRI reached hotel "My Inn" on 20.05.2012 at 1900 hrs. and in the presence of witnesses searched, inter alia, the petitioner's baggage. In one of the belongings of the petitioner, i.e. a cardboard package having printed mark Sony Bravia Model BX 35 32 80.0cm, one Sony LCD TV was found. The said Sony LCD TV was opened from the back, whereupon Indian Currency Notes of Rs.500 denomination, suspected to be fake, were found concealed below carbon paper. On counting, a total 3183 Indian Currency Notes of Rs.500 denomination were recovered, which was detailed in a Panchnama dated 20/ 21.05.2012. On initial examination, the said Currency Notes did not appear to be genuine. On enquiry, the petitioner informed that one Shera @ Bunty of Bangkok had requested him to take the TV to India for delivery to his (Shera @ Bunty's) brother-in-law named, Nawab, at Delhi and the same was handed over to the petitioner on 20.05.2012 at Bangkok by one Aslam at the behest of Shera @ Bunty, for which a payment of Rs.12,000/-

was to be made to the petitioner by Nawab. The FICN and the box containing the Sony LCD TV were seized by the DRI officers under the provisions of the Customs Act, 1962.

7. The GoD further narrate that during Panchnama proceedings, telephone calls were received through the reception of the hotel, which were answered by the petitioner. The petitioner informed that they were calls from Nawab, who informed that he would collect the TV within one or two hours. However, Nawab did not turn up at the spot during the Panchnama proceedings.

8. The GoD further states that the petitioner was served with summons dated 21.05.2012 under Section 108 of the Customs Act, 1962 for his appearance before the Senior Intelligence Officer, DRI on 21.05.2012 at 06:30 a.m. The petitioner assured that he shall appear and make his voluntary statement at 11:00 a.m. on 21.05.2012. The GoD states that the petitioner accordingly made his voluntary statement on 21.05.2012 admitting recovery and seizure of the said FICN having a total face value of Rs.15,92,500/-, which had been concealed in the TV brought and carried by the petitioner from Bangkok to India by Flight No.AI-333 dated 20.05.2012.

9. The GoD record that on 28.05.2012, a letter was sent to the General Manager, Currency Note Press (CNP), Nashik, Maharashtra informing about the seizure of FICN in question and seeking the convenient date and time for presenting the seized notes for verification. The seized notes were required to be produced for verification in the week commencing 02.07.2012. They were taken for verification on 03.07.2012 and 05.07.2012. The CNP opined that the seized notes were counterfeit notes.

10. The GoD record that the petitioner was placed under arrest under the provisions of Section 104 of the Customs Act, 1962 on 21.05.2012 at 20:00 hrs. vide Arrest Memo dated 21.05.2012, whereafter the petitioner was offered bail vide order dated 21.05.2012, subject to his furnishing a personal bond in the sum of Rs.2,00,000/- with two sureties of the like amount. However, the petitioner could not furnish the surety bond. His acquaintances/ relatives did not come forward to furnish the bail bond.

11. Once again, the petitioner was granted bail vide order dated 22.05.2012 passed by the learned ACMM. However, the sureties who furnished the surety did not appear before the Court and consequently, the surety/ personal bond was dismissed by the learned ACMM, Patiala House Courts, New Delhi on 28.05.2012. The Judicial Custody (JC) of the petitioner was extended from time to time from 24.05.2012 up to 17.12.2012.

12. Meanwhile, a reference was made to the CBI vide DRI letter dated 21.05.2012 regarding seizure of the FICN in question. The CBI lodged FIR No.RC 220 2012 E 0014 EOU-VI, EO-II dated 22.05.2012 under Section 120-B read with Sections 489B & 489C of the IPC against the petitioner. The learned ACMM permitted interrogation of the petitioner by the CBI, which took place on 24.05.2012. Thereafter, CBI arrested the petitioner and sought five-day police custody remand, which was granted by the learned Duty MM, North District, Tis Hazari Courts, Delhi vide order dated 24.05.2012. The remand was extended from time to time up to 21.08.2012. The CBI filed a chargesheet in the Court on 21.08.2012.

