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.

TUESDAY, THE 9TH DAY OF NOVEMBER 2021 / 18TH KARTHIKA, 1943

WP(CRL.) NO. 206 OF 2021

PETITIONER/S:

FOUSIA RABINS
AGED 38 YEARS
W/O.RABIN KARIKKANAKUDIYIL HAMEED (DETENU)
R/O.KARIKKANAKUDIYIL HOUSE, PERUMATTOM,
VELLOORKUNNAM VILLAGE, PUTHUPPADY P.O.,
MUVATTUPUZHA, ERNAKULAM - 686 673.
BY ADV P.A.AUGUSTIAN

RESPONDENT/S:

1 UNION OF INDIA
REPRESENTED BY DIRECTOR GENERAL, CENTRAL ECONOMIC INTELLIGENCE BUREAU, 6TH FLOOR, 'B' WING, JANPATH BHAWAN, JANP;ATH, NEW DELHI - 110 001.

2 JOINT SECRETARY (COFEPOSA)
GOVT. OF INDIA, DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, 6TH FLOOR, 'B'WING, JANPATH BHAWAN, JANPATH, NEW DELHI - 110 001.

3 THE SUPERINTENDENT
CENTRAL PRISON, THIRUVANANTHAPURAM.

4 THE COMMISSIONER OF CUSTOMS (PREVENTIVE)
CATHOLIC CENTRE, BROADWAY, COCHIN - 682 031.

BY ADVS.
SHRI SUVIN R. CENTRAL GOVENMENT COUNSEL (FOR R1 & R2)
SR. STANDING COUNSEL SRI, MANU FOR CUSTOMS
SRI.MANU.S, CGC FOR (R4)
SHRI.K.A. ANAS GOVERNMENT PLEADER FOR (R3)

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION ON 28.10.2021, THE COURT ON 9-11-2021 DELIVERED THE FOLLOWING:

W.P. (Crl. No. 206 of 2021

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Dated, this the 9th day of November, 2021

JUDGMENT

Mohammed Nias,J.

In this Habeas Corpus Petition, the petitioner questions the detention of her husband Rabins K. Hameed ("the detenu" for short) under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA" for short), pursuant to the order passed by the 2nd respondent on 15-3-2021 and executed on 17-3-2021.

2. 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 30.244 kilograms having a value of Rs. 14.82 Crores.

3. The investigations that followed the seizure on 5-7-2020 revealed that one K.T.Ramees, a major investor along with the other organizers and facilitators like Swapna Suresh, Sarith P.S., and Sandeep contacted the habitual offenders including Jalal A.M., the detenu and others and they conducted two trial consignments and the group had altogether smuggled around 136 kilograms of gold in 21 consignments including the one seized on 5-7-2020, during the period between 15-7-2019 to 27-6-2020. Investigations further revealed that the detenu along with Jalal A.M. had joined the smuggling racket and invested money for smuggling gold and on three occasions, the detenu had purchased gold and got it concealed with the help of a goldsmith at Ajman and had sent it to India in the name of Faisal Fareed. It was alleged that they had smuggled 12.853 kilograms of gold, by concealing it inside a diplomatic cargo and attempted to smuggle about 5.50 kgs of gold, included in the 30kgs of gold which was seized on 5-7-2020. It was in this background, the order of detention was issued by the second respondent.

