

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE V.G.ARUN

WEDNESDAY, THE 19TH DAY OF FEBRUARY 2020 / 30TH MAGHA, 1941

W.P(Cr1.).No.377 OF 2019

PETITIONER/S:

BEEVIKUNJU K.A, AGED 40 YEARS, W/O FAISAL P.A,
PUTHETHMOOLAYIL, PERUMATTOM, PUTHUPADI P.O.,
MUVATTUPUZHA , ERNAKULAM DISTRICT, PIN-686 673.

BY ADV. SRI.M.AJAY

RESPONDENT/S:

- 1 THE UNION OF INDIA,
(REPRESENTED BY ITS DIRECTOR GENERAL) ,
CENTRAL ECONOMIC INTELLIGENCE BUREAU,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE,
5TH FLOOR, B WING, JANPATH BHAVAN, JANPATH,
NEW DELHI, PIN-110001.
- 2 * [MR. RAVI PRATAP SINGH, IAS,]
JOINT SECRETARY, (COFEPOSA), GOVERNMENT OF INDIA,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE,
CENTRAL ECONOMIC INTELLIGENCE BUREAU,
5TH FLOOR, B WING, JANPATH BHAVAN, JANPATH,
NEW DELHI, PIN-110001.

* NAME OF RESPONDENT NO.2 (MR.RAVI PRATAP SINGH, IAS)
ALONE IS DELETED FROM CAUSE TITLE AS PER ORDER
DATED 05-11-2019.
- 3 THE DIRECTORATE OF REVENUE INTELLIGENE,
(REPRESENTED HEREIN BY ITS
PRINCIPAL ADDITIONAL DIRECTOR GENERAL) ,
ZONAL UNIT, 32/641A, VYLOPPILLI ROAD, ST.THOMAS LANE,
PALLINADA, PALARIVATTOM, KOCHI, PIN-682 025.
- 4 THE COFEPOSA ADVISORY BOARD,
HIGH COURT OF KERALA,
(REPRESENTED BY THE SECRETARY, (COFEPOSA) ,
REGISTRAR (JUDICIAL), HIGH COURT BUILDINGS,
ERNAKULAM, PIN-682 031.

- 5 THE SUPERINTENDENT,
CENTRAL PRISON, POOJAPURA,
THIRUVANANTHAPURAM, PIN-695 012.

- 6 THE DEPUTY INSPECTOR GENERAL OF PRISONS AND
CORRECTIONAL SERVICES, (SOUTH ZONE),
(FIRST APPELLATE AUTHORITY UNDER THE RIGHT TO
INFORMATION ACT), OFFICE OF THE DIG OF PRISONS,
POOJAPURA, THIRUVANANTHAPURAM, PIN-695012.

R1-R2 BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA
R1-R2 BY SRI.JAISHANKAR V.NAIR, CGC
R3 BY SRI.S.MANU, CGC,
R4-R6 BY GOVERNMENT PLEADER SRI.K.A.ANAS
R5 BY ADDL.DIRECTOR GENERAL OF PROSECUTION

OTHER PRESENT:

SRI.SURESHBABU THOMAS, ADDL.DGP.

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
19.02.2020, ALONG WITH WP(Cr1.).378/2019, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE V.G.ARUN

WEDNESDAY, THE 19TH DAY OF FEBRUARY 2020 / 30TH MAGHA, 1941

WP(Cr1.).No.378 OF 2019

PETITIONER/S:

KHALID NEDIYAMALA ABDULLA, AGED 65 YEARS,
F/O ADNAN KHALID (DETENU),
R/O NEDIYAMALA HOUSE,
MARKET P.O., MUVATTUPUZHA,
ERNAKULAM-686 673.

BY ADVS.
SRI.P.A.AUGUSTIAN
SRI.M.A.BABY
SMT.LINDA.M.J.
KUM. JOVIT LOBO

RESPONDENT/S:

- 1 UNION OF INDIA,
REPRESENTED BY SECRETARY TO GOVT. OF INDIA,
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
NEW DELHI-1
- 2 JOINT SECRETARY,
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-695 001.