13. Meanwhile, the petitioner submitted an application on 24.05.2012 before the learned ACMM, Tis Hazari Courts, Delhi in the CBI case alleging that the petitioner had been forcibly taken to the office of the DRI without being served with any summons, where the petitioner was mercilessly beaten and his statement was recorded under duress, threat and coercion, under Section 108 of the Customs Act, 1962. The petitioner, therefore, retracted from his said statement. The petitioner claimed that he had been falsely implicated in the case.

14. The GoD further record that on 22.06.2012, the petitioner submitted a bail application, once again stating that his statement under Section 108 of the Customs Act was not voluntarily made. The said bail application was dismissed on 29.06.2012, whereafter the chargesheet came to be filed on 21.08.2012. The petitioner moved another bail application on 14.09.2012. However, the same was rejected on 22.09.2012. The GoD records that thereafter the JC of the petitioner had been extended from time to time.

15. In the aforesaid background, learned counsel for the petitioner has made submissions on the aspect of delay. The first submission of learned counsel for the petitioner is that there was immense delay of seven months in passing of the detention order. He submits that the petitioner was first apprehended, allegedly carrying FICN on 20.05.2012. According to the respondent, the CNP opined with regard to the FICN being counterfeit notes on 05.07.2012. However, the detention order was passed only on 12.12.2012, i.e. after a delay of nearly seven months from the date when the petitioner was first apprehended, and over five months from the date when the aforesaid report with regard to the FICN was received. Learned counsel submits that on account of the said delay, the live link between the alleged occurrence, namely the seizure of FICN and the object of detention stood snapped.

16. The second submission of learned counsel for the petitioner is that at the time when the detention order was passed, the petitioner was already in custody, as the petitioner had been denied bail twice over in the CBI case aforesaid. Bail was firstly rejected on 29.06.2012, whereafter the CBI filed chargesheet on 21.08.2012. Even thereafter the second bail application was rejected by the learned ACMM, New Delhi on 22.09.2012. Learned counsel submits that no bail application had been filed by the petitioner thereafter, and none was pending. There was no material before the detaining authority to apprehend that the petitioner may be released on bail when no such application was moved by the petitioner, or pending before the Court. Learned counsel submits that the detention order was passed without due application of mind, and without there being any cause for passing the same, as the petitioner was already under detention and, therefore, the detaining authority could not have arrived at its subjective satisfaction with regard to the petitioner absconding, or interfering in the investigation being conducted by the respondents.

17. In support of his submissions, learned counsel for the petitioner sought to place reliance on the following decisions:

(i) Rekha Vs. State of Tamil Nadu Tr.Sec. To Govt. & Another, (2011) 5 SCC 244 (Crl. Appeal No.755/2011 and connected appeals decided on 05.04.2011);

(ii) T.V. Sravanan @ S.A.R. Prasana Vs. State through Secretary and Another, (2006) 2 SCC 664;

(iii) Adishwar Jain Vs. Union of India and Another, (2006) 11 SCC 339;

(iv) Abdul Kalam @ Mullaji Vs. Union of India & Others, W.P.(Crl.) No.167/2012 decided on 09.04.2012 reported as MANU/DE/2326/2012; and

(v) Navpreet Kaur Chadha Vs. Union of India & Another, W.P.(Crl.) No.288/2013 decided on 04.04.2013.