4. The detenu was in UAE and was extradited and arrested on 26-10-2020 by the National Investigating Agency (“NIA” for short) which registered RC 2/2020 under the Unlawful Activities Prevention

Act, 1967 (for short “UAPA”). Later, the Customs recorded the arrest of the detenu on 15-12-2020 after obtaining necessary permission from the Special Court dealing with the NIA case above mentioned. From 18-1-2021 to 28-1-2021, the detenu was in the custody of the customs. The detention order, as stated earlier, was passed on 15-3-2021 and the same was executed on 17-3-2021. Reference was made to the Advisory Board vide Ext. P3 dated 1-4-2021 and the detenu had requested for copies of certain documents on 3-5-2021 and he also submitted a representation on the same day to the advisory board. The advisory board, in terms of 8(f) of the COFEPOSA Act confirmed the detention order on 20-5-2021. Request for copies made before the 2nd respondent was also rejected on 5-5-2021. Representation was also made before the detaining authority on 9-5-2021. The petitioner also alleges that he had sent another representation through e-mail on 10-6-2021 to the jail authorities to be forwarded to the central government, but both of them denied having received any such representation. Representation submitted later on 5-8-2021 to the central government was rejected on 11-8-2021.

5. The petitioner alleges that the order being in total violation of the Constitutional mandates under Article 22 of the Constitution of India as well as against the provisions of the COFEPOSA Act seeks

the release of the detenu as well as to quash the detention order.

6. Counter affidavits opposing the prayers in the Writ Petition were filed on behalf of the Central Government, Customs, and the State of Kerala.

7. Heard the learned counsel for the petitioner Sri. K.A. Augustine, the learned Senior Standing Counsel for Customs Sri. Manu, the learned CGC Sri. Suvin.R and the learned Government Pleader Sri. Anas K.A.

8. The learned counsel for the petitioner submits that the detention order is bad for the following reasons:

That relevant documents relied on in the detention order were not supplied, that the non-consideration of the representation dated 10-6-2021 is fatal, that there has been undue delay in passing the detention order, that there was no application of mind by the detaining authority regarding the potentiality of the detenu to engage in prejudicial activities in future, that relevant documents were not placed before the advisory board by the detaining authority and further that there has been suppression of facts by the sponsoring authority in not placing the order rejecting the bail application of

the detenu by the NIA Court and finally that the advisory Board constituted in the case of the detenu was not competent to consider the same. Apart from the above, he also argued that the detention in this case is solely on the basis of his statements under Section 108 of the Customs Act and also that of one Jalal A.M. which has since been retracted by him and in short there was hardly any material to pass an order of detention under COFEPOSA Act.

9. The learned counsel for the Customs Sri. Manu argued that copies of all the relevant documents relied on in the detention order have been furnished and that no prejudice has been caused to the detenu on that count. He also submitted that no relevant material has been kept away by the sponsoring authority from the detaining authority and that subjective satisfaction has been arrived at by referring to the relevant documents and that there has been no infraction of any right of the detenu much less any non-compliance of the statutory requirements. He also submits that the detenu had sufficient opportunity to point out the subsequent events, which the detenu feel relevant before the advisory board and the alleged omission of the detaining authority to bring the subsequent events before the advisory board does not vitiate the detention. The learned counsel appearing for the Central Government apart from adopting the

contention of the learned Standing Counsel for the Customs submitted that no representation was received on 10-6-2021 or forwarded by the jail authorities to them and the representation which they have received later had been considered promptly and rejected. The learned Government Pleader for the State Government also submitted that no representation, allegedly sent by email on 10-6-2021, was received by the Jail authorities.

10. The learned counsel for the Customs relying on the judgment in Rajendrakumar Natvarlal Shah v. State of Gujarat and Others (AIR 1988 SC 1255) argues that the non-placing of the order rejecting appeal and does not amount to a suppression of relevant material vitiating the detention order. What is essential is the knowledge of the detaining authority that the proposed detenu is in custody and the instant case there is ample awareness of the detaining authority about the fact that the detenu is in custody.

11. The subjective satisfaction with regard to the necessity of passing detention order cannot be held to be void because of the subsequent infraction of the detenu's right or for the non-compliance of the procedure. Even in those cases only the further detention becomes illegal but the same cannot affect the validity of the order

of detention.

