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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 26.07.2019
Judgment Pronounced On : 02.08.2019

W.P.(CRL) 1840/2019, CRL.M.A.13331/2019 & CRL.M.(BAIL) 1186/2019

ANKIT ASHOK JALAN ..... Petitioner

versus

UNION OF INDIA ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Vikram Chaudhri, Sr. Advocate and Mr. Saurabh Kirpal, Sr. Advocate with Mr. Ashish Batra, Mr. Wattan Sharma, Mr. Sarthak Sahdev, Mr. Harshit Sethi and Mrs. Aanchal, Advocates

For the Respondent : Ms. Maninder Acharya, ASG with Mr. Vinod Diwakar, Mr. Ayush Sharma, Mr. Harshul Choudhary, Ms. Ikshita Singh and Mrs. Sakshi Singh, Advocates

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE BRIJESH SETHI

JUDGMENT

SIDDHARTH MRIDUL, J

1. The present writ petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 essentially in the nature of writ of habeas corpus, has been instituted by Ankit Ashok Jalan, seeking quashing and setting aside of the impugned detention orders bearing Nos.PD-12001/34/2019-

COFEPOSA and PD-12001/35/2019-COFEPOSA dated 01.07.2019 issued against his father Ashok Kumar Jalan as well his brother Amit Jalan (hereinafter referred to as 'the detenus') respectively, and to set them at liberty forthwith.

2. The facts as are relevant for the adjudication of the present proceeding are briefly encapsulated as follows:-

(i) In the light of specific intelligence, the Directorate of Revenue Intelligence, Kolkata Zonal Unit (for short 'DRI') intercepted one "Anand" on 09.06.2019 near Dankuni Toll Plaza, West Bengal, while he was travelling on a bus from Siliguri to Kolkata, carrying 8 Kgs. of gold of foreign origin valued at Rs.2.71 crores approximately.

(ii) The said Anand, vide his statements recorded on 09.06.2019 and 10.06.2019 indicated that, he had been engaged by the detenus to receive the 8 bars of smuggled gold from Indo-Bhutan border at Jaigaon from an unknown person, to be transported and delivered to Kolkata and Delhi.

(iii) As per the detenus, they were apprehended by officers of DRI on 10.06.2019 at about 2.00 p.m. at the Food Court

of Quest Mall, 33, Syed Amir Ali Avenue, Park Circus, Beck Bagan Row, Kolkata, West Bengal-700017 and taken to the latter's office.

(iv) The detenus' self-incriminating confessions were purportedly obtained under Section 108 of the Customs Act, 1962 (hereinafter referred to as 'the said Act') and they were formally shown as arrested on 11.06.2019 under the provisions Section 104 of the said Act.

(v) Thereafter the detenus were produced before the court of Judicial Magistrate on 12.06.2019.

(vi) Vide order dated 12.06.2019 in Misc.67/2019, the learned CMM, Kolkata rejected the prayer of bail made on behalf of the detenus and remanded them to judicial custody till 18.06.2019. However, in view of the contention made on behalf of the detenus in relation to their illegal detention by the office of DRI on 10.06.2019, as aforestated, the learned CMM directed the office of the Cyber Police Station, Kolkata to obtain the relevant CCTV footage of the Food Court at Quest Mall, Kolkata.

(vii) The detenus remand to custody has been extended from

time to time up to date.

(viii) Whilst the detenus were in custody, as aforestated, the detention orders impugned in the present petition were rendered by the Detaining Authority on 01.07.2019.

(ix) The impugned detention orders were served on both the detenus on 02.07.2019, and the relied upon documents (for short 'RUD') with the list of documents were served upon them on 04.07.2019.

(x) In the case of both the documents, a document at Sl.No.30 in the list of RUD served upon them, is purported to be a copy of the 'retraction petition' in respect of said Anand. It is an admitted position that, the said document at Sl.No.30, which is purported to be a 'retraction petition' is actually a copy of the bail application, filed by the said Anand.

(xi) The detenus filed their representations dated 07.07.2019, under Article 22(5) of the Constitution of India read with Section 3(3) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA'), addressed to

the Detaining Authority, against the impugned detention orders, through the jail authorities.

