REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1064 2019
(Arising out of SLP(Crl.) No.5459 of 2019)

1. UNION OF INDIA

2. JOINT SECRETARY (COFEPOSA),
GOVT. OF INDIA, MINISTRY OF FINANCE ...Appellants

VERSUS

DIMPLE HAPPY DHAKAD …Respondent

WITH

CRIMINAL APPEAL NO. 1066 2019
(Arising out of SLP(Crl.) No.5408 of 2019)

CRIMINAL APPEAL NO. 1067 2019
(Arising out of SLP(Crl.) No.5460 of 2019)

CRIMINAL APPEAL NO. 1065 2019
(Arising out of SLP(Crl.) No.5396 of 2019)

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. These appeals arise out of the judgment dated 25.06.2019 passed by the High Court of Judicature at Bombay

in W.P. (Crl.) Nos.2843 and 2844 of 2019 in and by which the High Court has quashed the detention orders dated 17.05.2019 passed against the detenues. The appellants-Union of India in appeals arising out of SLP(Crl.) Nos.5459 and 5460 of 2019 have challenged the impugned judgment quashing the detention orders. While quashing the detention orders, the High Court has stayed the operation of its own order for a period of one week to enable the appellants to approach the Supreme Court. Being aggrieved by the stay, the detenues-respondents have preferred appeals arising out of SLP(Crl.) Nos.5396 and 5408 of 2019 before this Court. All the appeals shall stand disposed of by this common judgment.

3. The facts giving rise to these appeals are that pursuant to an investigation by the office of Directorate of Revenue Intelligence in the matter of smuggling of foreign origin gold by a syndicate of persons from UAE to India. On 28.03.2019 search and interception of two vehicles i.e. a Honda Activa Scooter and a Honda City car was held. It was noticed that there were two persons Abdul Ahad Zarodarwala and Shaikh Abdul Ahad, employee of Zarodarwala. Search of the vehicles

resulted in recovery of 75 kgs of gold in the form of five circular discs valued at Rs.24.5 crores. Follow-up searches were conducted in the offices and residential premises of the connected persons resulted in further recovery of 110 kgs of gold and currency amounting to Rs.1.81 crores. Shoeb Zarodarwala, Abdul Ahad Zarodarwala and Shaikh Abdul Ahad were summoned and their statements were recorded and they are alleged to have made statement regarding receiving of smuggled gold from respondent detenu-Nisar Pallathukadavil Aliyar.

4. **Facts in SLP (Crl.) No. 5408 of 2018:** Case of the appellants is that the respondent-detenu Nisar Pallathukadavil Aliyar is a full-time organised smuggler of large quantities of gold and is the mastermind of the smuggling syndicate and has been smuggling gold into India since 2016. It is stated that two companies, viz. M/s. Al Ramz Metal Scrap Trading and M/s. Blue Sea Metal FZE were floated and registered by the appellant in the name of one Kalpesh Nanda for exporting metal scrap to India which is alleged to cover cargo to smuggle gold. It is alleged that detenue Nisar Aliyar ensured that the

sale proceeds of the smuggled gold were siphoned off to Dubai through hawala. It is alleged that Nisar Aliyar created a wide network of people to look after the operations at every stage and was smuggling gold into India since 2016 and is alleged to have smuggled more than 3300 kgs of gold having approximate value of Rs.1000 crores and is alleged to be a mastermind of the smuggling syndicate. Detenu Nisar Aliyar was arrested on 31.03.2019 for commission of offences punishable under Section 135 of the Customs Act, 1962 and his statement was recorded.

5. **Facts in SLP (Crl.) No. 5396 of 2019:** Detenu-Happy Arvindkumar Dhakad is a Director of Bullion Trading Firm and is a jeweller. As per the appellants, investigations revealed that the husband of the detenu Happy Dhakad was directly dealt with Shoeb Zarodarwala and Jignesh Solanki who are his relatives by buying gold from Nisar Aliyar. Detenu Happy Dhakad is alleged to have abetted Nisar Aliyar in his illegal activities of receiving and concealing smuggled gold and disposing it off through his jewellery outlets and is said to have played a vital role. It is alleged that through multiple jewellery

outlets owned by him and his relatives, detenu-Happy Dhakad disposed of the foreign origin smuggled gold easily. Follow up searches were conducted at various offices and residential premises of persons found connected with smuggling of gold. A total quantity of 110 kgs of gold was recovered from these premises. Thirty-one pieces of gold carrying a total weight of 20.4 kgs and 11.5 kgs of foreign marked gold bars totally valued at Rs.10.21 crores, Rs. 28.53 lakhs cash and unaccounted cash of Rs.28.53 lakhs and Rs.44.50 lakhs were seized respectively from the office and residence of detenu Happy Dhakad and he did not have any documents for his possession of gold. In his statement recorded on 29.03.2019, detenu Happy Dhakad is alleged to have accepted that 20.4 kgs of gold recovered from his premises was from the smuggled gold supplied to him by appellant Nisar Aliyar and the other 11.5 kgs of foreign marked gold was procured from other sources. Detenu Happy Dhakad was arrested on 29.03.2019 for the offence punishable under Section 135 of the Customs Act, 1962 and was remanded to judicial custody.

