

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

FRIDAY, THE 8TH DAY OF OCTOBER 2021 / 16TH ASWINA, 1943

WP(CRL.) NO. 152 OF 2021

PETITIONER:

KUMARI PRABHA SURESH
AGED 60 YEARS
W/O. LATE SUKUMARAN SURESH, KAILASAM,
RAMAPURAM, THANNIMOODU P. O., ARALUMOODU,
TRIVANDRUM - 695 123.

BY ADV SOORAJ T.ELENJICKAL

RESPONDENTS:

- 1 UNION OF INDIA
REPRESENTAED BY SPECIAL SECRETARY, CENTRAL
ECONOMIC INTELLIGENCE BUREAU, MINISTRY OF
FINANCE, DEPARTMENT OF REVENUE, 6TH FLOOR,
B-WING, JANPATH BHAWAN, JANPATH,
NEW DELHI - 110 001.
- 2 THE JOINT SECRETARY (COFEPOSA)
CENTRAL ECONOMIC INTELLIGENCE BUREAU,
GOVERNMENT OF INDIA, MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE, 6TH FLOOR, B-WING,
JANPATH BHAWAN, JANPATH, NEW DELHI - 110 001.
- 3 THE DIRECTOR GENERAL
CENTRAL ECONOMIC INTELLIGENCE BUREAU,
GOVERNMENT OF INDIA, MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE, 6TH FLOOR, B-WING,
JANPATH BHAWAN, JANPATH,
NEW DELHI - 110 001.
- 4 THE SUPERINTENDENT,
WOMEN'S PRISON AND CORRECTIONAL HOME,
ATTAKULANGARA, TRIVANDRUM - 695 023.

5 THE COMMISSIONER OF CUSTOMS (PREVENTIVE)
CUSTOMS (PREVENTIVE) COMMISSIONERATE, 5TH
FLOOR, CATHOLIC CENTER, BROAD WAY,
KOCHI - 682 031.

BY ADVS.

S.MANU, CENTRAL GOVERNMENT COUNSEL FOR CUSTOMS

N.S.DAYA SINDHU SHREE HARI

GOVERNMENT PLEADER SRI. K.A. ANUS

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 04.10.2021, ALONG WITH
WP(Crl.)No.102/2021, THE COURT ON 8-10-2021 DELIVERED
THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

FRIDAY, THE 8TH DAY OF OCTOBER 2021 / 16TH ASWINA, 1943

WP (CRL.) NO. 102 OF 2021

PETITIONER:

PREMAKUMARI P.,
W/O. S. SADANAKUMAR, MUDRA, T. C. NO.65/2055,
THIRUVALLAM P. O., THIRUVANANTHAPURAM,
KERALA STATE - 695 027.

BY ADVS.
GEORGE JACOB (JOSE)
SRI.SOORAJ T.ELENJICKAL
SRI.AJU GEORGE JACOB
SRI.ROSHAN JACOB MUNDACKAL

RESPONDENTS:

- 1 UNION OF INDIA
REPRESENTED BY THE DIRECTOR GENERAL, CENTRAL
ECONOMIC INTELLIGENCE BUREAU, GOVERNMENT OF
INDIA, MINISTRY OF FINANCE, DEPARTMENT OF
REVENUE, 6 TH FLOOR, B-WING, JANPATH BHAWAN,
JANPATH, NEW DELHI - 110001.
- 2 THE JOINT SECRETARY (COFEPOSA)
GOVERNMENT OF INDIA, MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE, CENTRAL ECONOMIC
INTELLIGENCE BUREAU, 6TH FLOOR, B-WING,
JANPATH BHAWAN, JANPATH, NEW DELHI.
- 3 THE SUPERINTENDENT
CENTRAL PRISON, POOJAPURA, THIRUVANANTHAPURAM,
KERALA STATE - 695 012.
- 4 THE COMMISSIONER OF CUSTOMS (PREVENTIVE)
5TH FLOOR, CATHOLIC CENTRE, BROADWAY,

COCHIN, KERALA STATE - 682031.