3. Mr. Vikram Chaudhri, learned Senior Counsel appearing on behalf of the detenus vehemently assails the impugned orders, as being the mere *ipse dixit* of the Detaining Authority and issued mechanically, without due application of mind and also without any compelling reason and further without pointing out any cogent material for the alleged satisfaction, on the grounds that:-

(a) Despite the detenus already being in judicial custody, when the same was rendered; and there being no imminent possibility of their being released on bail; nor any material relied upon therein to raise an apprehension that they may be so released in the near future – since no bail application was pending – the same are *ex facie* illegal and without any basis; and

(b) The RUD's have not been perused by the Detaining Authority, inasmuch as, the retraction petition of the said Anand, which is a vital document, has neither been placed before the Detaining Authority nor considered by it, in accordance with law; the document purported to be

a copy of the 'retracted petition' in respect of the said Anand, placed at Sl.No.30 of the list of RUD, is actually the latter's bail application, and thus the subjective satisfaction is sham, erroneous and incomplete; and, therefore, violative of the detenus' right to effective representation as mandated and guaranteed by the Constitution, by law. .

4. In order to buttress his submissions, Mr. Vikram Chaudhri, learned Senior Counsel has placed reliance on the following decisions:-

(i) ***T.V. Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi vs. State Through Secretary and Another*** reported as **(2006) 2 SCC 664.**
(ii) ***Rekha vs. State of Tamil Nadu Through Secretary to Government and Another*** reported as **(2011) 5 SCC 244.**
(iii) ***Navpreet Kaur Chadha vs. UOI & Another*** reported as **(2013) 2 DLT (Cri) 795.**
(iv) ***Sandhya Jain vs. Union of India & Another*** reported as **(2017) 3 DLT (Cri) 555**

5. On the other hand, Ms. Maninder Acharya, learned Additional Solicitor General appearing on behalf of Union of India would raise a preliminary objection to the effect that, the present habeas corpus should not be considered at this stage, since the detenus' representations thereagainst are pending consideration before the

Advisory Board, which is empowered by law to consider the validity thereof.

6. By inviting our attention to the paragraph Nos.1 to 9 of the detention order, it would also be urged by Ms. Maninder Acharya, learned ASG that, there was cogent material before the Detaining Authority to arrive at the subjective satisfaction that the detenus were likely to be released from judicial custody and that there was likelihood of their continuing to indulge in the prejudicial activities. In this behalf it was stated that, the material on record unerringly pointed to the propensity of the detenus to continue with their prejudicial activities.

7. Our attention was invited to the following decisions, in support of the foregoing contentions:-

(i) ***Haradhan Saha vs. The State of West Bengal and Others*** reported as **(1975) 3 SCC 198**

(ii) ***Union of India and Anr. vs. Dimple Happy Dhakad*** in **Criminal Appeal No.1064/2019 arising out of SLP (Crl.) 5459/2019** decided by the Hon'ble Supreme Court on 18.07.2019.

8. Before we proceed to consider the submissions made on behalf of the parties, it would be appropriate to extract the necessary paragraphs of the impugned orders, relevant to the determination of the issues before us, and the same are reproduced hereinbelow:-

"xvi. You i.e. Shri Ashok Kumar Jalan and Amit Jalan were arrested under Section 104 of the Customs Act, 1962 on 11.06.2019, as both of you appeared to be guilty of offence punishable under Section 135 of the Customs Act, 1962 and were produced before the Ld. Chief Metropolitan Magistrate, Kolkata on 12.06.2019, within 24 hrs of their arrest. The Ld. Chief Metropolitan Magistrate, Kolkata after hearing the accused from time to time was pleased to remand both of you to Judicial Custody, till 2.07.2019 and both of you are presently lodged at Presidency Correctional Home, Kolkata.

xvii. Petition have been filed on behalf of you i.e. Shri Ashok Kumar Jalan and Shri Amit Jalan before the Ld. Chief Metropolitan Magistrate, Kolkata, retracting their statements given before DRI officers.

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xxxi. It is on record vide letter F.No.T-23/7/Cal/95/Part dated 24.06.2019 of the Joint Director, Office of the Special Director, Eastern Region, Enforcement Directorate, Kolkata that you i.e. Shri Ashok Kumar Jalan alias Pappu Jalan S/o Late Madan Lal Jalan was detained in Presidency Jail on 2.10.1994 under COFEPOSA Act, 1974 vide Detention Order No.673/160/94 dated 22.09.1994. Subsequently the detention order was quashed by Hon'ble Calcutta High Court and you i.e. Ashok Kumar Jalan were released from jail on 23.12.1994. In another case a Detention Order No.673/14/2002 – Cus VII dated 20.05.2002 under COFEPOSA Act, 1974 was issued against you i.e. Shri Ashok Kumar Jalan alias Pappu and you were detained on 13.06.2002. Subsequently the said detention order was revoked by Central Government vide Order dated 21.08.2002 on the basis of opinion of the COFEPOSA Advisory Board.