6. The Detaining Authority-Joint Secretary (COFEPOSA), on being satisfied that the detenues have high propensity to indulge in the prejudicial activities, with a view to prevent them from smuggling and concealing smuggled gold in future, passed the orders of detention dated 17.05.2019 under Section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (COFEPOSA). The detention orders and the grounds of detention were served on the detenues on 18.05.2019. The copies of the relied upon documents were served on the detenues on 21.05.2019 and 22.05.2019.

7. The detention orders dated 17.05.2019 was assailed by the detenues by filing writ petitions before the High Court. The High Court vide interim order dated 04.06.2019 directed the appellant to consider the writ petitions as a representation of the detenues. Accordingly, the representation was considered and the same was rejected by the Joint Secretary (COFEPOSA) who did not find any justification in modification of the detention orders.

8. By the impugned order dated 25.06.2019, the High Court quashed the detention orders by holding that there was no application of mind by the Detaining Authority in passing the detention orders. The High Court held that as per the principles laid down in *Kamarunnisa v. Union of India* **(1991) 1 SCC 128**, there was no application of mind indicating the satisfaction of the detaining authority that there was imminent possibility of detenues being released on bail. The High Court also held that though the detention orders and grounds of detention were served on the detenues on 18.05.2019, the detenues were not served with the copies of relied upon documents and material particulars along with the orders of detention and grounds of detention and there was violation of Article 22(5) of the Constitution of India and violation of Guideline No.21 of *"Hand Book on Compilation of Instructions on COFEPOSA matters*". The High Court did not accept the contention of the Department that the preparation of copies of documents and bulk of records did not enable the respondents to serve the relied upon documents simultaneously with the orders of detention upon the respondents. Holding that the preventive detention was in

violation of Articles 21 and 22(5) of the Constitution of India and the Guidelines, the High Court quashed the detention orders dated 17.05.2019. As pointed out earlier, the High Court, however, stayed the operation of its own judgment for a period of one week which we have extended.

9. Mr. K.M. Natraj, learned Additional Solicitor-General appearing for the appellant-Union of India has submitted that the orders of detention and the grounds were served on the detenues on 18.05.2019 and since the documents were voluminous containing 2364 pages, the copies of which were served on the detenues on 21.05.2019 and 22.05.2019 respectively is well within the time period stipulated in Section 3(3) of the COFEPOSA Act. While so, it was submitted that the High Court was not right in quashing the detention orders on the ground that the relied upon documents were not served upon the detenues together with the detention orders and that there was violation of Guideline No. 21 (Part A of Do's) and Guideline No. 9 (Part B of Don'ts) which is only a guideline to the officers. The learned Additional Solicitor-General further submitted that *"Hand Book on compilation of instructions on*

COFEPOSA matters from July 2001 to February, 2007" is only in the nature of guidelines for the officers of the department in dealing with COFEPOSA matters and the said guidelines itself direct that care to be taken in communication/service of the detention orders, grounds of detention and relied upon documents and the statutory period of service laid down in the COFEPOSA Act. The learned Additional Solicitor-General further submitted that based on the materials placed before the detaining authority, the detaining authority satisfied itself as to the likelihood of the detenues being released on bail and while so, the High Court erred in quashing the detention orders on the ground that in the detention orders "*there was no finding that there was real possibility of their being released on bail by the Court*". The learned Additional Solicitor General urged that the present case involves huge volume of gold systematically smuggled into the country in the last three years and more than 3300 kgs of gold has been brought during the period from July 2018 to March 2019 and the detaining authority after considering that the detenues have propensity to indulge in the offence passed the detention orders and such subjective

satisfaction of the detaining authority cannot be lightly interfered with by the Court.