12. The learned counsel for the petitioner submits that there has been non-supply of the documents relied on in the detention order as the order-in-original of the previous proceedings against the detenu for smuggling was not furnished to him. The detaining authority relied on a letter dated 9-3-2021 received from the Special Investigation and Intelligence Branch, Customs House, Cochin and those facts are relied on in the detention order, but the fact that the petitioner had filed an appeal against the penalty proceedings against him and that the appeal is still pending are not placed by the sponsoring authority with a view to suppress it from the detaining authority.

13. The learned counsel also argues, by Ext. P5 dated 3-5-2021 the detenu had requested the 2nd respondent to issue copies of the documents, which he believes the detaining authority had relied upon to notice his previous involvement in the smuggling activities. In that case the copy of the appeal which he filed against the penalty imposed was also very relevant and he requested for furnishing the same. Seven other documents were also requested to be furnished. The learned counsel submits that in spite of a

request, the same has not been supplied to him. The non-supply of these documents, according to him vitiate the detention order.

14. Relying on the judgment in Shalini Soni v. Union of India & Others [(1980) 4 SCC 544 the learned counsel argues that sub-section (3) of Section 3 of the CFEPOSA Act provides that the grounds of detention should be communicated to the detenu and the grounds of detention includes the documents, statements or other materials relied upon in the grounds of detention, and if, any of them are not supplied, it must be taken that the grounds furnished to the detenu was not complete. According to him, in the instant case, the relevant documents were not supplied to the detenu which affects his Constitutional right to make a representation at the earliest. He also relies on the decision in Ibrahim Ahmad Battiu v. State of Gujrat and Others (AIR 1982 SC 1500) for the proposition that all the documents, statements and other materials incorporated in the grounds by reference and which influenced the detaining authority in arriving at the requisite satisfaction must be furnished to the detenu and failure to do so, would amount to a breach of the twin duties cast on the detaining authority under Article 22 (5) of the Constitution of India. This contention of the learned counsel for the petitioner is met by the learned Standing Counsel for the Customs by submitting that the

requirement under law is only to supply such documents which are relied on for the purpose of arriving at the subjective satisfaction and not every document narrated in the detention order. The learned Standing Counsel for the Customs also relied on the judgments in (1) State of Tamil Nadu and Others v. Abdullah Khader Batcha and Others [(2009) 1 SCC 333) and Kamarunnissa and Others v. Union of India and Others [(1991) 1 SCC 128] for the proposition that the documents which are merely records for the purpose of narration of facts cannot be terms as documents which need to be supplied. It is trite that only those documents on which the impugned detention order is primarily based need be supplied and not any and every document. This position is well settled and admits of no doubt.

15. The learned Standing Counsel also argues that the detenu in his voluntary statement under Section 108 of the Customs Act admitted his earlier involvement in a smuggling case from Cochin Airport and that a penalty of 50 lakhs was imposed on him. All that was furnished by the Special Intelligence and Investigation Branch, Customs House, Cochin, was the details of case which the detenu himself had admitted in his statement and the letter dated 9-3-2021 of the SIIB referred above is a part of the relied upon documents and served on the detenu. Order in original which is sought for by the

detenu was not in the possession of the sponsoring authority and the detaining authority had only narrated about the detenu's antecedents for arriving at the conclusion that he is a habitual offender. For so doing the letter dated 9-3-2021 of the SIIB read with the statements under Section 108 of the Customs Act given by the detenu were sufficient. No further details about the case or the rival contentions were taken into account by the detaining authority. As such there was no reference or reliance to any other documents with respect to the previous smuggling activities and therefore, there is no requirement to supply the same. Equally, there was no requirement to supply the same even when the detenu requested for it as per Ext. P5. On a consideration of the contentions made in this regard, we hold that the letter dated 9-3-2021 of the SIIB which is part of the relied upon documents and the detenu's statements were relied upon by the detaining authority for concluding about the antecedents of the detenu. We find nothing wrong in the said approach and we repeal the detenu's contention that relevant documents were not supplied and that non-consideration of his request for the supply of the same was in no way improper.