4 SENIOR INTELLIGENCE OFFICER,
DIRECTORATE OF REVENUE INTELLIGENCE,
COCHIN ZONAL UNIT, PALARIVATTOM,
COCHIN-682 025.

R1-R2 BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA
R1-R2 BY SRI.GIRISH KUMAR.V., CGC
R2 BY ADV. SRI.N.S.DAYA SINDHU SHREE HARI
R3 BY SRI.SURESHBABU THOMAS, ADDL.DGP.
R3 BY GOVERNMENT PLEADER SRI.K.A.ANAS
R4 BY SRI.S.MANU, CGC.

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
19.02.2020, ALONG WITH WP(Cr1.).377/2019, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

"C.R."

K.Vinod Chandran & V.G.Arun, JJ.

W.P (Cr1).Nos.377/2019-S and 378/2019-S

Dated, this the 19th day of February, 2020.

JUDGMENT

Vinod Chandran, J.

The wife of a detenu and the father of another detenu is before us challenging the detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [for brevity "COFEPOSA Act"]. The wife had unsuccessfully challenged her husband-Faisal's earlier detention, on similar allegations, which stood confirmed in W.P(Cr1.) No.351 of 2017. Faisal, undeterred, has been again indulging in smuggling activities, asserts the Directorate of Revenue Intelligence ['DRI' for brevity] and the Union of India, respectively the detaining and affirming authority under the COFEPOSA Act. The other detenu, Adnan Khalid, is an operative of Faisal, who was caught at the Airport, though not red-handed, allegedly passing on the contraband, to a Customs official. The parties have various contentions, which are almost similar in nature. We refer to the detenu by their names and the official respondents as detaining authority and the Union of India, in the judgment.

2. We have heard Sri.M.Ajay on behalf of Faisal and Sri.P.A.Augustian on behalf of Adnan Khalid. Central Government Counsel Sri.S.Manu argues for the detaining authority and Sri.Jaishankar V.Nair, CGC for the Union of India and the 2nd respondent.

3. Sri.M.Ajay specifically put forth his grounds of challenge with reference to the memorandum. It is argued that there is clear failure to supply documents that were relied on in the detention order produced at Exhibit P2 in his writ petition and also those further documents essential for a proper consideration by the Advisory Board, as sought for in Exhibit P13. Exhibit P13 has been rejected curtly and without any grace, mistaking it as a representation, while it was a request for supply of documents. Stress is laid on non-supply of CCTV footage, which is the crucial link establishing the seizure of the contraband at the Airport, which gave rise to the summoning of Faisal and other persons and resulted in their preventive detention. It is urged that the CCTV footage ought to have been supplied and facilities provided to view it. Curiously, mere printouts which were undecipherable, were supplied along with the documents. The printouts of the footage purportedly showing Adnan Khalid and the officer of the Customs, who is alleged to have stealthily

obtained the contraband from Adnan Khalid and hid it in his body, was a completely dark photo copy.

4. Reference is made to the documents supplied, which were handed over across the Bar, which also contains the original seal of the detaining authority. It is contended that a mere reading of the detention order would indicate that the detaining authority has completely gone by the surmises and conjectures made by the sponsoring authority and there is total absence of application of mind. The satisfaction to be entered by the detaining authority, in the case of preventive detention though subjective, it should emanate from the records available before the detaining authority. The detention orders are vitiated for total non application of mind.

5. With considerable force it is argued that the detaining authority has to provide the detenu his valuable right to make representation under Article 22 of the Constitution, an effective one, which has not been done. This is accentuated by the curtailment of the liberty and freedom of an individual, on subjective satisfaction of an authority of the Central Government, the sole basis for the detention. The expediency with which the representation has to be considered is also urged. Reference was made to the decisions of the Apex Court, which held that when the

matter is referred to an Advisory Board, the Government should await the decision of the Board before consideration of a representation. It is submitted that the declaration was made first in a case, in which the advise was received in the morning of a day, when the Board was scheduled to meet at noon on the same day. There could never be a delay in consideration of such representations when made sufficiently in advance and if the said dictum is found to be sacrosanct, without reference to the time at which the representation is made, it would run counter to the valuable remedy available to a detenu under Article 22 of the Constitution of India and render Section 11 of the COFEPOSA Act otiose.