5 DIRECTOR GENERAL
CENTRAL ECONOMIC INTELLIGENCE BUREAU,
GOVERNMENT OF INDIA, MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE, 6TH FLOOR, B-WING,
JANPATH BHAWAN, JANPATH, NEW DELHI.

BY ADVS.

S.MANU, CENTRAL GOVERNMENT COUNSEL FOR CUSTOMS

N.S.DAYA SINDHU SHREE HARI
GOVERNMENT PLEADER SRI. K.A. ANUS

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 04.10.2021, ALONG WITH WP(Cr1.)No.152/2021, THE
COURT ON 08.10.2021 DELIVERED THE FOLLOWING:

“C.R.”

JUDGMENT

Mohammed Nias C.P. J

Sarith P.S. and Swapna Prabha Suresh were detained pursuant to the orders dated 19-11-2020 and 9-10-2020 made by the Joint Secretary, (COFEPOSA) Government of India, Ministry of Finance under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (“COFEPOSA” for short,) with a view to prevent them from smuggling of goods/abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future.

2. Habeas Corpus Petition, WP(Crl)No.102 of 2021 has been filed by the mother of Sarith P.S.(hereinafter referred to as “detenu”) who is under detention from 24-11-2020 pursuant to Ext. P1 order of detention.

3. Habeas Corpus Petition, WP(Crl.)No.152 of 2021 is filed by the mother of Swapna Pabha Suresh (hereinafter referred to as “detenue”) who is under detention from

11-10-2020 following Ext. P1 order of detention.

4. Based on specific intelligence that gold in huge quantity was being smuggled through diplomatic luggage, one consignment of cargo with diplomatic immunity in terms of Foreign Privileged Persons (Regulation of Customs Privileges) Rules, 1957 consigned from Dubai by Al Zatar Spices, Sharjah in the name of charge d' affairs of UAE Consulate was withheld for clearance on 5-7-2020 and subsequent examination of the said consignment resulted in the seizure of gold weighing 30244.90 grams having a value of Rs. 14,82,00,010. The Consulate Officers claimed ownership of those items declared as food items and did not claim the concealed gold and they were further informed by the charge d' affairs that one Sarith P.S. helps them in clearing the goods in India. On questioning, Sarith revealed that he was assisted by Swapna Prabha Suresh, the Secretary of the charge d' affairs in clearing the luggage. Investigation also revealed that Sarith along with one Sandheep and Swapna were involved in transporting huge quantity of gold concealed in various items sent through diplomatic baggage. It was in this background, the orders of detention were issued by the second respondent.

W.P. (Crl. 102 of 2021

5. The detenue Sarith P.S. was arrested in O.R No.7/2020 registered by the Customs on 6-7-2020. He was granted bail by the ACJM (EO), Ernakulam by order dated 17-09-2020 which could not be executed for non-compliance of the conditions imposed. He was arrested by the NIA on 16-7-2020 in RC 2/2020 registered under the Unlawful Activities Prevention Act, 1967 (for short "UAPA"). OR 13/2020 was registered by Customs on the allegation of smuggling of dollars in which the detenue was arrested on 18-11-2020. He was also arrested in S.C. 610/2020 registered by the Enforcement Directorate under the provisions of the Prevention of Money - Laundering Act, 2002 and his arrest was recorded on 22-7-2021. The bail application filed by the detenue in this case was pending consideration when the order of detention was passed. As stated earlier, the detention order was passed on 19-11-2020 and the same was executed on 24-11-2020. He was served with grounds of detention and relied upon documents on 25-11-2020 and on the opinion of the Advisory Board, the detention order was confirmed by order dated 11-2-2021. The detenue had made a representation to the detaining Authority as also to the Central Government on 17-2-2021. The detaining authority rejected the

representation on 2-3-2021 and the representation addressed to the Central Government was rejected on 3-3-2021.