16. The learned counsel for the petitioner argued that Ext. P10 representation dated 9-6-2021, sent by e-mail by his lawyer on

10-6-2021 enclosing the representation on behalf of the detenu, to the Jail Authorities as well as to the 2nd respondent and that Ext. P11 is the proof for having sent Ext. P10 representation.

17. The learned counsel for the petitioner also relies on the decision in Kamlesh Kumar Ishwardas Patel & Ors. v. Union of India & Others [(1995) 4 SCC 51] to contend that once the detention order is passed by an officer, the said Officer is obliged to consider the representation sent by the detenu and failure on the part to do so in denial of the rights conferred on the detenu to make a representation, vitiates the detention order. The learned counsel for the 2nd respondent as well as the learned counsel for the State Government denies having received the said mail enclosing the representation.

18. There is nothing on record to show that such a representation was received by the 2nd respondent or the Jail Authorities except the bald assertion in the Writ Petition. It is also apposite to note that the subsequent representation sent on 5-8-2021 has been duly considered by the 2nd respondent and rejected as per Ext. P13 order dated 11th August 2021.

19. The petitioner also relies on Section 88A of the Evidence Act

to argue that there is a presumption that the electronic mail sent to the addressee was received as is clear from Ext. P11. It has to be straightaway noticed that Section 88A only presumes about the contents of the messages and not the proof of its receipt and will have no application in a case where the receipt of the mail itself is disputed. Ext. P11 is no proof of the fact that the mail was received by the addressees. We hold, going through the provisions of the section that it refers only to the contents of the e-mail and it does not deal with the question of receipt of the mail.

20. We do not think that the said judgment in Kamalesh Kumar (supra) has any application to the facts of the present case as there is nothing on record to suggest the 2nd respondent having received the representation as alleged by the detenu. We do not find any reason to disbelieve the assertions of the 2nd and the 4th respondent in their counter affidavits denying the receipt of Ext. P10 representation of the detenu dated 9-6-2021. The contention in this regard is liable to be rejected and we do so.

21. The learned counsel for the petitioner argues that there is considerable delay in passing the detention order as according to him the last prejudicial activity was on 5-7-2020 and even if the

contention of the respondent that the role of the detenu was brought to light only on 27-09-2020 is accepted, still there is considerable delay in passing the detention order, months later on 15-3-2020. The learned counsel in support of his contention relied on the judgment in Saeed Zakir Hussain Malik v. State of Maharashtra and Others [(2012) 8 SCC 233] which held as follows:-

> 5....Indeed mere delay in passing a detention order is not conclusive., but we have to see the type of grounds given and consider whether such grounds could really weigh with an officer some 7 months later in coming to the conclusion that it was necessary to detain the petitioner to prevent him from acting in a manner prejudicial to the maintenance of essential supplies of foodgrains. It is not explained why there was such a long delay in passing the order. The District Magistrate appears almost to have passed an order of conviction and sentence for offences committed about 7 months earlier. The authorities concerned must have due regard to the object with which the order is passed, and if the object was to prevent disruption of supplies of food grains one should think that prompt action in such matters should be taken as soon as incidents like those which are referred to in the grounds have taken place. In our opinion, the order of detention is invalid.

In T.V. Abdul Rahman v. State of Kerala and Other (1989) 4 SCC 741, in similar circumstance,

> 10...The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case.No hard and fast reule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending

> acts and the order of detention. However, when there s undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case".