6. In challenge of Exhibit P2, it is further argued that the subsequent material which normally ought to have been made available to the detaining authority had not been placed before it. Specific reference is made to Exhibit P2 detention order, wherein the mobile phone details were called for and the instrument subjected to an analysis by the C-DAC. The call details or the result of the analysis was never supplied to the detenu. There is no consideration made of such material by the detaining authority. It is further contended that the Jail Superintendent under whose custody both were under

detention, refused the information sought for by Exhibit P15 and in doing so, acted under the dictates of the DRI who is the detaining authority. It is also pointed out that both the detaining and affirming authorities have their offices in the same room and a common Secretary who has communicated the rejection of representations by both the authorities and sworn to the affidavit on behalf of both of them.

7. In this context, both Counsel submitted that in the Jails within the State; Wednesday is fixed for visit of convicts by their family members. Even lawyers are permitted to have meeting with the convicts only on the said day and often the presence of a DRI official is insisted. Many a time the lawyer, who visits the jail on any other day in the week, has been turned away, either on the ground of Wednesday being the day specified or the absence of the DRI officials. This seriously prejudices the right of the detenu and often they are unable to make effective representations to the detaining and affirming authorities as also the Advisory Board. Their right to challenge the confirmation orders before this Court also is seriously hampered for reason of there being no effective communication permitted between the lawyer and the detenu. The presence of an officer of the DRI in close proximity,

enables such officer to listen in, to the exchange between the lawyer and the detenu, which causes serious prejudice to the right of the detenu. Relying on the decision of the Hon'ble Supreme Court, it is argued that such exchange has to be, as held by the Hon'ble Supreme Court 'within eye sight, but out of earshot', asserts Sri.Ajay.

8. Sri.Augustian argued on the same lines as raised on behalf of Faisal; but, however, stressed on the aspect that the non-supply of the video footage in the case of Adnan Khalid cannot at all be condoned for reason of the allegation of, that detenu having transported the contraband from abroad and handed it over to C.X. Francis. There is absolutely no footage of the handing over and the allegation is raised on a presumption that both these persons, seen entering the toilet and exiting it, not even together, would have indulged in the exchange of contraband. The hand over could have been made by any other person who was in the toilet and no reliance could be placed on the depositions, since that was obtained in the custody of the Customs and later retracted from.

9. Both Counsel maintain that there were available details of mobile communications as extracted from the operators, which however, was not supplied to the detenu. The various transactions between those alleged to be

involved in the so-called smuggling ring could not have been linked by the DRI unless and until the operators supplied them with the Customer Detail Records (CDR) and Subscriber Detail Records (SDR). The various transactions could have been referred to in the detention order and relied on, only if the CDR and SDR received from the mobile operators were obtained by the sponsoring authority and the detaining authority. In the absence of supply of such documents obtained from the mobile operators, no reliance could have been placed on the same. The travel details of the various persons summoned on the basis of the deposition of Adnan Khalid and Francis C.X., the Havildar of Air Customs who was on leave on that particular day, could not have been obtained unless their Passports were summoned which the DRI did. The details of the Passports have not been supplied to the detenu along with the detention order or later even when they were separately sought for.

10. Sri.S.Manu arguing for the detaining authority at the outset contends that very clear copies of footage are available in the files and it is asserted, the same is supplied to both the detenu. Clear copies were also handed over to us across the Bar to evidence the same. It is argued that the depositions have evidentiary value under Section 108 and there was no allegation raised before the

Magistrate, before whom the detenu were produced after recording their arrest, as to any coercion having been made by the DRI officials. The depositions were voluntary in nature and supported by attendant circumstances. They were independently made by the detenu which, as is usual, were retracted from. There can be no weight attached to such casual retraction of statements made under oath before a public authority which also has a statutory validity. The depositions of various persons summoned read together also indicate a common thread justifying the assumption made by the DRI that there is a smuggling ring in operation.