WP(Crl)No.152 of 2021

6. The detainee, Swapna Prabha Suresh was arrested on 11-7-2020 by the National Investigating Agency (NIA) in R.C. No. 2 of 2020 and on 22.07.2020 by the Enforcement Directorate (ED) in S.C. 610/2020. Her formal arrest was recorded by the Customs in OR No.7 of 2020 on 24.07.2020. The Special Court for NIA cases dismissed the bail application of the detainee in the case registered under UAPA by Ext. P9 order on 10.08.2020. On 05.10.2020 the ACJM(EO), Ernakulam, granted default bail to the detainee in OR No.7 of 2020. But, the same could not be executed as the conditions imposed were not complied with. The preventive detention order was passed on 09.10.2020. The same was executed on 11.10.2020 and the detainee was served with the grounds of detention and the relied upon documents on 15.10.2020. On 11.11.2020 the detainee had submitted representations to the detaining Authority, Central Government and to the Advisory Board seeking revocation of the detention order. The detaining authority by communication dated 25-11-2020 intimated the rejection of the representation. The Director General, CEIB rejected the representation on 11-

12-2020. Pursuant to the report of the Advisory Board, the Central Government confirmed the detention order on 17.12.2020. A second set of representations dated 12.05.2021 was addressed to the detaining Authority and the Government seeking for revocation of the orders as well as for the temporary release of the detenue in view of the pandemic. The said representation was rejected by the detaining Authority on 28.05.2021 and by the Central Government on 31.05.2021.

7. The facts, allegations leading to the orders of detention and the legal issues raised in both the cases being similar, the petitions were heard together and are being disposed of by a common judgment.

8. Heard the learned counsel for the petitioner Sri. George Jacob in W.P. (Crl.) No. 102 of 2021, Sri. Sooraj T.Elenjikal, the learned counsel appearing for the petitioner in W.P. (Crl) No. 152 of 2021, Sri. Daya Sindhu Sreehari for the Union Government, Sri. S. Manu, Senior CGC and the learned Government Pleader Sri. Anas K.A.

9. The learned counsel for the petitioner Sri. George

Jacob raised the following contentions:

i) Though two cases were registered by the National Investigating Agency and the Enforcement Directorate as above mentioned, no documents pertaining to the said cases were supplied to the detainee inspite of the details of the cases being referred and relied upon in the grounds for detention and the non-supply has prevented the detainee from submitting an effective representation and thus there is an infraction of Article 22(5) of the Constitution of India. He cites the following judgments for the said proposition. Waheeda Ashraf and Others v. Union of India and Others (2021 KHC 303), Ummu Saleema v. B.B.Gujarat and Another [1981 KHC 636 : 1981 (3) SCC 317], Radhakrishnan Prabhakaran v. State of T.N. and others (2000 KHC 1427), State of Tamil Nadu. v. Abdullah Kadher Batcha and Another (2009 KHC 4268), Syed Farooq Mohammad v. Union of India and Another (1990 KHC 860), State of Punjab and Others v. Jagdev Singh Talwandi (1984 KHC 594) and J.Abdul Hakeem v. State of T.N. and Others (2005 KHC 1362).

ii) In spite of a specific request to supply copies of the documents pertaining to the two cases registered by the National Investigating Agency and the Enforcement Directorate, the same was not done and it vitiates the detention order. To canvass this argument, he cites : (1) Sk.Nizamuddin v. State of West Bengal :AIR 1974 SC 2353: 1975 KHC 692 (2) Suresh Mahatao v. District Magistrate, Burdwan - AIR 1975 SC 728 (3) Ashadevi v. K.Shivaraj and Another : 1979 KHC 479 :1979 (1) SCC 222 (4) Union of India v. Ranu Bhandari - [2008 (17) SCC 348 (5) Rekha v. State of Tamil Nadu Tr.Secy. to Govt. and Another - 2011 (5) SCC 244: 2011 KHC 4343 (6) State of U.P. v. Kamal

Kishore Saini – 1988 KHC 872 : Para 5 and 7 (7) (1989) 1 SCC 374; 1989 KHC 1063: Ayya alias Ayub v. State of U.P. And Another .