10. Mr. Mukul Rohatgi, learned senior counsel appearing for the detenues relied upon number of judgments and contended that the grounds of detention and relied upon documents are to be served on the detenues *pari passu* and in the instant case, serving of the relied upon documents and grounds of detention piecemeal deprives the detenues from making effective representation. Taking us through the grounds of detention, the learned senior counsel submitted that the detaining authority has recorded its awareness only as to the custody of the detenues and the dismissal of the bail application and the satisfaction of the detaining authority as to the likelihood of the detenues being released on bail is significantly absent and the absence of such satisfaction vitiates the detention orders. Reliance was placed upon *Kamarunnisa* and other judgments. The learned senior counsel further submitted that it was not possible for the detaining authority to pass all fifteen detention orders in one day after perusal of 2364 pages of documents describing role of each individual which clearly shows non-

application of mind by the detaining authority. Placing reliance upon *Rekha v. State of Tamil Nadu through Secretary to Government and Another* **(2011) 5 SCC 244**, it was submitted that in cases of preventive detention orders, procedural requirements are the safeguards and non-compliance of the procedural requirements vitiates the detention orders. It was submitted that upon consideration, the High Court has rightly quashed the detention orders that the detention order is an infraction of Article 22(5) of the Constitution of India and non-compliance of the Guidelines of *"Hand Book on compilation of instructions on COFEPOSA matters"* and the impugned order warrants no interference.

11. We have carefully considered the rival submissions and perused the impugned order and other materials on record. We have also carefully gone through the various judgments relied upon by both sides. The following points arise for consideration in these appeals:-

(i) Whether the orders of detention were vitiated on the ground that relied upon documents were not served along with the orders of detention and grounds of detention? Whether there was sufficient compliance

of the provisions of Article 22(5) of the Constitution of India and Section 3(3) of the COFEPOSA Act?

(ii) Whether the High Court was right in quashing the detention orders merely on the ground that the detaining authority has not expressly satisfied itself about the imminent possibility of the detenues being released on bail?

12. The present case relates to alleged smuggling of huge volume of gold of more than 3300 kgs of gold camouflaging it with brass metal scrap. Detenue Nisar Aliyar is stated to be the mastermind and kingpin of the syndicate who along with others smuggled gold from UAE to India. Detenu Happy Dhakad abetted smuggling by receiving smuggled gold from Nisar Aliyar and his group and disposing them off through jewellery outlets run by him and his relatives. The respondents were arrested for the offence punishable under Section 135 of the Customs Act on 29.03.2019 and their statements were recorded under Section 108 of the Customs Act. The orders of detention were issued on 17.05.2019. The detention orders along with grounds of detention were served on the detenues on 18.05.2019. Since the documents were running into 2364

pages and there were fifteen detention orders passed against various detenues, the compilation of documents was served on detenues on 21.05.2019 and 22.05.2019 respectively. Section 3(3) of COFEPOSA Act states that *"the detenue should be communicated with the order of detention and the grounds as soon as may be after detaining him but ordinarily not later than five days……"* According to the appellants, in the present case, the orders of detention and the grounds were served on the detenues on 18.05.2019. However, since the documents were voluminous running about 2364 pages, the same was served on the detenues on 21.05.2019 and 22.05.2019 respectively which, of course, was within the time period stipulated under Section 3(3) of the Act.

13. In the detention orders dated 17.05.2019, though it was expressly mentioned that the documents mentioned in the list relied upon by the detaining authority are served upon the detenues along with the detention orders, the relied upon documents were served upon the detenues between 20.05.2019 and 22.05.2019. The High Court quashed the detention orders dated 17.05.2019 on the ground that on

18.05.2019, the detention orders and the grounds of detention were served on the detenues; but the relied upon documents and other material particulars were not served upon the detenues together with the grounds of detention. After extracting the relevant portion of the detention orders, the High Court held that though it was stated that the relied upon documents were served upon the detenues along with the detention orders, actually they were not served on the detenues together with the detention orders and the grounds of detention and while so, the appellants cannot have recourse to Section 3(3) of the COFEPOSA Act, 1974. The relevant portion of the detention orders where the detaining authority has stated that the relied upon documents are being served upon the detenues along with the grounds of detention reads as under:-

> "9. While passing the Detention Order under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, I have relied upon the documents mentioned in the enclosed list, which are also being served to you along with the Grounds of Detention.
>
> 10. You i.e. Shri Happy Arvindkumar Dhakad have the right to represent against your detention to the Detaining Authority, to the Central Government as well as to the Advisory Board. If you wish to avail this right, you should send your representation

through the Jail Authorities where you are detained, in the manner indicated below…" [**underlining added**]