11. Faisal, especially is pointed out as the kingpin, who was also earlier detained at which point he had been so detained after considerable passage of time. The instance of smuggling which led to the detaining order at that point of time had resulted in Faisal absconding from the country and only on his re-entry he was apprehended and detained. Faisal is said to be behind a racket and even in that case those caught red handed, did not disclose his involvement. But the persons summoned based on the deposition of those caught red handed revealed Faisal's identity. It is pointed out that therein the *modus operandi* was bringing in contraband through a passenger and handing it over to a tainted Customs official who

surreptitiously takes it out beyond Customs borders on mere grounds of familiarity with those engaged in checking. It is pointed out from the deposition of Shamseer, Aslam Mytheen, Pratheesh and Shabeer M.K. that the specific involvement of Faisal is revealed. The detention order is read to indicate that there has been application of mind by the detaining authority. Section 5A of the COFEPOSA Act is read over to submit that the grounds of detention are severable and even if one ground is found to be unsustainable, on sole ground of procedural irregularity of non-supply or otherwise, the detention could be justified if the other grounds are upheld. It is pointed out that many of the documents in Exhibit P13 are not relied upon.

12. Sri.Jaishankar V.Nair appears for the Union of India and submits that C-DAC has not made any report as on date. The various dates relevant to the subject matter are pointed out to contend that there has been no delay. It is pointed out that the confirmation order was passed on 14.08.2019 and within seven days, the second respondent rejected the representation on 21.08.2019. It is also pointed out that August 15 was a holiday and though 16th was a working day, again 17th and 18th were Saturday and Sunday. The office re-opened on 19th and on 21st the representation was disposed off. With respect to the representation to the

1st respondent on 14.08.2019, on 19.07.2019 comments were sought for from the sponsoring authority and on 23.08.2019 the Additional Commissioner supplied the same. On 06.09.2019 the representation was rejected. It is pointed out that there is no personal bias alleged against the sponsoring authority, detaining authority or the affirming authority and, hence, there was no requirement for separate counter affidavits.

THE FINDINGS:

13. We shall refer to the decisions, wherever relevant, cited at the Bar by both parties in our judgment when dealing with the various grounds.

14. We are not convinced that the ground urged of the detaining and affirming authorities' orders being communicated by the very same Deputy Secretary as vitiating the detention order. The Deputy Secretary who is in charge of the files had merely communicated the order of the detaining authority and the confirming authority and in such circumstance he had also sworn to the affidavit before this Court. Asgar Ali v. District Magistrate, Burdwan & Ors. [(1974) 4 SCC 527] has categorically held that only if an allegation is made that the detaining authority was actuated by some personal bias against the detenu would there be a need of filing of an affidavit by the detaining

authority itself. We do not see any such allegation having been raised in the writ petitions.

15. The detention arose from the seizure of contraband from the body of a Customs official, Francis C.X., while he was smuggling out about 3 kilograms of gold hid in between his legs held up by four briefs he was wearing; specifically three numbers of rectangular gold pieces wrapped in black insulation tape. The Customs official who was found with the contraband on his person, confessed that he received it from Adnan Khalid who arrived in Cochin by Emirates flight EK 530. Francis, who was taken to the Customs Arrival Hall, identified Adnan Khalid holder of Indian Passport, as the person who brought in the contraband from whom he received it; who was accosted. Adnan Khalid admitted that he had brought three gold bars which were handed over to Francis in the Gents' Toilet behind Belt No.1 at the Arrival hall. Neither Adnan Khalid nor Francis could produce valid documents for the gold seized by the Customs officials, validating the allegation of illegal import without valid documents.