iii) There has been suppression of material facts by the Sponsoring Authority from the Detaining Authority and the same has impaired the subjective satisfaction of the Detaining Authority. To support his contention, he relies on the judgments in (1) Sk. Nizamuddin v. State of West Bengal (1975 KHC 692) (2) Suresh Mahato v. District Magistrate, Burdwan and others (1975 KHC 716) (3) Ashadevi v. K. Shivaraj and Another (1979 KHC 479) (4) Union of India v. Ranu Bhandari (2008 KHC 7117)

iv) The subjective satisfaction arrived at by the Detaining Authority to invoke the provisions of the COFEPOSA Act was not genuine as there was no compelling reason to make an order of detention since the detainee was already in judicial custody on the date of passing of the order. To buttress his contention, he relies on the decisions in (1) Raishad K.T. v. Union of India and Others [2021 (3) KHC 468] (2) Rivadeneyta Ricardo Agustin v. Government of the National Capital Territory of Delhi and Others (1994 KHC 930) (3) Amritlal and others v. Union Government through Secretary, Ministry of Finance and Others (2001 KHC 1349) (4) T.V.Sravanan Alias S.A.R.Prasana Venkatachaariar Chaturvedi v. State Through Secretary and Another (2006 KHC 133) (5) Rekha v. State of Tamil Nadu Tr.Sec.to Govt. and Another (2011 KHC 4343) (6) Union of India v. Dimple Happy Dhakad (2019 KHC 6662)

10. Learned counsel for the petitioner in WP(Crl)No.152 of 2021, Sri. Sooraj Elenjickal, apart from adopting the

arguments made by the learned counsel for the petitioner in WP(Crl.)No.102 of 2021 made the following submissions:- (i) The detenue's application for bail was rejected by the Special Court for NIA on 10.08.2020 and this fact was never brought to the notice of the Detaining Authority by the Sponsoring Authority. In any event the bail order by the Special Court for NIA cases dated 10.08.2020 was a vital fact which should have been taken into account while passing the detention order on 09.10.2020 as it has a direct bearing on the question to detain or not. (ii) The learned counsel also argues that there was a delay in considering the representations and that the refusal to consider the application even for a temporary release in view of the pandemic and the health condition of the detenue also make the continued detention illegal. He also submits that the detenue has not retracted to the statements made under Section 108 of the Customs Act, and it was her statement which helped the Investigating Agency to unearth the entire smuggling activities and her role was very minimal compared to the other accused persons. Learned counsel argued that by Ext.P9 order of the Special Court for NIA cases, there was no chance at all for the detenue to be released, and therefore, no order of preventive detention could have been passed.

11. The learned counsel for the Customs Sri. Manu opposing the arguments of the petitioners submits that the documents sought for by the detenue need not be given as they were merely referred in the detention order and they were not relied upon or made the basis for passing the detention orders. Only those documents on the basis of which the detaining Authority arrives at the subjective satisfaction need be supplied and failure to give the documents solely for the reason that they have been narrated in the detention order cannot invalidate the detention order passed. For this purpose he relies on the decisions, (1) **Thahira v. State of Kerala and Others** [(2013 (4) KLT 626 (2) **State of Tamiul Nadu v. Abdul Khader Batcha** [(2009) 1 SCC 333].

12. Sri. Manu also submits that there is no bar at all in passing a detention order even if the detenue is in judicial custody as the detaining authority was aware of the same and has also considered the fact that there was likelihood of the detenue being released on bail and in such circumstances, the detention orders are only to be sustained. He cited the following judgments in support of his contentions:

- 1) Rameshwar Shaw v. District Magistrate, Burdwan and Others (AIR 1964 SC 334)
- 2) Union of India v. Ankit Ashok Jalan (2019 (16) SCLE 682)

- 3)Union of India and Others v. Dimple Happy Dhakad (AIR 2019 SC 3428)
- 4)Abdul Sathat Ibrahim Manik v. Union of India (AIR 1991 SC 2261)
- 5)Noor Salman Makani v. Union of India (1994 1 SCC 381)
- 6)Sanjay Kumar Agarwal v. Union of India (1990 3 SCC 309)
- 7)Kamarunnissa and Others v. Union of India and Others [(1991) 1 SCC 128]
- 8)Vinod K. Chawla v. Union of India [(2006) 7 SCC 337]

He argues that even if bail applications have been filed, detention orders can still be issued going by the principle stated in **Senthamilaselvi v. State of Tamil Nadu and Other** [(2006) 5 SCC 676.

