REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1746 OF 2019
(Arising from S.L.P.(Criminal) No.7010/2019)

Union of India through
Joint Secretary (COFEPOSA),
Ministry of Finance, New Delhi **...Appellant**

Versus

Ankit Ashok Jalan **...Respondent**

WITH

SPECIAL LEAVE PETITION(CRIMINAL) NO.7013/2019
WRIT PETITION(CRIMINAL) NO. 204 OF 2019
WRIT PETITION(CRIMINAL) NO. 206 OF 2019
WRIT PETITION(CRIMINAL) NO. 209 OF 2019

J U D G M E N T

M.R. SHAH, J.

Leave granted in Special Leave Petition (Criminal) No. 7010 of 2019.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 02.08.2019 passed by the High Court of Delhi at New Delhi in Writ Petition (Criminal) No. 1840 of 2019, by which the High Court has allowed the said writ petition preferred by the respondent herein and has quashed and set aside the detention orders bearing Nos. PD-12001/34/2019-COFEPOSA and PD-12001/35/2019-COFEPOSA dated 1.7.2019, the Union of India through the Detaining Authority has preferred the present appeal. Feeling aggrieved and dissatisfied with the aforesaid impugned judgment and order passed by the High Court, even the detenu has preferred the special leave petition challenging the aforesaid impugned judgment and order, inasmuch as on grounds 'C', 'D', 'E', 'F' and 'G' raised in the main writ petition before the High Court, having not been decided one way or the other, while allowing the writ petition of the original writ petitioner on the first two grounds, i.e., grounds 'A' & 'B'.

2.1 Writ Petition (Criminal) Nos. 204/2019, 206/2019 and 209/2019 have been preferred by the respective writ petitioners under Article 32 of the Constitution of India for an appropriate writ, direction or order declaring that the disjunctive 'or' in Section 13 of the Conservation of Foreign Exchange and

Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA Act') shall be read as 'and' so that only those actions which are actually done in good faith would be protected under the said Section, to enable the respective petitioners to take such further action against the Detaining Authority, as may be permissible in law.

2.2 At the outset, it is required to be noted that so far as the respective writ petitioners of writ petitions are concerned, though detention orders qua them have been set aside by the High Court, still the respective petitioners have prayed for the aforesaid reliefs.

Criminal Appeal @ SLP (Criminal) No.7010/2019 and SLP(Criminal) No. 7013 of 2019

3. The facts of the case in nutshell are as follows:

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

recorded on 09.06.2019 and 10.06.2019 indicated that, he had been engaged by the detenus to receive the 8 bars of smuggled gold from Indo-Bhutan border at Jaigaon from an unknown person, to be transported and delivered to Kolkata and Delhi. That as per the detenus, they were apprehended by officers of DRI on 10.06.2019 at about 2:00 p.m. at the Food Court of Quest Mall, 33, Syed Amir Ali Avenue, Park Circus, Beck Bagan Row, Kolkata, West Bengal – 700017 and taken to the latter's office. That the detenus' self-incriminating confessions were purportedly obtained under Section 108 of the Customs Act, 1962 (hereinafter referred to as the 'Act') and they were formally shown as arrested on 11.06.2019 under the provisions of Section 104 of the Act. That thereafter the detenus were produced before the Court of Judicial Magistrate on 12.06.2019.

3.1 That vide order dated 12.06.2019 in Misc. 67/2019, the learned Chief Metropolitan Magistrate, Kolkata rejected the prayer of bail made on behalf of the detenus and remanded them to judicial custody till 18.06.2019.

3.2 That while the detenus were in custody, the detention orders were rendered by the Detaining Authority on 01.07.2019. The detention orders were served on both the detenus on

02.07.2019. The detenus have been served with the relied upon documents with the list of documents on 04.07.2019.

3.3 That the detenus filed their representations dated 07.07.2019, under Article 22(5) of the Constitution of India read with Section 3(3) of the COFEPOSA Act, addressed to the Detaining Authority against the impugned detention orders, through the jail authorities.