14. Guideline No.21 of Do's of "*Do's and Don'ts in handling COFEPOSA matters",* stipulates that the grounds of detention and relied upon documents must be invariably served together on the detenu (including the copies translated into the language known to and understood by the detenu, wherever necessary) and these should be served as quickly as possible but within the statutory time limit of five days from the date of his detention. In Part-B dealing with Don'ts of "*Do's and Don'ts in handling COFEPOSA matters",* Guideline No.9 lays down that the grounds of detention and relied upon documents should not be given on different dates. For quashing it on the ground of non-serving of the grounds of detention and relied upon documents along with the detention orders, the High Court held that there was violation of Guideline No.21 in Part-A dealing with Do's of "*Do's and Don'ts in handling COFEPOSA matters",* and Guideline No.9 in Part-B dealing with the Don'ts of "*Do's and Don'ts in handling COFEPOSA matters".* Guideline No.21

and Guideline No.9 dealing with "*Do's and Don'ts in handling COFEPOSA matters",* read as under:-

"**Do's and Don'ts in handling COFEPOSA matters**

A. Do's

…….

21. The Grounds of detention and the relied upon documents be invariably served **<u>together</u>** to the detenu (including the copies translated into the language known to and understood by the detenu, wherever necessary) and these should be served as quickly as possible but within the statutory time limit of five days from the date of his detention.

B. Don'ts

……

9. Grounds of detention and relied upon documents should not be given on different dates."

15. Contention of the learned senior counsel for the respondents is that though the detention orders served upon the detenues states that the relied upon documents mentioned in the list are also being served upon the detenues along with the grounds of detention, the relied upon documents were not actually served upon the detenues and such non-application of mind of the detaining authority vitiates the detention orders apart from depriving the detenu from making effective representation. The learned senior counsel further submitted

that there is clear breach of the guidelines containing Do's and Don'ts and the respondents were deprived of his right of personal liberty without following the procedure established by law. The learned senior counsel submitted that the High Court relied upon its own judgments of co-ordinate Benches in Criminal Writ Petition Nos.2/1996, 4/1996, 824/1995 and 690/1996 and rightly held that the relied upon documents were not served together with the orders of detention and grounds of detention on 18.05.2019 and hence, there is no question of the appellants taking recourse to Section 3(3) of the COFEPOSA Act.

16. In support of his contention that the detention orders are liable to be quashed on the ground that the documents and materials forming basis of the detention orders had not been supplied, the learned senior counsel for the respondents placed reliance upon *Virendra Singh v. State of Maharashtra* **(1981) 4 SCC 562** and *Ana Carelina D'souza (Smt.) v. Union of India and others* **AIR 1981 SC 1620** and number of other judgments. It was submitted that the High Court rightly relied upon *Kamleshkumar Ishwardas Patel v. Union of India and others*

(1995) 4 SCC 51 wherein the Supreme Court had observed that while discharging the constitutional obligation to enforce the fundamental rights of the people, more particularly, the right to personal liberty, the gravity of the allegations cannot influence the process and that to enforce the fundamental rights of the people, more particularly, the right to personal liberty, certain minimum procedural safeguards are required to be "*zealously watched and enforced by the court*".

17. In *Virendra Singh,* the order of detention was passed on 09.10.1980 and the grounds of detention and other documents and materials were supplied to the detenu on 01.11.1980 when he was arrested; but without the documents and the materials which were later served on 05.11.1980. The Supreme Court quashed the detention order and held as under:-

> "1. …..Admittedly, the order of detention was passed on October 9, 1980 and the grounds were supplied to the detenu on November 1, 1980 when he was arrested but without the documents and materials which were supplied on November 5, 1980. The detenu made a representation on November 13, 1980 which was disposed of on December 13, 1980. In this case as the documents and the materials forming the basis of the order of detention had not been supplied to the detenu along with the order of detention when the same was served on him, the order

> is rendered void as held by this Court in *Icchu Devi Choraria* v. *Union of India* (1980) 4 SCC 531 and in *Shalini Soni* v. *Union of India* (1980) 4 SCC 544. Moreover, the order of detention suffers from another infirmity, namely, that the representation made by the detenu was disposed of by the detaining authority more than a month after the representation was sent to it. No reasonable explanation for this delay has been given which violates the constitutional safeguards enshrined under Article 22(5) and makes the continued detention of the detenu void. For these reasons, therefore, we allow this petition and direct the detenu to be released forthwith."

By a reading of the above that as there was a long gap between the order of detention and the arrest and also inordinate delay in considering and disposal of the representation, the Supreme Court quashed the detention order.