13. Lastly he submits that the adequacy of the material on which subjective satisfaction is arrived is not a matter to be examined by the Court, as the detaining authority has considered relevant materials and has weighed all other circumstances and has applied its mind before passing the detention order. He also cites the judgment in **Asha Keshvarao Bhossle v. Union of India** [(1985) 4 SCC 361]. Summing up, he submits that there can be no straitjacket formula for reaching the subjective satisfaction, and each

case has to be dealt with on the basis of the facts and circumstances.

14. The learned counsel appearing for the Central Government submits that they had duly considered the representations and applied their mind before they rejected the representation. They also maintain the stand that the detention orders are necessary in order to prevent prejudicial activities in future. According to him, the documents and materials along with the individual role of the detenues clearly show their continued propensity and inclination to indulge in acts of smuggling by forming a racket which detrimentally affect the economic security of the country. He has also made available the files which dealt with the consideration of the representations submitted by the detenues. We have also perused the files of the proceedings of the Advisory Board.

15. Sri. George Jacob, the learned counsel appearing for the detainee in W.P. (Crl.)No. 102/2021 while relying on the judgments regarding non-supply of documents submits that the documents sought for in those the cases were neither relevant nor forming the basis for passing the detention orders and it was in that circumstances that the failure to supply those were

held not fatal. He submits that in the instant case there is an excessive narration of the facts of cases registered against the detainee, and as such non-supply of those documents starting from the registration of the case has certainly affected his right to make a meaningful representation. It is his further submission that inspite of a specific request to supply the copies of the documents pertaining to the two cases registered by the NIA and Enforcement Directorate, the same was not supplied and it vitiates the order of detention.

16. The contentions, according to us are interlinked and we feel that there cannot be any doubt on the proposition that the requirement is only to furnish those documents which are relied upon by the detaining Authority and which formed the basis for arriving at the subjective satisfaction. The narration about the cases or the passing references made in the course of narration of facts and which are not relied upon by the detaining authority while passing the order of detention need not be furnished to the detainee and he cannot complain of being prevented from making an effective representation. Resultantly, there cannot be any violation of Article 22 (5) of the Constitution of India. As a sequel, we hold that even if a request is made for supply of those documents which, as aforesaid did

not determine the basis of detention, non-supply of the same cannot in any manner be faulted. In the instant case, in the detention order the authority had referred to the cases only to indicate that he is involved in two other cases. Those facts are not in any way relied on for arriving at the subjective satisfaction that led to the detention order. We also do not find any prejudice caused to the detainee on account of the failure to supply copies of the documents sought. We therefore, repel the first and second contentions on behalf of the detainee in W.P. (Crl.) 102/2021.

17. As regards the third contention, viz., suppression of facts by the sponsoring Authority from the detaining authority, relying on the judgment of the Hon'ble Supreme Court in **Nizamuddin** (supra) it is seen from the said judgment that the non disclosure of pendency of criminal case arising out of the very same incident and which formed the basis of detention was held to be a material circumstance which ought to have been placed before the Detaining Authority in that case. It is pertinent to note that in that case detention was ordered on the basis of the solitary incident of theft committed by the detainee therein with respect to which a criminal case was also registered. In contrast, we find that the cases registered

against the detenue in the instant case are totally independent from each other and are registered under different enactments wherein, the mandate, scope of enquiry and the ultimate conclusions under those statutes are all distinct and separate. It cannot be assumed that the developments in each of the cases so registered should be within the knowledge of the other agency or that the documents pertaining to the investigation of one need to be in the possession of the other agency. Though there can be sharing of information and materials, we cannot hold that every information and material is required to be shared by all the agencies. It is also to be noticed that investigation in O.R. 13/2020 pertained to the smuggling of a different commodity i.e. foreign currency, and was only at a preliminary stage when the detention order was passed. In that view of the matter, we are unable to hold that there has been any suppression of materials by the sponsoring Authority from the detaining Authority or that the same has resulted in the subjective satisfaction being vitiated on any count. We therefore, reject the third contention made on behalf of the detenue.