3.4 That the respondent Ankit Ashok Jalan filed writ petition before the High Court challenging the aforesaid detention orders against his father – Ashok Kumar Jalan and his brother – Amit Jalan (detenus) dated 01.07.2019. It was mainly contended on behalf of the original writ petitioner that despite the detenus already being in judicial custody, the Detaining Authority rendered the detention orders and there being no imminent possibility of their being released on bail nor any material relied upon therein to raise an apprehension that they may be so released in the near future since no bail application was pending, the same are *ex facie* illegal and without any basis. It was further contended that the relied upon documents have not been perused by the Detaining Authority, inasmuch as, the retraction petition of the said Anand, which is a vital document, has neither

been placed before the Detaining Authority nor considered by it in accordance with law, the document purported to be a copy of the 'retraction petition' in respect of the said Anand, placed at Sr. No.30 of the list of relied upon documents, is actually the latter's bail application, and thus the subjective satisfaction is sham, erroneous and incomplete, and therefore, violative of the detenus' right to effective representation as mandated and guaranteed by the Constitution, and by law.

4. The writ petition before the High Court was opposed by the Detaining Authority. It was requested not to entertain the writ petition at this stage, since the detenus' representations were pending consideration before the Advisory Board. On merits, it was submitted that there was cogent material before the Detaining Authority to arrive at the subjective satisfaction that the detenus were likely to be released from judicial custody and that there was likelihood of their continuing to indulge in the prejudicial activities. It was also submitted on behalf of the Detaining Authority that all the relevant documents were supplied to the detenus. That by the impugned judgment and order, the High Court has quashed and set aside the detention orders mainly on the ground that there was a clear lapse and

failure on the part of the Detaining Authority to examine and consider the germane and relevant question relating to the imminent possibility of the detenus being granted bail, while recording its subjective satisfaction and passing the detention orders.

4.1 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court quashing and setting aside the detention orders, Union of India through the Detaining Authority has preferred the present appeal. As observed hereinabove, even the original writ petitioner has also approached this Court against the impugned judgment and order passed by the High Court, inasmuch as on grounds 'C', 'D', 'E', 'F' and 'G' raised in the main writ petition before the High Court, having not been decided one way or the other, while allowing the writ petition of the original writ petitioner on the first two grounds, i.e., grounds 'A' & 'B' only.

5. Shri K.M. Nataraj, learned Additional Solicitor General of India has vehemently submitted that the impugned judgment and order passed by the High Court is clearly contrary to the law laid down by this Court in a recent judgment rendered in the case of *Union of India and another v. Dimple Happy Dhakad,*

Criminal Appeal No. 1064/2019 arising out of SLP (Criminal) No. 5459/2019, decided on 18.07.2019, 2019 SCC OnLine SC 875. It is submitted that despite the categorical finding recorded by the Detaining Authority with regard to the "immediate possibility of the release of the detenus from judicial custody", the High Court has observed that the same is not sufficient compliance in law and has quashed the detentions orders on this sole ground.

5.1 Relying upon para 7 of the detention orders, it is submitted that the Detaining Authority was aware with regard to detenus being in custody and their immediate possibility of the release and their propensity to indulge in prejudicial activities after release. It is submitted that the subjective satisfaction of the Detaining Authority has been clearly recorded with regard to the custody - the likelihood of the release and the propensity to indulge in prejudicial activities. It is submitted that even the bail application of Anand was also considered by the Detaining Authority.

5.2 It is further submitted by the learned Additional Solicitor General that the aforesaid consideration on the part of the Detaining Authority is sufficient compliance with the constitutional protections. Reliance is placed upon the decision

of this Court in the case of *Noor Salman Makani v. Union of India (1994) 1 SCC 381 (paras 5 & 6).*

5.3 It is further submitted by the learned Additional Solicitor General that even in the case of *Kamarunnisa v. Union of India (1991) 1 SCC 128*, relied upon by the respondent, this Court lays down a three-pointer test in passing of a detention order in case of a person already in judicial custody as under:

> "(1) if the authority passing the order is aware of the fact that he is actually in custody;
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> (2) if he has reason to believe on the basis of reliable material placed before him;
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> (a) that there is a real possibility of his being released on bail, and
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> (b) that on being so released he would in all probability indulge in prejudicial activity and
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> (3) if it is felt essential to detain him to prevent him from so doing."