18. In yet another decision relied upon by the learned counsel for the respondents i.e. *Ana Carelina D'souza*, facts are not clear. The detention order was quashed mainly on the ground of non-supply of the relied upon documents along with the grounds of detention. It is not known whether the statutory time limit of five days was complied with or not. It has been held by the Supreme Court in several cases that mere service of the grounds of detention is not in compliance of the mandatory

provision of Article 22(5) of the Constitution of India unless the grounds are accompanied with the documents which are referred to are relied on the grounds of detention. In the decisions relied upon by the learned senior counsel for the respondents, the detention order was quashed in the facts and circumstances of those cases viz. (i) that the relied upon documents were served beyond the statutory mandate of five days; and (ii) that there was inordinate delay in disposal of the representation. The decisions relied upon by the learned senior counsel for the respondents being in the factual context of respective cases are not applicable to the present case.

19. Section 3(3) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (COFEPOSA) states that the detenu should be communicated with the order of detention and the grounds '*as soon as may be*' after detaining him 'but ordinarily not later than five days and in exceptional cases and for reasons to be recorded in writing not later than fifteen days from the date of detention. Sub-section (3) of Section 3 of the COFEPOSA Act, 1974 reads as under:-

> "**3. Power to make orders detaining certain persons.**
>
> ……

(1) + (2)……..

(3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention." [**underlining added**]

Section 3(3) of the COFEPOSA Act stipulates the statutory period of five days to serve the grounds of detention and in exceptional circumstances and for reasons to be recorded not later than fifteen days from the date of detention. Section 3(3) of the COFEPOSA Act thus allows a leeway of five days at least for the grounds of detention and the documents relied upon in the grounds to be served on the detenues. By the term *"as soon as may be….."*, the statute considers five days as a reasonable time in normal circumstances to convey the grounds of detention to the detenues. There is no statutory obligation on the part of the detaining authority to serve the relied upon documents on the very same day of the service of the order of detention. In view of the time stipulated in Section 3(3) of COFEPOSA Act and the language used in Article 22(5)

of the Constitution of India "….*earliest opportunity……"*, non-serving of copies of documents together with detention order cannot be a ground to quash the detention order.

20. In the case of *Sophia Gulam Mohd. Bham v. State of Maharashtra and Others* **(1999) 6 SCC 593**, the Supreme Court has held that "the use of the words *"as soon as may be….."* indicate a positive action on the part of the detaining authority in supplying the grounds of detention and that there should not be any delay in supplying the grounds on which the order of detention was based". Likewise, it was held that "the use of the terms *"….earliest opportunity…."* in Article 22(5) also carry the same philosophy that there should not be any delay in affording adequate opportunity to the detenu of making a representation against the order of detention". In *Icchu Devi Choraria v. Union of India and Others* (**1980) 4 SCC 531,** the Supreme Court held that "clause (5) of Article 22 and sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be". The expression "*as soon as may be*" cannot be read in isolation from the

phrase "*but ordinarily not later than five days*". [Vide *Jasbir Singh v. Lt. Governor, Delhi and another* **(1999) 4 SCC 228**]. On a proper construction of clause (5) of Article 22 read with Section 3(3) of the COFEPOSA Act, 1974, it is necessary that documents and other materials relied upon in the grounds of detention should be furnished to the detenu along with grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days from the date of detention.

21. In the present case, the detention orders and the grounds of detention were served upon the detenues on 18.05.2019. The relied upon documents were served upon them between 20.05.2019 and 22.05.2019 i.e. within five days from the date of serving of detention orders i.e. 18.05.2019. As pointed out earlier, Section 3(3) of COFEPOSA Act provides for the statutory period of five days to serve the grounds of detention and the relied upon documents. It was pointed out that the relied upon documents were running into 2364 pages and fifteen detention orders were passed against various detenues and therefore, the compilation of the documents was served on

the detenues on 21.05.2019. As rightly contended by the learned Additional Solicitor-General, the preparation of copies of voluminous documents was a time-consuming process and it took time to serve the compilation of documents upon the detenues and therefore, the orders would not be illegal. Section 3(3) of COFEPOSA Act mandates to furnish the documents within five days. Admittedly, the copies have been furnished within the said period. The statutory requirement therefore has been complied with.

22. There is no statutory obligation on the part of the detaining authority to serve the grounds of detention and relied upon documents on the very same day; more so, when there is nothing to show that the detaining authority was guilty of inaction or negligence. The principle laid down by the Supreme Court in *Mehdi Mohamed Joudi v. State of Maharashtra and others* **(1981) 2 SCC 358** that non-supply of documents and material *pari passu* would vitiate the detention order must be understood in the context of Section 3(3) of the COFEPOSA Act. Serving of detention order, grounds of detention and supply of documents must be contemporaneous as mandated

within the time limit of five days stipulated under Section 3(3) of the COFEPOSA Act and Article 22(5) of the Constitution of India.