18. The learned counsel for the petitioner vehemently argued that in the instant case there was no possibility of the detenue being enlarged on bail and thus there was no necessity

at all to detain. He argues that the detenue was in judicial custody throughout and the detaining authority, except stating that there was the imminent possibility of his being released from judicial custody, has not taken into account the fact that the detenue had not even applied for bail in OR No. 13/2020 registered by the Customs and SC No. 610/2020 registered by the Enforcement Directorate.

19. It is pertinent to note that, the detaining authority was not only aware that the detenue was in judicial custody but also noted the circumstances on the basis of which he was satisfied that the detenue was likely to be enlarged on bail and also that he would continue to engage in smuggling. Therefore, the detention was not ordered on the mere ground that he is likely to be released on bail but also on the ground that the detaining authority was satisfied the detenue was likely to indulge in the same activity if he was released on bail. It is trite that satisfaction under the law is subjective and it is not for the Court to test the adequacy of the material on which such satisfaction is reached. The fact that the detenue has not moved bail applications in two cases cannot mean that he is prevented from moving a bail application or that he will not file bail application in future. We also find force in the contention of

the learned Standing Counsel for Customs that a strategy was adopted by all the accused not to seek bail so as to set up pleas while challenging the detention order. In as much as the possibility for getting bail cannot be ruled out, the conclusion of the detaining authority cannot be held as a mere ipse dixit. In the instant case, the detaining authority has concluded as follows:

“ 8. I am aware that i.e. Shri. Sarith P.S. are in judicial custody at present. However, there is an imminent possibility of your release from judicial custody and if you are released on bail, you are likely to continue to indulge in the prejudicial activities and therefore, there is a need to issue a Detention Order against you under the COFEPOSA Act, 1974 with a view to prevent you from smuggling of gold in future.”

20. This, according to us it is perfectly in consonance with the principles laid down by the Hon'ble Supreme Court in **Ankit Ashok Jalan** (supra) wherein almost all the previous judgments on the point were noticed. The detaining authority in the instant case was alive to the fact that the detinue was already in judicial custody and also felt that there were compelling reasons justifying the detention, despite the fact that

the detenue was in judicial custody. The decisions relied on by the learned counsel are clearly distinguishable being governed and qualified by the particular facts of those cases. It is trite that even a single significant detail may alter the entire aspect obtaining in a case. None of the judgments cited by the learned counsel for the petitioner persuade us to hold otherwise. We, therefore, feel the said contention has also to be rejected and we do so.

21. On an anxious consideration of the submissions made on either side we are satisfied that no grounds are made out for interference with the detention order in this writ petition. WP(Crl)No.102 of 2021 is to be dismissed and we do so.

W.P. (Crl.) 152 of 2021

22. With respect to the contentions of the learned counsel for the detenue, we find considerable force in the contention that Ext. P9 order whereby the bail was rejected by the Special Court was not placed by the Sponsoring Authority before the Detaining Authority and resultantly the latter was not aware of the said material fact. The Special Court for Trial of NIA Cases, Ernakulam had passed an order rejecting the bail on 10.08.2021 as follows:-

“13. To sum up, when the Case Diary and the other materials produced before the Court are perused, there are sufficient grounds for believing that the accusation made against the petitioner is prima facie true. When it is found so, section 43D of the UA(P) Act mandates that she is not entitled to be released on bail.”

23. It is relevant to extract proviso to Section 43D(5) of the UAP Act:-

“Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.”