18. Mr. Anil Soni, learned Central Government Standing Counsel has opposed the petition. To explain the time taken, i.e. seven months for passing the detention order on 12.12.2012, when the petitioner was first apprehended on 20.05.2012 , Mr. Soni has sought to draw the attention of the Court to the following extract from the GoD:

> "25. In the statement given by Shri Adarsh Pal Singh, i.e. you, to the DRI officials, you had mentioned that about a telephonic call received from one Shri Nawab through the Hotel Reception between 6 and 6:30 PM on 20.05.2012 informing that he would visit the hotel within an hour or two to collect the FICN. In your statement you had also admitted having received one call from Shera and one call from Nawab during the Panchnama proceedings in which you were informed that Nawab will be taking delivery of the goods (TV) in a short time. Although, you have stated that the two persons Shera@ Bunty and Aslam had visited your restaurant in Bangkok everyday and on whose request you had agreed to carry the FICN concealed in a TV to India to handover to one Nawab at Delhi for a payment, you had deliberately withheld the details including the telephone numbers of these persons thereby protecting the identity of other members of the smuggling syndicate. This inference is strengthened by the fact that the payment of Rs.12,000/- was to be made only on delivery of FICN to Nawab, one of the syndicate members whose telephone numbers you would have invariably insisted upon, especially when you have provided your own contact numbers at the Hotel "My Inn" to them.
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> 26. In your statement made before the CBI, you have disclosed that all the three persons namely Aslam, Shera@Bunty and Nawab are engaged in the smuggling of FICN into India from Bangkok and that you got acquainted with these persons through your brother-in-law, Mr. Taranjit Singh Anand, who is residing in Japan and running a hotel/restaurant business; that you know the proprietor of M/s Khurana Inn at 120/176-178, Baiyoke Tower 2, behind Indra Hotel, Pratunam, Rajprarop Road, Bangkok, Thailand, Tel.No.582 2080517-9, Fax No.862 208 0009 where Shera @ Bunty and Aslam had stayed for a period of 35 days from 16.04.2012 to 21.05.2012 by procuring the copy of the ID/passport details mentioned in the Hotel Register for knowing their correct identity and address, nationality etc.
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> 27. During investigation, a copy of the passport of the said Mohd Aslam Rathor was procured and it was brought to light during interrogation that seized consignment of FICN were brought by Shri Adarsh Pal Singh, i.e. you, from one Mohd. Aslam Rathor, Pakistani National, S/o Abdul Sattar, holding Islamic Republic Paksitan Passport No. AA9446821 issued on 10.01.2008 and valid upto 08.01.2013, D.O.B:01.01.1966, place of birth Karachi, Pakistan. Investigation has further revealed the existence of organized syndicate of FICN racketeers of which you are a part, responsible for

pumping Fake Indian Currency Notes into the country after getting them smuggled across from Bangkok. The person referred by name 'Mohd Aslam Rathore @ Aslam (Pakistan National) and Shera @ Bunty (Pakistani National) by Adarsh Pal Singh, i.e. you, are part of criminal conspiracy along with other persons to smuggle FICN from Bangkok to India and thereafter cause its circulation in various parts of the country through conduits like Nawab. Several attemps were made to apprehend the accused Nawab, R/o Jama Masjid by visiting the said area but he was not found available at the place. Detailed investigation is therefore being conducted regarding identitites and activities of Mohd Aslam Rathore@Aslam and Shera@Bunty who were using mobile No.+923243044600, 0066846610953 and 0066846431814 through NCB at Bangkok, Thailand and NCB, Islamabad, Pakistan to ascertain the modus operandi of the smuggling syndicate of which you are a part, vide CBI reference number 6756/RC 220 2012 E 0014 EOU-VI dated 02.07.2012 and 6755/RC 220 2012 E 0014 EOU-VI dated 02.07.2012 respectively.

28. From the aforesaid facts it appears that Shri Adarsh Pal Singh S/O Shri Manmohan Singh R/O House No.3/67, Kohli Garden, Civil Lines, Haldwani, Distt. Nainital, Uttara Khand i.e. you, presently lodged in Central Jail, Tihar, Delhi, had smuggled FICN concealed in a TV, mis-declared, carried and dealt with the seized smuggled FICN having face value of Rs.15,91,500/- which you knew or had reasons to believe were prohibited for import and were liable to confiscation under the provisions of the Customs Act, 1962 and thus you appear to have committed offences punishable under Section 132 & 135 of the Customs Act, 1962.