It is submitted that in the said decision, this Court further observed:

> "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."

It is submitted that this Court further clarified as under:

> "....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 be 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 prevention detention."

5.4 It is submitted that even as per the said decision, the awareness that the detenus are in custody and the categorical recording of the fact that the detenu is likely to be released on bail, is sufficient when a detention order is being passed against a person in custody. Learned ASG has also relied upon the following decisions of this Court, *Merugu Satyanarayana v. State of A.P. (1982) 3 SCC 301; State of Gujarat v. Sunil Fulchand Shah (1988) 1 SCC 600; Vijay Kumar v. Union of India (1988) 2 SCC 57; Abdul Sathar Ibrahim Manik v. Union of India (1992) 1 SCC 1; Veeramani v. State of T.N. (1994) 2 SCC 337; and Baby Devassy Chully v. Union of India (2013) 4 SCC 531.*

5.5 It is further submitted by the learned ASG that the detenus have been released on bail subsequent to the impugned judgment and order of the High Court and therefore the ground of imminent likelihood of release stood proved. It is submitted that

admittedly the detenus have been granted bail by the Court on the very date of the order of detention was quashed by the High Court by the impugned judgment and order dated 2.8.2019. It is submitted therefore the apprehension in the mind of the Detaining Authority that the detenus are likely to be released on bail and regarding the prejudicial activities of the detenus has to be taken as well founded and fortified. It is submitted therefore that the grounds raised by the detenus regarding non-mentioning of imminent likelihood of release does not survive for consideration, as the detenus have been released subsequent to the order of detention as apprehended by the Detaining Authority. It is submitted that as on date if the detention order is quashed, the detenus will be free to indulge in the prejudicial activities as mentioned in the detention order thereby causing serious harm and prejudice to the society in general and the economy of the nation in particular.

5.6 Now so far as the other grounds raised by the detenus with respect to retraction statement of Shri Anand not being with the Detaining Authority on the date of passing of the detention orders and therefore the detention orders have been vitiated is concerned, it is submitted that an affidavit has been furnished

along with documentary evidence by the Sponsoring Authority by letter dated 31.8.2019. It is submitted that as per letter dated 31.08.2019 of the jail authority, prisoner's petition dated 22.6.2019 submitted by Shri Anand, was forwarded to the learned court of Chief Metropolitan Magistrate, Calcutta only. It is submitted that the said petition was not forwarded to any other concerned including the Sponsoring or Detaining Authority except the court of Chief Metropolitan Magistrate, Calcutta. It is submitted that further, as per letter memo dated 30.08.2019 of jail authority, a copy of the prisoner's petition of Shri Anand dated 22.6.2019 was forwarded on 22.6.2019 to learned Chief Metropolitan Magistrate, Calcutta. The same was received by the office of Chief Metropolitan Magistrate on 24.6.2019. It is submitted that Shri Anand, Shri Ashok Kumar Jalan and Shri Amit Jalan were produced before the learned Chief Metropolitan Magistrate, Calcutta from judicial custody on 2.7.2019. It is submitted that during the course of hearing of the case, it came to the notice of the prosecution that a retraction petition was filed by Shri Anand. Accordingly, a request was made before the learned Chief Metropolitan Magistrate for supply of a copy of the same. Accordingly, learned Chief Metropolitan Magistrate

ordered advocate of accused No.1 (Shri Anand) to serve the copy vide order dated 2.7.2019. It is submitted that the office of DRI, Kolkatta received a copy of the prisoner's petition/retraction petition of Shri Anand dated 22.6.2019 on 15.7.2019, which was served by one Shri Sumit Dey, Advocate of Shri Anand as per learned Chief Metropolitan Magistrate's order dated 2.7.2019. It is submitted that therefore when the Sponsoring Authority was not aware about the retraction application of Shri Anand dated 22.6.2019 when the proposal was forwarded by the Sponsoring Authority to the Detaining Authority and therefore the alleged retraction application dated 22.6.2019 could not be placed by Sponsoring Authority before the Detaining Authority before passing the detention orders on 1.7.2019 against the detenus. It is submitted that therefore and even otherwise non-consideration of the retraction application dated 22.6.2019 of Shri Anand by the Detaining Authority does not vitiate the orders of detention. In support of his above submission, learned ASG has relied upon a decision of this Court in the case of *Raverdy Marc Germain Jules v. State of Maharashtra (1982) 3 SCC 135.*