24. We feel, having gone through Ext.P9 order, in a case about which the detaining authority was fully aware that the non-placing and non-consideration of the same assumes significance. The order, as stated above was passed on 10-08-2021, whereas the order of detention in the instant case is almost two months later on 9-10-2020. We cannot but hold that Ext. P9 was vital and relevant material, that had a bearing on the question to detain or not, and non-consideration of the said material vitiates the detention for non-application of mind. What weight Ext.P9 would carry if it was within the knowledge

of the detaining authority is altogether a different matter. It is not disputed that Ext. P9 was not placed before and considered by the detaining authority. The detention order will be vitiated on the ground of non-application of mind if a piece of evidence that is relevant, though not binding, had not been considered at all. If a fact or material that might reasonably have affected the decision, whether or not to pass an order of detention, is excluded from consideration, there would be a failure of application of mind which would, in turn, invalidate the detention order. We quite see that the detaining authority might very well have come to the same conclusion even after considering Ext. P9, but in the facts of the case, the omission to consider the same is fatal. We also find that the above material could have significantly affected the decision of the detaining authority on the issue of whether the detenue who was already in custody was likely to be enlarged on bail. As observed by the Supreme Court in the decisions referred above, the detaining authority has to bear in mind that orders of preventive detention have to be passed only in circumstances where the ordinary criminal laws are not effective in detaining the accused. In the instant case, the rejection of the bail application by the Special Court considering the UAPA case, together with the fact that no fresh bail application had been filed by the detenue till

the date of the detention order ought to have engaged the attention of the detaining authority, who ought to have given reasons as to why, despite the above facts, he felt that a detention under the COFEPOSA Act was necessary.

25. Though we are conscious of the fact that the period of detention would come to an end in a couple of days, since it is our constitutionally entrusted duty to safeguard the rule of law, more so, in a matter involving personal liberty which is sacrosanct and protected under Article 21 of the Constitution of India, we have no choice but to hold the detention to be bad in the eye of law.

26. We also remind ourselves of the prophetic statements of the Hon'ble Supreme Court in **Ichu Devi Choraria v. Union of India and Others** (AIR 1980 SC 1983), which reads thus:-

“We are not unmindful of the fact that the COFEPOSA Act has been enacted for the purpose of eradicating the evil of smuggling which is eating into the vitals of the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the Court releasing a person detained under this Act, it is quite possible that the effect of the order may be to let loose on the

society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty. For it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The Constitution has therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This Court has also through its judicial pronouncements created various legal bul-works and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a

smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty in order to prevent a smuggler from securing his release from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This Court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention".

27. The order of detention impugned is quashed, the petitioner in W.P. (Crl.) 102 of 2021 is directed to be set at

liberty forthwith unless she is held in custody pursuant to any other lawful order.

In the result, W.P. (Crl.) 102 of 2021 is dismissed and W.P. (Crl) No. 152/2021 is allowed as above.

Sd/-

A.K.JAYASANKARAN NAMBIAR, JUDGE

Sd/-

MOHAMMED NIAS C.P., JUDGE

dlk/ani

APPENDIX OF WP(CRL.) 102/2021

PETITIONER EXHIBITS

EXHIBIT P1 TRUE COPY OF THE ORDER DATED 19.11.2020 ISSUED BY THE 2ND RESPONDENT UNDER SECTION 3(1) OF THE COFEPOSA ACT.

EXHIBIT P2 TRUE COPY OF THE 'GROUNDS OF DETENTION' DATED ISSUED BY THE 2ND RESPONDENT WHICH HAD BEEN FURNISHED TO THE DETENU.

EXHIBIT P3 TRUE COPY OF THE LIST OF DOCUMENTS CONTAINING THE DESCRIPTION OF 203 DOCUMENTS PURPORTEDLY RELIED UPON BY THE 2ND RESPONDENT WHILE DIRECTING THE DETENTION OF THE DETENU.

EXHIBIT P4 TRUE COPY OF THE REPRESENTATION DATED 8.1.2021 OF THE DETENU SUBMITTED TO THE HON'BLE COFEPOSA ADVISORY BOARD.

EXHIBIT P5 TRUE COPY OF THE ORDER DATED 11.02.2021 OF THE CENTRAL GOVERNMENT CONFIRMING THE ORDER OF DETENTION OF THE DETENUE UNDER SECTION 8(1)F OF THE COFEPOSA ACT.