29. It is clear that Shri Adarsh Pal Singh S/O Shri Manmohan Singh R/O House NO. 3/67, Kohli Garden, Civil Lines, Haldwani, Distt. Nainital, Uttara Khand i.e. you have engaged yourself in smuggling, transporting, concealing and keeping the smuggled Fake Indian Currency Notes thereby adversely affecting the economy and security of the country. This activity could result in reduction in the value of real money in India. It could result in inflation as more money is being circulated in the economy through this unauthorized artificial increase in money supply. This results in loss to the exchequer and a loss of confidence in one's own currency leading to fear psychosis of the public in general. It leads to criminal activity entering the realm of national security. The intention is to cause damage and destruction of India's legal tender and monetary system."

19. Mr. Soni submits that after 20.05.2012, the respondent was engaged in the process of developing information and making further investigation. He submits that the petitioner has withheld the contact details of Nawab, Shera @ Bunty & Aslam. As noticed above, Nawab was the person named, who had to collect the TV set from the petitioner, whereas Shera @ Bunty & Aslam had met and interacted with the petitioner at Bangkok.

20. Mr. Soni submits that during investigation, it had come out that the petitioner had brought the FICN from one Mohd. Aslam Rathore, a Pakistani national. Further investigation had revealed the

existence of an organized syndicate of FICN racketeers, of which the petitioner was found to be a part, responsible for pumping FICN into the country by getting them smuggled them across from Bangkok. Investigation revealed that Mohd. Aslam Rathore and Shera @ Bunty - both Pakistani nationals, and the petitioner were a part of criminal conspiracy along with other persons to smuggle FICN from Bangkok to India and to cause its circulation through conduits like Nawab. Several attempts were made to apprehend accused Nawab, resident of Jama Masjid area but he was not found.

21. Mr. Soni submits that the aforesaid explains the time consumed in passing the detention order on 12.12.2012. He further submits that since the petitioner was in custody - his second bail application also having been rejected, there was no immediate or eminent possibility of the petitioner getting released from custody. Therefore, the occasion to pass the detention order did not arise till some time after the dismissal of the second bail application on 22.09.2012.

22. Mr. Soni further submits that there was justification in passing the detention order on 12.12.2012, since the petitioner had remained in custody from 20.05.2012; the chargesheet in the CBI case had been filed on 21.08.2012; and the second bail application had been rejected on 22.09.2012. Therefore, there was every possibility that had the petitioner applied for bail on the third occasion, he would have been granted bail as the investigation had since long been completed and even the chargesheet had been filed by the CBI.

23. Having heard learned counsel for the parties, perused the detention order and the GoD, and considered the decisions relied upon by the petitioner, we are of the view that the impugned order of detention suffers from the vice of unexplained delay in the passing of the detention order, as also the absence of cogent reasons for passing the detention order at the time when the same was passed, as there was no subsisting material to have subjective satisfaction that the petitioner would be granted bail and would be released, unless detained by resort to Section 3(1) of the COFEPOSA Act.

24. Firstly, we find merit in the submission of learned counsel for the petitioner that there was unexplained delay in passing of the detention order. The alleged seizure of FICN from the possession and custody of the petitioner took place on 20.05.2012. The apprehension of the respondent that the currency seized was counterfeit stood confirmed on 05.07.2012. A perusal of the GoD shows that investigation was completed on or before 21.08.2012 and the chargesheet was filed by the CBI.

25. Reliance placed by Mr. Soni on paragraphs 25 to 29 of the GoD to claim that further investigation was in progress and, therefore, the detaining authority was justified in passing the detention order, as it did on 12.12.2012, appears to be of no avail. A perusal of the aforesaid extract from the GoD does not disclose that information was being gathered, or developed qua the petitioner till the time before the passing of the detention order. The respondent has not relied upon any fact discovered, or any further development in relation to the case pertaining to the petitioner after the date on which the chargesheet was filed, i.e. on 21.08.2012. The detaining authority observes in paragraph 37 of the GoD as follows:

> "37. I am also aware that detailed investigation is being conducted in close coordination with the concerned agencies at Bangkok, Thailand and Islamabad, Pakistan to unearth the nefarious activities of the syndicate involved in smuggling FICN into the country and your role therein. The investigation of CBI is in progress and has not yet been completed as the accused Mohd. Aslam Rathore (Pakistani National), Shera@Bunty and Nawab, r/o Delhi are yet to be traced and arrested for the purpose of investigation. I am therefore satisfied that there is a live link between the date of incident i.e. your being caught red handed with smuggled FICN on 20/21.05.2012 and the date of issue of this detention order."