2. In view of the facts, circumstances, findings corroborative evidence and your role in the whole operation, I am satisfied that you i.e. Shri Ashok Kumar Jalan are a key person and mastermind of a syndicate and ably assisted by your nephew Shri Amit Jalan involved in smuggling of gold and foreign currency. You along with your associates, are in the habit of repeatedly smuggling goods into India from abroad without declaring the same before the

Customs Authorities and paying applicable duty which amounts "smuggling" in terms of Section 2 of the Customs Act, 1962. The underlying common threat is your propensity to smuggle goods for making illicit profit and putting the National economy into danger which needs to be curbed and you need to be prevented from indulging in such activities further.

3. I am satisfied that you i.e. Shri Ashok Kumar Jalan have indulged in activities amounting to smuggling in terms of Section 2(39) of Customs Act, 1962 and Section 2(e) of COFEPOSA Act, 1974 and your acts of deliberate commissions and omissions have rendered the goods involved liable to confiscation under the Customs Act, 1962.

4. I am satisfied that, as evidenced above and as discussed in the foregoing paras, you i.e. Shri Ashok Kumar Jalan have shown a repeated habit and propensity to indulge in fraudulent activities by way of smuggling goods, abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods at the cost of government revenue and national security and with the clear motive of enriching yourself with no concern to the general economy and the national security interests.

5. In view of the facts and circumstances explained above, I have no hesitation in concluding that you i.e. Shri Ashok Kumar Jalan played a vital role in smuggling of gold from abroad along with other accomplices. You have also designed plan in an organized and repeated manner in the act of smuggling. Investigation done by DRI Kolkata clearly establishes your continued propensity and inclination to indulge in acts of smuggling in a planned manner to the detriment of the economic security of the country and that unless prevented you i.e. Shri Ashok Kumar Jalan will continue to do so. Further considering the nature and gravity of offence in an organized manner in which you i.e. Shri Ashok Kumar Jalan have engaged yourself in such prejudicial activities and your role therein, all of which reflect your high potentiality and propensity to indulge in such prejudicial activities in future, I am satisfied that there is a need to prevent you i.e. Shri Ashok Kumar Jalan from smuggling goods. Hence, you i.e. Shri Ashok Kumar Jalan ought to be detained under the

Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 with a view to preventing you from smuggling goods, abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods in terms of Section 3(1) of the COFEPOSA Act, 1974.

6. I am aware that prosecution under Section 135 of the Customs Act, 1962 may be launched against you 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 your i.e. Shri Ashok Kumar Jalan high propensity to indulge in the prejudicial activities, I am satisfied that in the meantime you should be immobilized by detention under the COFEPOSA Act, 1974 with a view to prevent you from smuggling goods, abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods in future.

7. **I am aware that you i.e. Shri Ashok Kumar Jalan are in Judicial custody at present at Presidency Correctional Home, Alipore, Kolkata. However, there is an immediate 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 and foreign currency in future."

9. A perusal of the above extracted grounds of detention and in particular paragraph 7 thereof, clearly reflects that, it is completely bereft of any material expressed therein for the Detaining Authority to arrive at the conclusion to the effect that '*there is immediate possibility of your release from judicial custody*'. Further, as is axiomatic from a reading of the same paragraph, the Detaining

Authority was aware that the detenus were in judicial custody at the Presidency Correctional Home, Alipore, Kolkata, at the time of passing of the impugned order.

10. In our opinion, in the absence of cogent material, the statement in the grounds of detention regarding the alleged imminent possibility of the detenus' coming out on bail, is mere *ipse dixit*, untenable and without any cogent basis, and consequently has to be ignored. In our considered view, therefore, in the absence of reliable material to this effect, the detention order is vitiated and cannot be sustained.