23. In *Jasbir Singh v. Lt. Governor, Delhi and another* **(1999) 4 SCC 228**, it was held that for computing the period of five days, the date on which the detention order was served has to be excluded. In the case in hand, therefore for computing the period of five days, the date 18.05.2019 has to be excluded. The grounds of detention and the relied upon documents have been served upon the detenues from 20.05.2019 to 22.05.2019 which is well within the statutory period of five days and there is no infraction of sub-section (3) of Section 3 of the COFEPOSA Act.

24. In the present case, the grounds of detention and relied upon documents were served upon the detenues within five days from 18.05.2019 – the date of detention orders i.e. on 21.05.2019 and 22.05.2019. The term *pari passu* has to be read with the statutory provision of Section 3(3) of the COFEPOSA Act which would mean that the grounds of detention and relied upon documents are served within five

days and for reasons to be recorded within fifteen days with explanation. Only when such rule is vitiated, it can be said that they were not furnished together. The High Court erred in quashing the detention orders on the ground that the documents and the material were not supplied *pari passu* the detention orders.

25. The *"Hand Book on Compilation of Instructions on COFEPOSA matters"* from July 2001 to February 2007 – contain instructions of do's and don'ts to be followed relating to COFEPOSA matters. Referring to Guideline No.21 (Part A of Don's and Don'ts in handling COFEPOSA matters) and Guideline No.9 (Part B of Don's and Don'ts in handling COFEPOSA matters), the High Court held that there is violation of the guidelines which would vitiate the detention orders.

26. The *"Hand Book on Compilation of Instructions on COFEPOSA matters"* is only in the nature of guidelines for the officers of the department in dealing with COFEPOSA matters. The said guidelines direct that "care to be taken in communication/service of detention order" and the grounds of detention and relied upon documents should be served as

quickly as possible but within the statutory time limit of five days from the date of detention order. The said guidelines were fully complied with. Also, it is well-settled principle that any executive instruction like the guidelines cannot curtail the provisions of any statute or whittled down any provision of law.

27. The High Court quashed the detention orders on yet another ground that the detaining authority has to record grounds of detention indicating the reasons with the satisfaction that there is imminent possibility of detenue's release from the custody and after release, such person is likely to continue to indulge in the prejudicial activities and the detention orders nowhere expressly mention the satisfaction of the detaining authority as to the imminent possibility of the detenue's release on bail and continue to indulge in the prejudicial activities. The High Court held that the tests laid down in *Kamrunnissa* are not satisfied. The High Court held that mere role played by detenu Nisar Aliyar in smuggling gold or role of another detenu Dimple Happy Dhakad in aiding and abetting Nisar Aliyar in the illegal activities of smuggling do not dispose with the necessity of

recording satisfaction that there is no imminent possibility of the detenues being released on bail.

28. Drawing our attention to the grounds of detention, the learned senior counsel for the respondents has submitted that the detaining authority has recorded its awareness as to the custody of the detenues and the dismissal of their bail applications. It was submitted that the satisfaction of the detaining authority as to the imminent possibility of the detenues being released on bail is significantly absent which vitiates the detention orders. Placing reliance upon *Kamrunnissa*, it was submitted that when the detention orders do not record the satisfaction of the detaining authority as to the possibility of detenues being released on bail and if so released, there is likelihood of their indulging in prejudicial activities; and absence of finding as to the possibility of the detenu being released on bail would vitiate the detention order and the High Court rightly quashed the detention orders. Placing reliance upon number of judgments, the learned senior counsel submitted that the preventive detention order should

not be passed merely to pre-empt or circumvent the enlargement on bail.

29. The learned Additional Solicitor-General has submitted that the detaining authority was aware that the detenu was already in custody up to 20.05.2019 which is clearly recorded in the grounds of detention. Taking us through the grounds of detention, the learned Additional Solicitor-General urged that the detaining authority has succinctly brought out the role of the detenu in the smuggling syndicate and thereafter recorded the satisfaction as to detenu's propensity and likelihood of his indulging in the smuggling activity and the subjective satisfaction of the detaining authority based upon the material particulars cannot be interfered with by the court. In support of his contention, the learned ASG placed reliance upon *Vijay Kumar v. Union of India and others* **(1988) 2 SCC 57** and other judgments.

30. It is well settled that the order of detention can be validly passed against a person in custody and for that purpose, it is necessary that the grounds of detention must show that the detaining authority was aware of the fact that the detenu was

already in custody. The detaining authority must be further satisfied that the detenu is likely to be released from custody and the nature of activities of the detenu indicate that if he is released, he is likely to indulge in such prejudicial activities and therefore, it is necessary to detain him in order to prevent him from engaging in such activities.