26. The only facet of the investigation of the CBI which is stated to be in progress and not yet complete is vis-à-vis Aslam, Shera @ Bunty & Nawab

- who are yet to be traced and arrested for the purpose of interrogation.

That cannot be a justification to explain the delay in passing the detention order qua the petitioner, since the material qua the petitioner - on the basis of which the detention order has ultimately been passed, was already available with the respondent. The mere recording in the detention order that there is a live link between the date of incidence, i.e. when the petitioner was apprehended with smuggled FICN on 20/ 21.05.2012, and the date of issuance of the detention order is not sufficient. The GoD do not disclose any materials to establish the so-called live link.

27. In T.D. Abdul Rahman v. State of Kerala & Ors., AIR 1990 SC 225, the Supreme Court, after referring to several earlier decisions observed as follows:

> "10. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.
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> 11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority

> was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner".

This decision has been followed in Adishwar Jain (supra) and Abdul Kalam @ Mullaji (supra).

28. There is also merit in the petitioner's submission that there was no justification for passing the detention order on 12.12.2012 since the petitioner was already in custody in the CBI case; his two bail applications - one filed before the filing of the chargesheet and one thereafter, had been rejected and; no fresh bail application had been moved by the petitioner before the learned ACMM. Since the petitioner was already in JC, the respondent could not have arrived at its subjective satisfaction when the petitioner was likely to be released on bail, or that there was a possibility of the petitioner absconding and interfering in the investigation being conducted into the activities of the other members of the smuggling syndicate.

29. In paragraph 35 of the GoD, the detaining authority observed as follows:

> "35. I am aware that you were offered bail by the DRI vide Order No.DRI F.No.338/IV/41/2012-GI dated 21.05.2012 subject to your furnishing a personal bond to a sum of Rs.2,00,000/- with two sureties of the like amount which was reduced to Rs.1,00,000/- along with two sureties by the Ld. ACMM, Patiala Court. However, due to the non production of Shri Adarsh Pal Singh i.e. you on 24.05.12 and thereafter on 28.04.12 before the Ld. ACMM and due to the failure on the part of sureties to appear before the Ld. Court, the surety / personal bond were dismissed by the Ld ACMM, Patiala House on 28.05.2012. I am also aware that Shri Adarsh Pal Singh i.e. you, in your bail applications dated 22.06.2012 and 14.09.2012 filed before the Ld. CMM, Tis Hazari Court in the CBI case, had retracted your statement given u/s 108 of Customs Act, 1962. However, your contentions have been rejected by the Hon'ble Courts keeping in view the facts submitted by CBI. I am also aware that the passport surrendered by you to the DRI Officers is also returnable to you as the DRI has no authority to impound your passport under the provisions of the Passport act, 1967. I am also aware that the bail granted to you by the Ld. ACMM, Patiala Court in the case filed under Customs Act 1962, was dismissed only on account of non appearance of the sureties before the said Court. The case is coming up for hearing on 17.12.2012. In the event of being granted bail by either Court and your passport being not impounded till date, there is a possibility of your absconding and interference in the investigation being conducted into the activities of other members of the smuggling syndicate whose identities you have attempted to protect by withholding information and hence it is imperative to immobilize you by detention under COFEPOSA Act, 1974."