16. Statements were recorded from both Francis and Adnan Khalid, which revealed a ring operating within the Airport which was involved in similar *modus operandi* in other cases also. Here we pause to notice that in the

earlier case relating to Faisal the facts of which is evident from the decision dated 05.11.2018 in W.P(Cr1.) No.351 of 2017, a different *modus operandi* was employed. This was also with the active involvement of a Customs official. Therein the mode employed was bringing contraband from abroad and leaving it near the belt before checking by the Customs officials which bag is picked up by a Customs official and ferreted out, on grounds only of familiarity with the Customs officials manning check points. We have also come across incidents where the contraband, is left in the vehicle which transports the passengers from the aircraft to the airport, which is picked up by the ground staff or an official of the airport to smuggle the contraband through the customs frontiers. We cannot but observe that there should be a machinery in place to regularly check the Officials, who have free access beyond the Customs barriers. We leave it at that for the present and proceed to consider the subject detention.

17. Admittedly neither Francis nor Adnan Khalid revealed Faisal's name. The deposition of Adnan Khalid indicated the names of persons he had been in constant contact with, over the mobile phone, which was also extracted from the phone by himself, in presence of Customs

officials. Many of them were summoned and some even detained later. As noticed, some of these persons summoned, in their deposition referred to Faisal, who was later summoned and who too deposed before the Customs officials on oath. Faisal admitted to his involvement, which promptly he retracted later. The alleged incident which led to the further proceedings occurred on 01.03.2019 and the detention order was passed on 22.05.2019. The detention order was executed on 30.05.2019 by arrest of both the detenu. The documents were given in five days, clearly within the mandate of the COFEPOSA Act.

18. Exhibit P13, a request for documents, was made on 25.09.2019, before which representations were filed by Exhibit P5 dated 13.07.2019, to the Government of India and Exhibit P6 of even date, to the detaining authority. A further representation by Exhibit P7 was also made to the Advisory Board, which is dated 13.07.2019. The reference to Advisory Board was made by Exhibit P8 dated 19.07.2019. The Advisory Board was convened on 23.07.2019 and on their opinion/advise dated 01.08.2019, Exhibit P10 was issued by the Government of India confirming the order of detention. Later to that, by Exhibit P11 dated 21.08.2019 the representation to the detaining authority was rejected. By Exhibit P12 dated 06.09.2019 the affirming authority too

rejected the representation. It is after this that Exhibit P13 request dated 25.09.2019 was submitted for supply of documents.

19. Going by the dates, we are quite sure in our mind that there could not have been a supply of such documents sought for, prior to the consideration of the representation by the Advisory Board; for the simple reason that it was sought for later. That ground alone cannot result in the detaining authority's order being set aside for procedural irregularity. This ground survives only if the documents or the materials from such documents, were relied on in the detaining authority's order; which then should have been supplied to the detenu, even without a request for the same. It is also pertinent that the non-supply of the documents even after the affirmation order would prejudice their rights in challenging such affirmation order before this Court. We will deal with this question a little later.

20. The most compelling argument addressed was with respect to the detaining authority having not applied its mind and merely extracted the opinion of the sponsoring authority. We do not think, on a reading of Exhibit P2 order, that the said contention can be countenanced. It is true that the detaining authority has extracted the opinion

of the sponsoring authority; but he has arrived at clear findings as is revealed from Paragraphs [liv] and [lv]; the former having eleven grounds and the latter, one. What has persuaded the detaining authority to concur with the sponsoring authority is the voluntary statement recorded under Section 108 of the Customs Act made by Faisal himself. Faisal's connection to the smuggling syndicate being established by the voluntary statements of carrier passengers, viz., Pratheesh Chirayil, Chirakkal Ibrahim Shamseer, Aslam Mytheen and Shabeer M.K. Paragraphs [liv] (3) to (7) refers to the specific statements made by these persons and also one Jinesh Pothodi, who styled Faisal as the kingpin of the syndicate. At paragraph [liv](8), the call data records of Faisal, who was in continuous contact with Adnan Khalid, Pratheesh.C. and Shaber M.K., have been referred to. At paragraph [liv](9) the depositions referred to in paragraphs [liv](1) to (7) and the call records in paragraph [liv](8) are stated to have established that Faisal is the kingpin of the smuggling racket based at Muvattupuzha. At paragraph [liv](10), the imprisonment of Faisal for nine months in 2014 for smuggling in Nepal, also relied on from the deposition under Section 108 has been referred to. At paragraph [liv](11), the show cause notice issued in the earlier instance when he was detained for