5.7 It is further submitted by the learned ASG that even otherwise the contents of the prisoner's petition/retraction

petition of Shri Anand dated 22.6.2019 is a mere afterthought. It is submitted that Shri Anand was caught carrying 8Kgs. of foreign origin gold without any supporting documents whatsoever in the presence of the independent witnesses, as per due process and procedure. It is submitted that whatsapp messages exchanged between him and Shri Ashok Jalan and the whatsapp calls made between them provides unclenching evidence about their acquaintance and complicity in the case. It is submitted that hence the prisoner's petition/retraction petition does not prejudice the decision of the Detaining Authority in passing of the detention orders, which were based on the facts and evidence on record which were duly mentioned in the detention orders and relied upon documents supplied along.

5.8 It is further submitted that even the retraction statement of Shri Anand is not a vital document in case of the present detention orders against the detenus as their retractions have been duly considered by the Detaining Authority.

5.9 It is further submitted by the learned ASG that apart from the above facts, Shri Anand after his release on bail has reiterated his earlier statements dated 9.6.2019, 10.6.2019 and 14.6.2019 on 19.7.2019 wherein he has categorically stated that

he filed the retraction petition as per the directions of his advocate which was a mistake on his part.

5.10.It is further submitted by the learned ASG that even otherwise failure to place certain documents may not necessarily be fatal to a detention order. In support of his submission, learned ASG has also relied upon the decisions of this Court in the cases of *Prakash Chandra Mehta v. Commissioner and Secretary., Government of Kerala, (1985) Suppl. SCC 144 (paras 69 to 73, 75, 82 & 83) and Madan Lal Anand v. Union of India (1990) 1 SCC 81.*

5.11 Making the above submissions and relying upon the above decisions, it is prayed to allow the present appeal and quash and set aside the impugned judgment and order passed by the High Court quashing and setting aside the detention orders.

6. While supporting the impugned judgment and order passed by the High Court quashing and setting aside the orders of detention, learned counsel appearing on behalf of the respondent has vehemently submitted that the High Court has given cogent reasons while quashing and setting aside the orders of detention, and therefore, the same is not required to be interfered with by this Court.

6.1 Shri Vikram Chaudhri, learned Senior Advocate appearing on behalf of the original writ petitioner has taken us to the relevant grounds of detention, more particularly paragraphs (v) and (vii) and has submitted that the statements of Shri Anand are the fulcrum, basis and foundation on which the entire case set up against the detenus rests. Consequently, if the statements are excluded from the zone of consideration, nothing shall survive qua the detenus. It is submitted that there is no incriminating recovery from the detenus as such.

6.2 It is further submitted by the learned Senior Advocate appearing on behalf of the original writ petitioner that though a specific reference has been made by the Detaining Authority regarding the factum of retraction of their statement by the present detenus, however, not a whisper has been made as to the fact of any retraction made by Shri Anand even in his bail application. It is submitted that even if the short denial of statement of bail application of Shri Anand is seen as retraction, the same has never gone into the mind making of the Detaining Authority for arriving at his subjective satisfaction. It is submitted that the Detaining Authority has chosen to make a detailed consideration of the retraction made by the detenus, but

it will not show the same consideration to the retraction made by Shri Anand, it was alive and aware regarding the same.

6.3 It is further submitted that as such the retraction statement of Shri Anand has not been supplied by the Detaining Authority to the detenus. It is submitted that as per the relied upon documents, it is stated as "copy of retraction petition in respect of Shri Anand". It is submitted that however the above document is a bail application of Shri Anand and not a retraction statement. It is submitted that therefore non-supply of the retraction statement of Shri Anand to the detenus has vitiated the orders of detention.