22. The learned counsel for the Customs pointed out that the decision to detain in the instant case was taken after verifying all the three statements of the detenu made under Section 108 of the Customs Act on 15-12-2020, 22-1-2021 and 27-01-2021 and the investigation was progressing steadily and the last statement as mentioned above was on 27-1-2021 and after due consideration of all the materials and inputs, the detention order was passed on 15-3-2021. The investigation of this nature was bound to take some time, given the fact that voluminous documents are involved. We notice that the delay has to be reckoned with reference to the reason put forth and it is such explanation for the delay that matters much more than the length of the delay itself. It is only the unexplained delay that can be held as vitiating a detention order. The judgment of the Hon'ble Supreme Court reported in Rajendrakumar Natvarlal Shah v. State of Gujrat and Ors. (AIR 1988 SC 1255) succinctly held as follows:

> “In the enforcement of a law relating to preventive detention like the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 there is apt to be some delay between the prejudicial activity complained of under S. 3 (1) of the Act and the making of an order of detention. When a person is detected in the act of smuggling or foreign exchange racketeering, the Directorate of Enforcement has to make a thorough investigation into all the facts with a view to determine the identity of the persons engaged in these operations which have a deleterious effect on the national economy. Quite often these activities are carried on by persons forming a syndicate or having a wide network and therefore this includes recording of statements of persons involved, examination of their books of accounts and other related documents. Effective administration and realisation of the purpose of the Act is often rendered difficult by reason of the clandestine manner in which the persons engaged in such operations carry on their activities and the consequent difficulties in securing sufficient evidence to comply with the rigid standards, insisted upon by the Courts. Sometimes such investigation has to be carried on for months together due to the magnitude of the operations. Apart from taking various other measures i.e. launching of prosecution of the persons involved for contravention of the various provisions of the Acts in question and initiation of the adjudication proceedings, the Directorate has also to consider whether there was necessity in the public interest to direct the detention of such person or persons under S. 3(1)of the Act with a view to preventing them from acting in any manner prejudicial to the conservation and augmentation of foreign exchange or with a view to preventing them from engaging in smuggling of goods etc. The proposal has to be cleared at the highest quarter and is then placed before a Screening Committee. For ought we know, the Screening Committee may meet once or twice a month. If the Screening Committee approves of the proposal, it would place the same before the detaining authority. Being conscious that the requirements of Art. 22 (5) would not be satisfied unless the 'basic facts and materials' which weighed with him in reaching his subjective satisfaction, are

> communicated to the detenu and the likelihood that the Court would examine the grounds specified in the order of detention to see whether they were relevant to the circumstances under which the impugned order was passed, the detaining authority would necessarily insist upon sufficiency of the grounds which would justify the taking of the drastic measure of preventively detaining the person.
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> Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Art. 22 (5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the Courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are 'stale' or illusory or that there is no real nexus between the grounds and the impugned order of detention.

23. A reading of the above decision judged in the light of the facts obtaining in the instant case would make us hold that even on

27-1-2021 investigation was progressing and it is after that steps were taken after perusing the documents and the relevant inputs which culminated in the order of detention on 15-3-2021. We, therefore, reject the contention that there is undue delay in passing the order for detention.

24. The learned counsel for the petitioner strenuously argued that the petitioner's application for bail in the N.I.A.case was rejected on 22-3-2021, and the said fact, which according to him is very crucial, was never brought to the notice of the detaining authority by the sponsoring authority which resulted in the detaining authority not placing the same before the advisory board. The rejection of bail under the provisions of the UAPA Act, according to the learned counsel, being a very crucial document in deciding whether to detain or not, the non-production of the said document is fatal.

25. The learned counsel for the petitioner also argues relying on the judgment in Ayya @ Ayub v. State of U.P. and another [(1989) 1 SCC 374] for the proposition that the non-placing of the order rejecting bail, a vital piece of evidence, was fatal and the detention order has to be set aside on that ground alone.

26. The learned counsel for the petitioner relies on a judgment of the Madras High Court Thaarmar v. the State of Tamil Nadu and Others (Habeas Corpus Petition (MD) No. 635 of 2011) to content that the documents which came into being after the passing of the detention order, if relevant the detaining authority is under duty to put those documents before the Advisory Board. We are afraid that we cannot accept the said contention or the view laid down in the above judgment of the Madras High Court in the light of the judgment of the Hon'ble Supreme Court in the decision reported in Raverdy Marc Germain Jules v. State of Maharashtra and Ors. [1982 (3) SCC 135].