preventive reasons has also been referred. In paragraph [lv], the evidence gathered from Francis C.X. and other persons, including Faisal, who were summoned and who voluntarily gave the deposition and the video footage of Francis and Adnan Khalid were referred to.

21. Likewise, Exhibit P2 in W.P(Cr1) No.378 of 2019 is the order passed against Adnan Khalid, which records the summary of the findings in paragraph [liv]. This refers to the statement of Adnan Khalid and Francis C.X. About the smuggling of gold bars on 01.03.2019 and also their deposition with respect to a similar activity employing the same *modus operandi* having been carried out by both of them on 25.01.2019. The voluntary statement of carrier passengers, viz., Ravichandran C., Jinesh Pothodi, Chirakkal Ibrahim Shamseer and Aslam Mytheen, have also been referred to, which termed Adnan Khalid as the main co-ordinator at Dubai for smuggling gold into India and smuggling out foreign currency concertedly; with Faisal as the kingpin of the racket. Paragraph [liv](iii) refers to Faisal's deposition that he was assisted by Adnan Khalid in gold smuggling and remuneration handed over for the same. Paragraph [liv](iv) speaks of the call data records of various carrier passengers and the records retrieved from mobile phones about ticket booking, which pins, on Adnan

Khalid; the co-ordination of travel of carrier passengers into India by providing ticket and Visa, packing of gold and detailing the *modus operandi* with constant communication through mobile phones. Adnan Khalid also acted as mediator of distribution of remuneration to the carrier passengers. Paragraph [liv](v) speaks of extensive use of mobile number +971521441403 for communicating with carrier passengers. The ticket, boarding passes and copy of passport were also referred to in paragraph [liv](vi).

22. L.M.S.Ummu Saleema v. B.B.Gujaral & Ors. [(1981) 3 SCC 317], Radhakrishnan Prabhakaran v. The State of Tamil Nadu & Ors. [(2000) 9 SCC 170], Sunila Jain v. Union of India & Ors. [(2006) 3 SCC 321] and State of Tamil Nadu & Ors. v. Abdulla Kadher Batcha & Ors. [(2009) 1 SCC 333] have been placed before us to contend that there is no legal requirement that copy of every document mentioned in the order shall be supplied to the detenu. Only those which are relied on by the detaining authority for reaching the subjective satisfaction necessarily have to be supplied to the detenu. We are of the opinion that the CDR and SDR as also the travel details as available from the Passports are crucial documents, based on which alone the detaining authority could have arrived at the satisfaction of the two detenus having been involved in a smuggling ring.

23. In deciding as to whether the detaining authority had supplied the documents based on which the specific grounds of detention were found, we have to first look at the manner in which such findings have been rendered. There is absolutely no doubt that the entire investigation, leading to the findings which resulted in the preventive detention of the two persons, arose from the single instance of seizure of contraband, coming to about 3 kilograms of gold; seized from the body of a Customs official on 01.03.2019. The crucial link between the Customs official and Adnan Khalid, one of the detenu who travelled into India in an Emirates flight coming from the Middle-East, is the video footage. The video footage according to the detaining authority establish the handing over by Adnan Khalid, the passenger, to Francis, the Customs official. It is later to that that the seizure occurred. Adnan Khalid was accosted and the statements were recorded from both of them. It is pertinent that neither Adnan Khalid or Francis refers to Faisal. Adnan Khalid refers to one Ashraf, who is stated to be a native of Muvattupuzha, Perumattam; who is said to have handed over the gold to the passenger at Dubai. There is no investigation carried out to identify the said Ashraf or apprehend him.