6.4 It is further submitted that in the grounds of detention, there is no reference to the retraction petition on behalf of Shri Anand.

6.5 It is further submitted that as it is evident from the order sheet of the Court, retraction petition filed by Shri Anand has reached the Court on 24.06.2019 and handwritten court proceedings recorded the said fact. It is submitted that therefore retraction petition formed a part of the judicial/court record, much prior to the issuance of the detention orders. It is submitted that therefore the retraction petition of Shri Anand

was in complete knowledge of the DRI Officers as well as their Advocates. It is submitted that except the Detaining Authority and the prosecution, none was aware of the proposal for detention and it was their bounden duty to call for all the records. It is submitted that, however, request for supply of the said retraction petition and the entire Court record was not made before passing of the detention orders.

6.6 It is further submitted that the stand that the authorities got knowledge of the retraction only on 2.7.2019 has not been substantiated. It is submitted that the retraction petition dated 22.6.2019 of co-accused Shri Anand had a vital bearing on the complicity or otherwise of the detenus in the alleged prejudicial activities. It is submitted that the Detaining Authority would have been aware of the contents of the retraction and would have considered the same, it may have influenced the mind of the Detaining Authority one way or the other. It is submitted therefore that non-supply of the retraction petition by Shri Anand and/or non-consideration of the factual factum of retraction petition by Shri Anand has definitely vitiated the orders of detention and therefore the High Court has rightly set aside the detention orders. In support, learned counsel has heavily relied

upon the decisions of this Court in the cases of *V.C. Mohan v. Union of India (2002) 3 SCC 451; Deepak Bajaj v. State of Maharashtra (2008) 16 SCC 14; and Rushikesh Tanaji Bhoite v. State of Maharashtra (2012) 2 SCC 72.*

6.7 It is further submitted that even otherwise subjective satisfaction was also vitiated for lack of any cogent material to arrive at the satisfaction regarding the imminent possibility of release on bail, more particularly when the bail application filed by both the detenus was already rejected by the Magistrate and no further bail application of the detenus was pending.

6.8 It is further submitted that indisputably bail application of the detenus was rejected on 12.06.2019. No further bail application was filed or pending before any court. It is submitted therefore the subjective satisfaction of the Detaining Authority that the detenus are likely to be released on bail has been vitiated and therefore the High Court has rightly quashed and set aside the orders of detention on this ground alone. In support, learned counsel has heavily relied upon the decisions of this Court in the cases of *Rameshwar Shaw v. District Magistrate AIR 1964 SC*

334; Kamaarunnissa (supra); T.V. Sravanan v. State (2006) 2 SCC 664; and Rekha v. State of T.N. (2011) 5 SCC 244.

6.9 Relying upon the decision of this Court in the case of *Union of India v. Dimple Happy Dhakad (supra)*, it is vehemently submitted by the learned counsel appearing on behalf of the respondent that, as held by this Court, the satisfaction of the Detaining Authority that the detenus may be released on bail cannot be *ipse dixit* of the Detaining Authority. It is submitted that as such on facts in the case of *Dimple Happy Dhakad (supra)*, this Court confirmed the orders of detention having been satisfied that the subjective satisfaction of the Detaining Authority that the detenu is likely to be released on bail is based on the materials. It is submitted that even otherwise the decision of this Court in the case of *Rekha (supra)* has been delivered by three Judges Bench and the decision in the case of *Dimple Happy Dhakad (supra)* has been delivered by two Judges Bench. It is submitted that in any case, in the present case, as such no bail application of the detenus was pending before any court.

6.10 It is further submitted that even the question of severability under Section 5-A of the COFEPOSA was never urged/pleaded by

the appellant/Detaining Authority either before the High Court or before this Court in any of their pleadings. It is submitted that even otherwise in view of the decisions of this Court in the cases of *A. Sowkath Ali v. Union of India* (2000) 7 SCC 148; *and P. Saravanan v. State of T.N. (2001) 10 SCC 212*, Section 5-A of COFEPOSA shall not be applicable.