11. We are supported in this behalf by the dictum of the Supreme Court in the three Judge Bench decision in ***Rekha*** *(supra),* and in particular paragraphs 7,8,9,10,11,13,26,27,28,29,35 and 36, which read as under:-

> **"7.** A perusal of the above statement in Para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the court concerned. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused. All that has been stated in the grounds of detention is that "in similar cases bails were granted by the courts". In our opinion, in the absence of details this statement is mere ipse dixit, and cannot be relied upon. In our opinion, this itself is sufficient to vitiate the detention order.
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> **8.** It has been held in *T.V. Sravanan* v. *State* [(2006) 2 SCC 664 : (2006) 1 SCC (Cri) 593] , *A. Shanthi*v. *Govt. of T.N.* [(2006)

9 SCC 711 : (2006) 3 SCC (Cri) 371] , *Rajesh Gulati* v. *Govt. of NCT of Delhi*[(2002) 7 SCC 129 : 2002 SCC (Cri) 1627] , etc. 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. These decisions appear to have followed the Constitution Bench decision in *Haradhan Saha* v. *State of W.B.* [(1975) 3 SCC 198** : 1974 SCC (Cri) 816] wherein it has been observed: (SCC p. 209, para 34):

> "*34. …* **where the person concerned 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 the likelihood of such a person indulging in activities which would jeopardise the security of the State or public order."**

9. On the other hand, Mr Altaf Ahmed, learned Senior Counsel appearing for the State of Tamil Nadu, has relied on the judgments of this Court in *A. Geetha* v. *State of T.N.* [(2006) 7 SCC 603 : (2006) 3 SCC (Cri) 324] and *Ibrahim Nazeer* v. *State of T.N.* [(2006) 6 SCC 64 : (2006) 3 SCC (Cri) 17] wherein it has been held that even if no bail application of the petitioner is pending but if in similar cases bail has been granted, then this is a good ground for the subjective satisfaction of the detaining authority to pass the detention order.

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.

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.

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13. In our opinion, Article 22(3)(*b*) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in *R.* v. *Secy. of State for the Home Deptt., ex p Stafford* [(1998) 1 WLR 503 (CA)] : (WLR p. 518 F-G)

> " … The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law."

Article 22, hence, cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.

26. It was held in *Union of India* v. *Paul Manickam* [(2003) 8 SCC 342 : 2004 SCC (Cri) 239] that if the detaining authority is aware of the fact that the detenu is in custody and the detaining authority is reasonably satisfied with cogent material that there is likelihood of his release and in view of his antecedent activities he must be detained to prevent him from indulging in such prejudicial activities, the detention order can validly be made.

27. In our opinion, there is a real possibility of release of a person on bail who is already in custody *provided he has moved a bail application which is pending*. **It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal.** However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail

application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

28. Mr Altaf Ahmed, learned Senior Counsel, further submitted that we are taking an overtechnical view of the matter, and we should not interfere with the preventive detention orders passed in cases where serious crimes have been committed. We do not agree.

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.

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35. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a "jurisdiction of suspicion" (vide *State of Maharashtra* v. *Bhaurao Punjabrao Gawande* [(2008) 3 SCC 613 : (2008) 2 SCC (Cri) 128] , SCC para 63). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is, in our opinion, mandatory and vital.

36. It has been held that the history of liberty is the history of procedural safeguards. (See *Kamleshkumar Ishwardas*

Patel v. *Union of India* [(1995) 4 SCC 51 : 1995 SCC (Cri) 643] vide para 49.) These procedural safeguards are required to be zealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu. As observed in *Rattan Singh* v. *State of Punjab* [(1981) 4 SCC 481 : 1981 SCC (Cri) 853] : (SCC p. 483, para 4)

> "*4*. … May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set up, it is essential that at least those safeguards are not denied to the detenus."

12. A similar view was also expressed by a Division Bench of the Supreme Court in ***T.V. Sravanan*** *(supra)* in paragraphs 6,7,8,9,12,13 and 14. The same are extracted hereinbelow:-

"**6.** Before us the same submission was advanced as was advanced before the High Court. However, Shri K.T.S. Tulsi, learned Senior Counsel appearing for the appellant, in addition to the aforesaid submission, advanced a second submission that in the facts and circumstances of the case, as is evident from the record itself as well as the order of detention, the appellant was already in custody when the order of detention was passed. There was no imminent chance of his being released on bail and yet the detaining authority, even in the absence of any material to raise an apprehension that he may be released on bail in near future and continue with his nefarious activities, passed the impugned order of detention. In our view having regard to the material on record it is not necessary to consider the first ground of challenge, since the second ground of challenge must succeed. It may be useful to notice the relevant part of the detention order which deals with this aspect of the matter. It reads as follows:

> "I am aware that Thiru Venkata Sravanan alias S.A.R. Prasanna Venkatachariyar Chaturvedi is in remand in Central Crime Branch, Crime Nos. 582 of 2004, 592 of

2004, 594 of 2004, 598 of 2004, 601 of 2004 and 602 of 2004 and a bail application was moved before the Principal Sessions Court in Crl. MP No. 11163 of 2004 in Central Crime Branch, Crime No. 582 of 2004 and the same was dismissed on 17-11-2004. Further a bail application was moved before the Hon'ble High Court, Madras in Crl. OP No. 37011 of 2004 in Central Crime Branch, Crime No. 582 of 2004 and the same was withdrawn on 3-12-2004. He has not moved any bail subsequently. However, there is imminent possibility of his coming out on bail by filing another bail application before the Principal Sessions Court or the Hon'ble High Court since in similar cases bails are granted by the Principal Sessions Court after a lapse of time. If he comes out on bail, he will indulge in further activities which will be prejudicial to the maintenance of public order."

7. The question is whether on the basis of such material, an order of detention was justified, even though the appellant was in custody on the date of issuance of the order of detention. The principle in this regard is well settled. In *Rameshwar Shaw* v. *District Magistrate, Burdwan* [(1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257] this Court observed: (SCR pp. 929-30)

"[*12.*] As an abstract proposition of law, there may not be any doubt that Section 3(1)(*a*) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. … Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case."

8. The principle was further elucidated in *Binod Singh* v. *District Magistrate, Dhanbad* [(1986) 4 SCC 416 : 1986 SCC (Cri) 490] in the following words: (SCC pp. 420-21, para 7)

"*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."

9. In *Kamarunnissa* v. *Union of India* [(1991) 1 SCC 128 : 1991 SCC (Cri) 88] this Court observed: (SCC p. 140, para 13)

"*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."

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12. The order of detention itself notices the fact that the appellant had moved an application for grant of bail before the Principal Sessions Court which was rejected on 17-11-2004. The appellant had moved another bail application before the High Court which was withdrawn on 3-12-2004. The detaining authority noticed that the appellant had not moved any bail application subsequently but it went on to state that there was imminent possibility of the appellant coming out on bail by filing another bail application before the Sessions Court or the High Court since in similar cases bails are granted by the Sessions Court after a lapse of time. The order of detention was passed on 15-12-2004 i.e. merely 12 days after the dismissal of the bail application by the High Court. There is nothing on record to show that the appellant had made any preparation for filing a bail application, or that another bail application had actually been filed by him which was likely to come up for hearing in due course.

13. A somewhat similar reasoning was adopted by the detaining authority in *Rajesh Gulati* v. *Govt. of NCT of Delhi* [(2002) 7 SCC 129 : 2002 SCC (Cri) 1627] . This Court noticing the facts of the case observed: (SCC pp. 133-34, para 13)

> "*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, Etah* [(1985) 4 SCC 232 : 1985 SCC (Cri) 514] , AIR at p. 316.)"

14. We are satisfied that for the same reason the order of detention cannot be upheld in this case. The bail applications

> **moved by the appellant 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 appellant 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 detenu 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. There was, therefore, no sufficient compliance with the requirements as laid down by this Court.** These are the reasons for which while allowing the appeal we directed the release of the appellant by order dated 13-12-2005."

14. From a conjoint reading of the above extracted paragraphs, as well as, the decisions of Co-ordinate Benches of this Court in ***Navpreet Kaur Chadha*** *(supra)* and ***Sandhya Jain*** *(supra)*, it is clear, categorical and unequivocal that the settled position of law is that when the detenus are in judicial custody and there is no imminent possibility of their release on bail and even no bail applications are pending, the power of preventive detention ought not to be exercised.

15. The decision of the Hon'ble Supreme Court in ***Dimple Happy Dhakad*** *(supra),* relied upon on behalf of the Detaining Authority, does not come to their aid, inasmuch as, it was clearly expressed by the Hon'ble Supreme Court in that case as well that the satisfaction of the Detaining Authority, that the detenu may be released on bail,

cannot be the mere *ipse dixit* of the Detaining Authority, and that the Guideline No.24 (Part-A of Don's) of the '*Hand Book on Compilation of Instructions on COFEPOSA Matters*' clearly stipulates that, when the detenu is in judicial custody, the Detaining Authority has to record in the grounds of detention its awareness thereof and then indicate the reasons for the satisfaction that there is imminent possibility of his release from the custody.