> “9. The second limb of the submission was that in any event that retraction letter ought to have been forwarded to the Advisory Board. In para 12 of the petition it is alleged that the letter retracting the confessional statement was not considered by the Advisory Board. One Shri C.V. Karnik, Assistant Secretary, Government of Maharashtra Home Department (Special) in his counter-affidavit para 6 has stated that all the documents which were before the detaining authority were also placed before the Advisory Board. It is further averred that the Advisory Board examines the question of subjective satisfaction of the detaining authority on the material the detaining authority had before it and as the retraction was no before the detaining authority it is immaterial that the Advisory Board did not take the same into consideration. This stand may not be very satisfactory and may necessitate our deeper examination but for the fact that the detenu himself was before the

> Advisory Board. He is a highly qualified, highly placed person and it is unthinkable that he would not have informed the Advisory Board that he had retracted his confessional statement. Therefore, nothing turns on the letter retracting the confessional statement being not placed before the Advisory Board and the contention must be negatived".

27. The learned counsel for the customs also countered the said argument by stating that the petitioner was a literate person and had engaged the services of a lawyer who appeared before the advisory board and this fact could have been brought to the notice of the advisory board by either the detenu or by his lawyer, and thus no fault can be attributed to the detaining authority in this regard and further submits that no prejudice has been caused to the detenu. In the above case, the detenu cannot be said to have been prejudiced or put at a disadvantageous position by the detaining authority in not producing the order of rejection of the bail application as the detenu as well as his lawyer appeared before the advisory board and got every opportunity to place the same and going by the principles in the decisions mentioned above, the argument of the detenu in this regard cannot be accepted, and thus, we are clearly disinclined to accept the argument on this aspect.

28. The learned counsel for the petitioner argues that the

detenu was in judicial custody and that too under the provisions of the UAPA Act and the chance of him being enlarged on bail was very bleak and this aspect has not been considered by the detaining authority at all. The Hon'ble Supreme Court in the decision reported in Abdul Sathar Ibrahim Manik and Ors. v. Union of India (UOI) and Ors. [(1992) 1 SCC 1] has clearly held, referring to most of the earlier decisions as follows:-

> "Having regard to the various above-cited decisions on the points often raised we find it appropriate to set down our conclusions as under:
>
> (1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.
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> (2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court.
>
> (3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

> (4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22 (5) when it is clear that the authority has not relied or referred to the same".

29. The detaining authority in the instant case was very much alive to the fact that the detenu is in judicial custody and also that he had moved an application for bail in the NIA case and the same was pending. Thus, it cannot be said that the conclusion arrived at by the detaining authority about the possibility of release on bail is bad in law. The learned counsel for the petitioner also relied on the judgment of this Court in Kumari Prabha Suresh v. Union of India and Others [WP (Crl.) No. 152 of 2021] for the proposition that non-placement of the order rejecting the bail was fatal. In that case, we have held that the non-placement of the order rejecting the bail application by the NIA court, two months prior to the passing of the detention order was fatal. In the instant case, the application for bail was pending when the detention order was passed and therefore, the decision in Kumari Prabha Suresh (supra) is clearly distinguishable and has no application to the facts of this case. We, accordingly, reject the contention on the non-placement of the bail application by the sponsoring authority before the detaining authority.

30. The learned counsel for the petitioner also argued that the advisory Board in the instant case was not competent to consider the case of the detenu or to pass orders pass orders in terms of Section 8 (f) of the COFEPOSA as they were not authorised by the notification as the advisory Board under the Hon'ble High Court of Kerala is not empowered under clause (a) of Section 8 of the COFEPOSA Act to consider the case of detention issued by the Union of India as the State Advisory Board was not notified by the appropriate government in the instant case. It is to be noticed that the said contention is squarely covered against the detenu by the decision of this Court reported in Raishad v. Union of India 2021 (3) KLT 799.