6.11 It is further submitted that even otherwise there was a delay in deciding the representation and therefore also the orders of detention were liable to be set aside.

6.12 Learned counsel appearing on behalf of the detenus has also requested to consider the observations made by the learned trial Court while granting bail to the detenus, more particularly strictures on the conduct of the DRI officials thereby highlighting illegal incarceration of the detenus by the DRI and extraction of false statements during such illegal custody.

6.13 Making the above submissions and relying upon the aforesaid decisions, it is prayed to dismiss the present appeal/petitions and not to interfere with the impugned judgment and order passed by the High Court quashing and setting aside the orders of detention.

7. We have heard the learned counsel for the respective parties at length.

8. By the impugned judgment and order, the High Court has set aside the respective orders of detention and released the detenus, namely, Ashok Kumar Jalan and Amit Jalan under the provisions of COFEPOSA. The orders of detention are set aside by the High Court mainly, inter alia, on the ground that there was a clear lapse and failure on the part of the Detaining Authority, to examine and consider the germane and relevant question relating to the imminent possibility of the detenus being granted bail, while recording its subjective satisfaction and passing the detention orders and also on the ground that non-placement of the relevant material in the form of Anand's retraction petition and its non-consideration by the Detaining Authority, also vitiates the detention orders.

8.1 Now so far as the first ground on which the detention orders have been set aside, namely, there is a clear lapse and failure on the part of the Detaining Authority, to examine and consider the germane and relevant question relating to imminent possibility of detenus being granted bail while recording its subjective satisfaction and passing the detention orders is concerned, at the

outset, it is required to be noted that in paragraph 7, the Detaining Authority observed and stated as under:

> "7. I am aware that you, i.e., Shri Ashok Kumar Jalan are in judicial custody at present at Presidency Correctional Home, Alipore, Kolkata. However, there is an immediate possibility of your release from judicial custody and if you are released on bail, you are likely to continue to indulge in the prejudicial activities and therefore there is a need to issue a Detention Order against you under the COFEPOSA Act, 1974 with a view to prevent you from smuggling of gold and foreign currency in future."

Therefore, it is evident that the Detaining Authority while passing the detention orders was aware of the fact that the detenus are actually in custody; that there is a real possibility of their being released on bail; and that on being so released they would in all probability indulge in prejudicial activities and therefore it is essential to prevent them from smuggling of gold and foreign currency in future.

As per catena of decisions of this Court, even if a person is in judicial custody, he can be detained under the relevant provisions of the concerned Act, like COFEPOSA etc. However, there must be a proper application of mind and the Detaining Authority must have been subjectively satisfied on considering the relevant material that there is a reason to believe that there is

a real possibility of detenus being released on bail and that on being so released the detenus will in all probability indulge in prejudicial activities. In the recent decision, this Court in the case of *Dimple Happy Dhakad (supra)* had an occasion to consider the aforesaid aspect and after considering the decisions of this Court in the cases of *Kamarunnisa (supra); Union of India v. Paul Manickam (2003) 8 SCC 342; Huidrom Konungjao Singh v. State of Manipur (2012) 7 SCC 181; Dharmendra Suganchand Chelawat v. Union of India (1990) 1 SCC 746; and Veeramani* (supra), this Court observed and held (i) that the order of detention validly can be passed against a person in custody and for that purpose it is necessary that the grounds of detention must show whether the Detaining Authority was aware of the fact that the detenu was already in custody; (ii) that 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; and (iii) the satisfaction of the Detaining Authority that the detenu is already in custody and is likely to be released on bail and on

being released, he is likely to indulge in the same prejudicial activities with the subjective satisfaction of the Detaining Authority.

8.2 In the case of *Noor Salman Makani (supra)*, a submission was made regarding non-application of mind by the Detaining Authority with regard to the circumstance that the detenu was in jail and a mere bald statement that the possibility that the detenu was likely to be released on bail cannot be ruled out is not enough and it only shows that there was no proper application of mind. This Court did not accept the said submission and has observed that nothing more could have been said by the Detaining Authority in this context. It is required to be noted that in the said decision the apprehension of the Detaining Authority came to be true as the

detenu was released on bail. This Court refused to set aside the detention order on the aforesaid ground. It appears that the detenus were waiting for the setting aside of the detention orders on the ground that they are in custody and that there is no real apprehension that the detenus are likely to be released on bail.