30. Pertinently, the detaining authority makes a mention of the fact that the petitioner had been granted bail by the learned ACMM, Patiala House Courts, Delhi in the case filed under the Customs Act, 1962, however, the detaining authority does not take note of the date when the CBI's case was listed; whether the petitioner had applied for bail and; whether any notice had been issued on any

such application. There was no question of there being any possibility of the petitioner being granted bail "by either Court"

> when the petitioner had not even applied for bail in the CBI case. Obviously, if such an application were to be moved, notice would have to be issued to the Public Prosecutor and only after hearing the parties, bail could be granted. Therefore, there was no basis to entertain the apprehension that bail would be granted to the petitioner, or that if he is enlarged on bail, he shall abscond, or interfere with the investigation into the activities of the other members of the smuggling syndicate.

31. In Binod Singh v. District Magistrate, Dhanbad, Bihar and Ors., (1986) 4 SCC 416, the Supreme Court observed as follows:

> "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 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". (emphasis supplied)

32. In Kamarunnissa v. Union of India and Anr., (1991) 1 SCC 128, the Supreme Court observed:

> "13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court".

33. In Rajesh Gulati v. GNCT of Delhi, (2002) 7 SCC 129, the Supreme Court observed as follows:

> "13. In this case, the detaining authority's satisfaction consisted of two parts-one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that "bail is normally granted in such cases".

When in fact the five applications filed by the appellant for bail had been rejected by the Courts (indicating that this was not a 'normal' case), on what material did the detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail? The fact that the appellant was subsequently released on bail by the High Court could not have been foretold. As matters in fact stood when the order of detention was passed, the "normal" rule of release on bail had not been followed by the courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail. [See: in this context Ramesh Yadav v. District Magistrate : (1985) 4 SCC 232].

34. We are, thus, satisfied that for the same reason the order of detention cannot be upheld in this case. The bail applications moved by the petitioner had been rejected by the Courts, and there was no material whatsoever to apprehend that he was likely to move a bail application or that there was imminent possibility of the prayer for bail being granted. The "imminent possibility" of the petitioner coming out on bail is merely the ipse dixit of the detaining authority unsupported by any material whatsoever. There was no cogent material before the detaining authority on the basis of which the detaining authority could be satisfied that the detenue was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention.

35. The decision in T.V. Sravanan (supra), which has referred to the earlier decisions, fully supports the case of the petitioner. In Navpreet Kaur Chadha (supra), the Supreme Court took note of the recent decision in Rekha (supra), which had, in turn, analysed the decision in T.V. Sravanan (supra), A Shanti (smt.) v. Govt. of Tamil Nadu & Ors., (2006) 9 SCC 711 and Rajesh Gulati (supra). The Supreme Court in Navpreet Kaur Chadha (supra), after referring the said decision, observed as follows:

> ".... .... it was observed that in the said cases it has been held that if no bail application was pending and the detenu was already, in fact, in jail in a criminal case, the detention order under the preventive detention law is illegal. Reference was also made to the observations of the Constitution Bench decision in Haradhan Saha v. State of West Bengal, (1975) 3 SCC 198, wherein it was observed:-
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> "34. Where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of

> the detaining authority as to be likelihood of such a person indulging in activities which would jeopardize the security of the State or public order."

36. The Supreme Court also quoted from its earlier decision in Rekha (supra) and the extract from Rekha (supra) reads as follows:

> "10. In our opinion, if details are given by the Respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the Petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the Petitioner, then the Petitioner is ordinarily granted bail. However, the Respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the ground of detention cannot sustain the detention order and has to be ignored.
>
> 11. In our opinion, the detention order in question only contains ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Hence, the detention order in question cannot be sustained."

37. In view of the aforesaid discussion, we allow the present writ petition and quash the detention order dated 12.12.2012 and the confirming order dated 04.03.2013 passed by the respondents under Sections 3(1) and 8(f) of the COFEPOSA Act respectively. The parties are left to bear their respective costs.

(VIPIN SANGHI) JUDGE (S. RAVINDRA BHAT) JUDGE AUGUST 21, 2014 B.S. Rohella