> “21. Further, the provisions of Section 8 (a) of the COFEPOSA Act provide for the constitution of Advisory Boards. Significantly, those provisions do not use the words 'appropriate Government'. Section 8 (b), no doubt says that the reference to the Advisory Board shall be by the 'appropriate Government' and uses the words 'the Advisory Board'. We cannot, however, give any significance to the word 'the' before the words 'Advisory Board' to hold that the Advisory Board must be one constituted by the appropriate Government. The decisions relied upon by the learned counsel for the petitioner regarding significance of the word 'the' has no application in the light of the provisions of the COFEPOSA Act. We must give effect to the plain meaning of the words used in the statute. We cannot add or subtract from it. In other words we cannot read into Section 8 (a), the requirement that the reference must be to an Advisory Board constituted by the appropriate Government. Section 8 (b) uses the words 'appropriate Government' only to indicate that the reference must be made by the appropriate Government as defined in Section 2 (a). The Parliament deliberately has not used the words 'appropriate Government' in Section 8 (a) and

> we see no reason to read it in that manner. The Constitution as it stands today does not call for such an interpretation. It appears to us that the provisions of Art.22(4) of the Constitution and Section 8 of the COFEPOSA only requires that the case of the detenu could be considered by an Advisory Board consisting of persons having the qualifications mentioned in Art.22(4) and constituted by appropriate notification under Section 8 of the COFEPOSA Act. The Learned Counsel for the petitioner has no case that the Advisory Board which considered the case of the detenu has not been constituted under Section 8 of the COFEPOSA Act. At any rate, the detenu cannot be said to be prejudiced in any manner as his representation was duly considered by an Advisory Board comprising of such members as are recognised both by the unamended and amended provisions of Art.22(4) of the Constitution. We, therefore, hold that there is no merit in the contention of the learned counsel for the petitioner that only the Board constituted under the notification dated 17.3.2020 was competent to consider the case of the detenu"

The above contention on the competency of the advisory Board is only to be rejected, and we do so.

31. The learned counsel for the petitioner also argues that the detenu, even according to the allegations against him, is only a financier as since he was extradited from Dubai and his passport was also cancelled, there is no chance of him indulging in further smuggling activity and that the live and the proximate link stands snapped and therefore, there is no requirement of detaining him. Responding to this argument, the learned counsel for the customs submitted that his role as a financier as well as his antecedents points

out to his propensity to continue the smuggling activities in further as well and the only effective way to prevent the prejudicial activities in future was by detaining him. We find considerable force in this argument and we have no doubt in our mind that the subjective satisfaction on this aspect was arrived at by taking into account all the relevant inputs and it was a cumulative effect from those materials that cannot be faulted at all. We repel the contentions of the detenu in this regard as well.

32. The learned counsel for the petitioner citing the judgment in Mrs. Tsering Dolkar v. The Administrator, Union Territory of Delhi and Others (AIR 1987 SC 1192) argues that in the backdrop of the allegations in the Writ Petition, the detaining authority himself should have filed the counter affidavit dealing with the averments raised. This issue is covered against the detenu by our judgment in Kumari Prabha Suresh (supra) as there is no such requirement for the detaining authority to file a counter affidavit in every case in the absence of any allegation of malafides or bias alleged against the person who passed the detention order.

On a keen consideration of the issues raised in the above case, we hold, without any doubt that the impugned detention order is

legal and the same has been passed by the 2nd respondent with due application of mind and after arriving at the requisite subjective satisfaction based on the sufficient materials, facts and circumstances of the case.

This Writ Petition thus, fails and is dismissed.

A.K. JAYASANKARAN NAMBIAR, Judge

MOHAMMED NIAS C.P , Judge

ani/date/9/11/