As discussed earlier, the detention orders show the application of mind by the Detaining Authority based on the

material available on record, facts and circumstances of the case, nature of activities and propensity of the detenus indulging in such activities. Therefore, in the facts and circumstances of the case, the High Court has erred in setting aside the detention orders on the ground stated hereinabove, namely, that there is a clear lapse and failure on the part of the Detaining Authority, to examine and consider the germane and relevant question relating to the imminent possibility of the detenus being granted bail, while recording its subjective satisfaction and passing the detention orders.

8.3 A Constitution Bench of this Court in the case of *Rameshwar Shaw (supra)* has observed and held that the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. It is further observed that "therefore the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case. Following the aforesaid decision of this Court, in the subsequent decision, in the case of *N. Meera*

Rani v. Government of T.N. (1989) 4 SCC 418, in para 22, this Court observed and held as under:

> "....Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision 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 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; but, even so, if the detaining authority is reasonably satisfied on cogent material 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 even in anticipation to operate on his release. This appears to us, to be the correct legal position."

8.4 Now so far as the reliance placed upon the decisions of this Court in the cases of *Rekha (supra)* and *T.V. Sravanan (supra)* by the learned counsel appearing on behalf of the detenus is concerned, at the outset, it is required to be noted that on the facts and circumstances of the case, narrated hereinabove, the aforesaid decisions shall not be of any assistance to the detenus and/or, as such, the same shall not be applicable to the facts of the case on hand. Even in the case of *Rekha (supra)*, the decision of the Constitution Bench of this Court in the case of *Rameshwar*

Shaw (supra) was not placed before the Court for consideration and therefore this Court had no occasion to consider the said decision. It is also required to be noted that even after considering the decision of this Court in the case of *Rekha (supra)*, which has been heavily relied upon by the learned counsel appearing on behalf of the detenus, in the case of *Dimpy Happy Dhakad (supra)*, this Court has observed that even if a person is in judicial custody, he can be put on a preventive detention provided there must be an application of mind by the Detaining Authority that (i) the order of detention validly can be passed against a person in custody and for that purpose it is necessary that the grounds of detention must show whether the Detaining Authority was aware of the fact that the detenu was already in custody; (ii) that 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; and (iii) the satisfaction of the Detaining Authority that the detenu is already in custody and is likely to be released on bail and on being released, he is likely

to indulge in the same prejudicial activities with the subjective satisfaction of the Detaining Authority.

8.5 In the case of *Kamarunnissa (supra)*, this Court concluded 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.

> (5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.
>
> (6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

9. Now applying the law laid down by this Court, referred to hereinabove, to the facts of the case on hand and considering the ground (para 7) and the various circumstances noted by the Detaining Authority, we are satisfied that the detention orders cannot be quashed on this ground. It is to be noted that the detenus have been granted bail by the Court on the very date the orders of detention were quashed by the High Court, i.e., on 2.8.2019. Therefore, the apprehension in the mind of the

Detaining Authority that the detenus are likely to be released on bail was well founded and fortified. Therefore, the High Court has fallen in error in quashing and setting aside the detention orders on the ground that there is a clear lapse and failure on the part of the Detaining Authority, to examine and consider the germane and relevant question relating to the imminent possibility of the detenus being granted bail, while recording its subjective satisfaction and passing the detention orders.