31. After reviewing all the decisions, the law on the point was enunciated in *Kamarunnisa v. Union of India and Another* **(1991) 1 SCC 128** where the Supreme Court held as under:-

> "**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. What this Court stated in the case of *Ramesh Yadav* (1985) 4 SCC 232 was that ordinarily a detention order should not be passed merely to pre-empt or circumvent enlargement on bail in cases which are essentially criminal in

nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention. …….”

32. The same principle was reiterated in *Union of India v. Paul Manickam and Another* **(2003) 8 SCC 342** where the Supreme Court held as under:-

> **“14.** …….. Where detention orders are passed in relation to persons who are already in jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention, and the decision in this regard 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 or economic stability 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. If the detaining authority is reasonably satisfied with cogent materials 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. Where the detention order in respect of a person already in

> custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated. (See *N. Meera Rani* v. *Govt. of T.N.* (1989) 4 SCC 418 and *Dharmendra Suganchand Chelawat* v. *Union of India (1990) 1 SCC 746*) The point was gone into detail in *Kamarunnissa* v. *Union of India* (1991) 1 SCC 128. ….." [**underlining added**]

33. Whether a person in jail can be detained under the detention law has been the subject matter for consideration before this Court time and again. In *Huidrom Konungjao Singh v. State of Manipur and Others* **(2012) 7 SCC 181**, the Supreme Court referred to earlier decisions including *Dharmendra Suganchand Chelawat* v. *Union of India* **(1990) 1 SCC 746** and reiterated that if the detaining authority is satisfied that taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

34. In *Veeramani v. State of T.N.* **(1994) 2 SCC 337** in para (6), the Supreme Court held as under:-

> **"6.** From the catena of decisions of this Court it is clear that even in the case of a person in custody, a detention order can validly be passed if the authority passing the order is aware of the fact that he is actually in custody; if he has reason to believe on the

> basis of the reliable material that there is a possibility of his being released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities and if the authority passes an order after recording his satisfaction the same cannot be struck down."

35. In the light of the well settled principles, we have to see, in the present case, whether there was awareness in the mind of the detaining authority that detenu is in custody and he had reason to believe that detenu is likely to be released on bail and if so released, he would continue to indulge in prejudicial activities. In the present case, the detention orders dated 17.05.2019 record the awareness of the detaining authority:- (i) that the detenu is in custody; (ii) that the bail application filed by the detenues have been rejected by the Court. Of course, in the detention orders, the detaining authority has not specifically recorded that the "*detenu is likely to be released*". It cannot be said that the detaining authority has not applied its mind merely on the ground that in the detention orders, it is not expressly stated as to the "detenue's likelihood of being released on bail" and "if so released, he is likely to indulge in the same prejudicial activities". But the detaining authority has clearly

recorded the antecedent of the detenues and its satisfaction that detenues Happy Dhakad and Nisar Aliyar have the high propensity to commit such offences in future.

36. The satisfaction of the detaining authority that the detenu is already in custody and he is likely to be released on bail and on being released, he is likely to indulge in the same prejudicial activities is the subjective satisfaction of the detaining authority. In *Senthamilselvi v. State of T.N. and Another* **(2006) 5 SCC 676**, the Supreme Court held that the satisfaction of the authority coming to the conclusion that there is likelihood of the detenu being released on bail is the “subjective satisfaction” based on the materials and normally the subjective satisfaction is not to be interfered with.

37. The satisfaction of the detaining authority that the detenu may be released on bail cannot be *ipse dixit* of the detaining authority. On the facts and circumstances of the present case, the subjective satisfaction of the detaining authority that the detenu is likely to be released on bail is based on the materials. A reading of the grounds of detention clearly indicates that detenu Nisar Aliyar has been indulging in smuggling gold and

operating syndicate in coordination with others and habitually committing the same unmindful of the revenue loss and the impact on the economy of the nation. Likewise, the detention order qua detenu Happy Dhakad refers to the role played by him in receiving the gold and disposing of the foreign origin smuggled gold through his multiple jewellery outlets and his relatives. The High Court, in our view, erred in quashing the detention orders merely on the ground that the detaining authority has not expressly recorded the finding that there was real possibility of the detenues being released on bail which is in violation of the principles laid down in *Kamarunnisa* and other judgments and Guidelines No.24. The order of the High Court quashing the detention orders on those grounds cannot be sustained.

38. Guideline No.24 of (Part A of Do's) stipulates that when the detenu was 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 and after release such person is likely to continue to indulge in the same

prejudicial activities. As discussed earlier, the detention order shows the application of mind of the detaining authority based on the materials available on record, facts and circumstances of the case, nature of activities and the propensity of the detenues indulging in such activities.