EXHIBIT P6 TRUE COPY OF THE REPRESENTATION DATED 17.02.2021 OF THE DETENUE SUBMITTED TO THE DETAINING AUTHORITY.

EXHIBIT P7 TRUE COPY OF THE REPRESENTATION DATED 17.02.2021 OF THE DETENUE SUBMITTED TO THE 1ST RESPONDENT.

EXHIBIT P8 TRUE COPY OF THE COMMUNICATION DATED 2.3.2021 OF THE DIRECTOR (COFEPOSA) ISSUED TO THE DETENUE.

EXHIBIT P9 TRUE COPY OF THE COMMUNICATION DATED 3.3.2021 OF THE DIRECTOR (COFEPOSA) ISSUED TO THE DETENUE.

APPENDIX OF WP(CRL.) 152/2021

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY OF THE ORDER NO.PD-12002/06/2020-COFEPOSA DATED 09.10.2020 ISSUED BY THE 2ND RESPONDENT.
Exhibit P2	TRUE COPY OF THE 'GROUNDS OF DETENTION' SERVED UPON THE DETENUE.
Exhibit P3	TRUE COPY OF THE LIST OF 'RELIED UPON DOCUMENTS' FURNISHED TO THE DETENUE.
Exhibit P4	TRUE COPY OF THE REPRESENTATION DATED 11.11.2020 OF THE DETENUE SUBMITTED TO THE DETAINING AUTHORITY.
Exhibit P5	TRUE COPY OF THE REPRESENTATION DATED 11.11.2020 OF THE DETENUE SUBMITTED TO THE CENTRAL GOVERNMENT.
Exhibit P6	TRUE COPY OF THE REPRESENTATION DATED 11.11.2020 OF THE DETENUE SUBMITTED TO THE HON'BLE ADVISORY BOARD.
Exhibit P6(a)	TRUE COPY OF THE PETITION DATED 11.11.2020 OF THE DETENUE BEFORE THE ADVISORY BOARD.
Exhibit P7	TRUE COPY OF THE COMMUNICATION DATED 25.11.2020 OF THE DETAINING AUTHORITY.
Exhibit P8	TRUE COPY OF THE ORDER DATED 17.12.2020 OF THE CENTRAL GOVERNMENT CONFIRMING THE DETENTION ORDER.
Exhibit P9	TRUE COPY OF THE ORDER DATED 10.08.2020 PASSED BY THE SPECIAL COURT FOR TRIAL OF NIA CASES,

ERNAKULAM.

- Exhibit P10 TRUE COPY OF THE ORDER DATED
08.12.2020 PASSED BY THE
ADDITIONAL CHIEF JUDICIAL
MAGISTRATE COURT (ECONOMIC
OFFICES), ERNAKULAM.
- Exhibit P11 TRUE COPY OF THE STATEMENT
(WITHOUT ANNEXURES) DATED
04.03.2021 FILED BY THE CUSTOMS
(PREVENTIVE) COMMISSIONERATE,
COCHIN IN CRL.M.C.NO.5743/2020 ON
THE FILES OF THIS HON'BLE COURT.
- Exhibit P12 TRUE COPY OF THE REPRESENTATION
DATED 12.05.2021 OF THE DETENUE
ADDRESSED TO DETAINING AUTHORITY.
- Exhibit P13 THE TRUE COPY OF THE
REPRESENTATION DATED 12.05.2021
ADDRESSED TO CENTRAL GOVERNMENT.
- Exhibit P14 TRUE COPY OF THE MEMORANDUM DATED
28.05.2021 OF THE DETAINING
AUTHORITY.

RESPONDENTS EXHIBITS

- EXHIBIT R2 (a) TRUE COPY OF THE MEMORANDUM
NO.PD-15002/08/2020-COFEPOSA
DATED 18.12.2020
- EXHIBIT R2 (b) TRUE COPY OF THE MEMORANDUM
NO.PD-15002/08/2020-COFEPOSA
DATED 31.05.2021