10. Now so far as the other submissions made by the learned counsel appearing on behalf of the detenus, which according to the learned counsel were not considered by the High Court, namely, non-consideration of the relevant facts, namely, the retraction statement made by Shri Anand, by the Detaining Authority is concerned, at the outset, it is required to be noted that it appears that Memo No. 9920/AB-I dated 31.08.2019 of Jail Authority, prisoner's (Shri Anand) petition dated 22.6.2019 was forwarded to the learned Chief Metropolitan Magistrate, Calcutta only. It appears that the said petition was not forwarded to any other concerned including the Sponsoring Authority or Detaining Authority. It also appears from the material on record that as per letter Memo No. 9899/AB-I dated

30.08.2019 of Jail Authority, a copy of the prisoner's petition of Shri Anand dated 22.6.2019 was forwarded on 22.6.2019 itself to the learned Chief Metropolitan Magistrate, Calcutta, The same was received by the office of the learned Chief Metropolitan Magistrate, Calcutta on 24.6.2019. It appears that Shri Anand and the detenus herein were produced before the learned Chief Metropolitan Magistrate, Calcutta from judicial custody on 2.7.2019 and during the course of hearing, it had come to the notice of prosecution that a retraction petition was filed by Shri Anand. Therefore, and accordingly, a request was made before the learned Chief Metropolitan Magistrate, Calcutta for supply a copy of the same and accordingly the learned Chief Metropolitan Magistrate ordered advocate of Shri Anand to serve a copy of the retraction petition vide order dated 2.7.2019. It appears from the material on record that the office of DRI, Calcutta received a copy of the retraction petition of Shri Anand dated 22.6.2019 on 15.07.2019. Much reliance is placed upon the orders sheet of the learned trial Court dated 22.06.2019 in support of the submission on behalf of the detenus that the Sponsoring Authority was aware of the Anand's retraction statement and therefore the Sponsoring Authority ought to have drawn the

attention of the Detaining Authority on the wider aspect of Anand's retraction. However, it is required to be noted that there are two orders available on the order sheet of the trial Court. First is the handwritten order and other is a typed order. All other orders are typed orders. The handwritten order does not bear the stamp of the court and/or signature of the learned Magistrate. Therefore, the handwritten order does not inspire any confidence and therefore no reliance can be placed upon the handwritten order on the order sheet of the trial Court dated 24.06.2019. Under the circumstances, it appears that when the detention orders were passed by the Detaining Authority, neither the Sponsoring Authority nor even the Detaining Authority was aware of any retraction petition of Shri Anand. Under the circumstances, there was no occasion and/or reason for the Detaining Authority to consider the retraction statement of Shri Anand. Under the circumstances, it cannot be said that on non-consideration of the Anand's retraction petition, the detention orders have been vitiated.

11. In view of the above and for the reasons stated above, the High Court has committed a grave error in quashing and setting aside the detention orders and interfering with the subjective

satisfaction of the Detaining Authority. Consequently, the appeal preferred by the Detaining Authority, i.e., Civil Appeal arising from Special Leave Petition (Criminal) No. 7010 of 2019 is allowed, the impugned judgment and order passed by the High Court quashing and setting aside the detention orders is hereby quashed and set aside and the detention orders of the respective detenus are hereby restored. The detenus, i.e., Ashok Kumar Jalan and Amit Jalan shall be taken into custody forthwith by the Detaining Authority. Accordingly, the special leave petition preferred by the respondent, i.e., Special Leave Petition (Criminal) No. 7013/2019 stands dismissed.

Writ Petition (Criminal) Nos. 204, 206 & 209/2019

As stated above, Writ Petition (Criminal) Nos. 204/2019, 206/2019 and 209/2019 have been preferred by the respective writ petitioners under Article 32 of the Constitution of India for an appropriate writ, direction or order declaring that the disjunctive 'or' in Section 13 of the COFEPOSA Act shall be read as 'and' so that only those actions which are actually done in good faith would be protected under the said Section, to enable the respective petitioners to take such further action against the Detaining Authority, as may be permissible in law. But in

support of the prayer(s) made in the writ petitions, during the course of hearing, no such submissions were advanced by the learned counsel for the respective petitioners.

Even otherwise, in view of our judgment rendered in Criminal Appeal arising from Special Leave Petition (Criminal) No. 7010/2019, we find no merits in the present writ petitions and they are accordingly dismissed.

.....J.
[UDAY UMESH LALIT]

.....J.
[INDIRA BANERJEE]

NEW DELHI;
NOVEMBER 22, 2019.

.....J.
[M.R. SHAH]