39. After we have reserved the matter for judgment, the learned senior counsel for the respondent-detenu has drawn our attention to the detention order No.PD-12001/34/2019-COFEPOSA dated 01.07.2019 passed against one Ashok Kumar Jalan (Kolkata) under the COFEPOSA Act and submitted that in the said detention order, the detaining authority – Joint Secretary (COFEPOSA) has recorded the satisfaction as to the likelihood of the detenu being released on bail and in the present case, non-recording of such satisfaction clearly indicates non-application of mind. The said detention order dated 01.07.2019 has no relevance to the present case. It does not strengthen the contention of the respondent as to the non-application of mind of detaining authority, which contention we have rejected for the reasons recorded supra.

40. The learned senior counsel for detenues submitted that personal liberty and compliance of procedural safeguards are the prime consideration and since the procedural requirements are not complied with violating the personal liberty of the detenues, the High Court rightly quashed the detention orders and the same cannot be interfered with. As discussed earlier, in the case in hand, the procedural safeguards are complied with. Insofar as the contention that the courts should lean in favour of upholding the personal liberty, we are conscious that the Constitution and the Supreme Court are very zealous of upholding the personal liberty of an individual. But the liberty of an individual has to be subordinated within reasonable bounds to the good of the people. Order of detention is clearly a preventive measure and devised to afford protection to the society. When the preventive detention is aimed to protect the safety and security of the nation, balance has to be struck between liberty of an individual and the needs of the society.

41. Observing that the object of preventive detention is not to punish a man for having done something but to intercept and to

prevent him from doing so, in *Naresh Kumar Goyal v. Union of India and others* **(2005) 8 SCC 276**, it was held as under:-

> **"8.** It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the antisocial and subversive elements from imperilling the welfare of the country or the security of the nation or from disturbing the public tranquillity or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so……".

42. Considering the scope of preventive detention and observing that it is aimed to protect the safety and interest of the society, in *State of Maharashtra and others v. Bhaurao Punjabrao Gawande* **(2008) 3 SCC 613**, it was held as under:-

> **"36.** Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and

services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life.

37. In considering and interpreting preventive detention laws, courts ought to show greatest concern and solitude in upholding and safeguarding the fundamental right of liberty of the citizen, however, without forgetting the historical background in which the necessity—an unhappy necessity—was felt by the makers of the Constitution in incorporating provisions of preventive detention in the Constitution itself. While no doubt it is the duty of the court to safeguard against any encroachment on the life and liberty of individuals, at the same time the authorities who have the responsibility to discharge the functions vested in them under the law of the country should not be impeded or interfered with without justification (vide *A.K. Roy* v. *Union of India* (1982) 1 SCC 271, *Bhut Nath Mete* v. *State of W.B.* (1974) 1 SCC 645, *State of W.B.* v. *Ashok Dey* (1972) 1 SCC 199 and *ADM* v. *Shivakant Shukla* (1976) 2 SCC 521)." **[underlining added].**

43. The court must be conscious that the satisfaction of the detaining authority is "subjective" in nature and the court cannot substitute its opinion for the subjective satisfaction of the detaining authority and interfere with the order of detention. It does not mean that the subjective satisfaction of the detaining authority is immune from judicial reviewability. By various decisions, the Supreme Court has carved out areas within

which the validity of subjective satisfaction can be tested. In the present case, huge volume of gold had been smuggled into the country unabatedly for the last three years and about 3396 kgs of the gold has been brought into India during the period from July 2018 to March, 2019 camouflaging it with brass metal scrap. The detaining authority recorded finding that this has serious impact on the economy of the nation. Detaining authority also satisfied that the detenues have propensity to indulge in the same act of smuggling and passed the order of preventive detention, which is a preventive measure. Based on the documents and the materials placed before the detaining authority and considering the individual role of the detenues, the detaining authority satisfied itself as to the detenues' continued propensity and their inclination to indulge in acts of smuggling in a planned manner to the detriment of the economic security of the country that there is a need to prevent the detenues from smuggling goods. The High Court erred in interfering with the satisfaction of the detaining authority and the impugned judgment cannot be sustained and is liable to be set aside.

44. In the result, the impugned judgment of the High Court dated 25.06.2019 in W.P. (Crl.) Nos.2843 and 2844 of 2019 quashing the detention orders of the detenues viz. Happy Arvindkumar Dhakad and Nisar Pallathukadavil Aliyar is set aside and the appeals preferred by Union of India are allowed. Consequently, the appeals preferred by the detenues shall stand dismissed.

……..J.
[R. BANUMATHI]

……..J.
[A.S. BOPANNA]

New Delhi;
July 18, 2019