16. Insofar as, the threshold objection raised on behalf of the official respondent to the effect that, in view of the pendency of the representations before the Advisory Board – which has adequate powers to examine the entire material – the present writ petition ought not to be determined at this stage is concerned, the same cannot be countenanced in view of the decision of the Hon'ble Supreme Court ***Piyush Kantilal Mehta vs. Commissioner of Police, Ahmedabad City and Another*** reported as **1989 Supp (1) SCC 322** and in particular paragraphs 6 and 7 thereof, wherein it was observed as follows:-

> "**6.** At this stage, it may be stated that the representation of the petitioner is pending before the Advisory Board. The question that has been raised on behalf of the respondents is whether in view of the pendency of the representation before the Advisory Board, the writ petition is maintainable under Article 32 of the Constitution. The question need not detain us long, for it has already been decided by this Court in *Prabhu Dayal Deorah* v. *District Magistrate, Kamrup* [(1974) 1 SCC 103 : 1974 SCC (Cri) 18 : 1974 Cri LJ 286] . In para 16 of the Report Mathew, J., speaking

for himself and Mukherjea, J., observed inter alia as follows : (SCC pp. 112-13, para 16)

> "We think that the fact that the Advisory Board would have to consider the representations of the petitioners where they have also raised the contention that the grounds are vague would not in any way prevent this Court from exercising its jurisdiction under Article 32 of the Constitution. The detenu has a right under Article 22(6) of the Constitution to be afforded the earliest opportunity of making a representation against the order of detention. That constitutional right includes within its compass the right to be furnished with adequate particulars of the grounds of the detention order. And, if their constitutional right is violated, they have every right to come to this Court under Article 32 complaining that their detention is bad as violating their fundamental right. As to what the Advisory Board might do in the exercise of its jurisdiction is not the concern of this Court."

7. In the above observation, this Court has specifically laid down that even though a representation is pending before the Advisory Board, the writ petition under Article 32 of the Constitution is maintainable before this Court. In the circumstances, we may proceed to dispose of the writ petition on merits."

17. In the backdrop of the reasons and judicial precedents discussed above, and the examination of the grounds of detention in the light thereof, we have no option but to hold that, paragraph 7 and other paragraphs of the impugned detention orders dated 01.07.2019 do not meet the criteria and ratio enunciated in the decisions of the Hon'ble Supreme Court in ***Rekha*** *(supra)* and ***T.V. Sravanan*** *(supra),* inasmuch as, there is a clear lapse and failure on the part of the Detaining Authority, to examine and consider the germane and relevant question relating to the imminent possibility of the detenus

being granted bail, while recording its subjective satisfaction and passing the detention orders. The same are, therefore, unsustainable and liable to be set aside and quashed. We also hold that, the non-placement of the relevant material, in the form of Anand's retraction petition and its non-consideration by the Detaining Authority, also vitiates the detention order, in terms of the decision of the Hon'ble Supreme Court in ***Deepak Bajaj vs. State of Maharashtra and Another*** reported as **(2008) 16 SCC 14** and in particular paragraph 31 thereof, wherein it is observed as under:-

> "**31.** Most of the retractions were made to DRI, and it belongs to the same department as the sponsoring authority, who is the Additional Director, Revenue Intelligence. Hence, it was the duty of DRI to have communicated these retractions of the alleged witnesses to the sponsoring authority, as well as the detaining authority. There is no dispute that these retractions were indeed made by persons who were earlier said to have made confessions. These confessions were taken into consideration by the detaining authority when it passed the detention order. Had the retractions of the persons who made these confessions also been placed before the detaining authority it is possible that the detaining authority may not have passed the impugned detention order. Hence, in our opinion, the retractions of the confessions should certainly have been placed before the detaining authority, and failure to place them before it, in our opinion, vitiates the detention order."

18. We resultantly set aside and quash the impugned order Nos.PD-12001/34/2019-COFEPOSA and PD-12001/35/2019-COFEPOSA dated 01.07.2019 and further direct that, the concerned detenus be released forthwith, if not required to be detained in any other case, in

accordance with law.

19. The writ petition is allowed and disposed of accordingly. The pending applications also stand disposed of. There shall be no order as to costs.

SIDDHARTH MRIDUL
(JUDGE)

BRIJESH SETHI
(JUDGE)

AUGUST 02, 2019
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HIGH COURT OF DELHI
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