24. Then there are a number of persons referred to in the deposition of Adnan Khalid itself, whose numbers were extracted from his mobile phone, in the presence of the Customs officials. Their numbers along with their names and the dates on which such calls were made, is seen from the deposition itself. Pratheesh C., Jineth Pothodi, Ravichandran Chirayil and Chirakkal Ibrahim Shamseer are persons whose names are referred to in the deposition itself. Apparently they were also summoned and some of them spoke of Faisal. The persons revealed from the deposition of Adnan Khalid, in their subsequent deposition, spoke of certain other persons, who were also examined. Some of them also spoke of Faisal and Adnan Khalid.

25. It can be unequivocally declared that it is the seizure of contraband from Francis and the video footage showing Adnan Khalid, entering the toilet before Francis and both of them exiting the toilet, after which Francis was caught with the contraband in his briefs, that gave rise to the above preventive detention. The video footage, offers the crucial link between Francis and Adnan Khalid. The original depositions though having evidentiary value under Section 108, for the purpose of using it for the purpose of preventive detention, there should be corroborating material, which as we see from the detention

orders, with respect to both the detenu, is garnered by the detaining authority from the call records and travel details of those summoned, who also gave voluntary deposition before the Customs authorities.

26. We cannot but emphasize that there should be a connecting link insofar as the finding with respect to a smuggling ring in which Faisal is the kingpin and Adnan Khalid, the main co-ordinator, other than the depositions alone. The depositions though having evidentiary value under Section 108, cannot be solely relied on especially to detain a person on preventive reasons, when the deponents have retracted from the depositions at a later stage, after the detenu were released from the custody of the Customs officials.

27. The learned Counsel submitted that mere mobile communication between two individuals or the frequent travels from Middle-East to India would not by itself reveal a smuggling ring having been in operation. We are unable to countenance such an argument. Coupled with the seizure and the depositions, especially of the persons caught at the Airport itself, immediately after the alleged handing over of the contraband had taken place; the frequent communications between certain individuals and the frequent travel from India to Middle-East and back, the

periodicity as also the frequency of communication before and after the travel would supply sufficient material for the subjective satisfaction of an authority under the COFEPOSA Act to make an order of preventive detention. The vexing question is whether this has been satisfied but for the recitals in the order.

28. We first look at the video footage, which was the crucial link offered by the sponsoring authority between Adnan Khalid and Francis. Adnan Khalid, after his exiting from the aircraft, is said to have entered into a toilet before the Customs frontiers. He was followed into the toilet area by Francis, a Customs official, who was on leave on that particular day. Their depositions after they were apprehended, indicated that both these persons entered adjacent cubicles and on Adnan Khalid hearing a knocking on the door in a particular manner, handed over the gold bars to Francis in the adjacent toilet. They were also seen coming out from the toilet, after which Francis was first apprehended and then Adnan Khalid when he came for Customs clearance, as identified by Francis. The link between Adnan Khalid and Francis was offered by the video footage, which was not supplied to the detenu.

29. We see from the bulky file of documents, with the list of relied on documents, as supplied to the detenu,

that it does not indicate supply of the video footage as such, in a CD. In this context, we have to notice the two judgments of this Court in S.Reshmi v. Union of India [2016 (3) KHC 20] and Hajira N.K. v. Union of India in W.P.(Cr1) No.324 of 2019 dated 26.11.2019; in a similar situation wherein video footage was relied on by the detaining authority. Both the decisions were with respect to the very same incident. In S.Reshmi this Court had found that the non-supply of video footage cuts at the very root of the preventive detention ordered. Subsequent to that, when one of the persons found involved in the smuggling ring revealed in S.Reshmi was apprehended, he too was detained. At that time a specious plea was raised by the Department that he was offered to be shown the video footage by the Jail authorities, but he refused. There was no substantiating material produced to validate such a contention. The non-supply of video footage resulted in the preventive detention being set aside in both the cases.

30. In the instant case also Adnan Khalid who was apprehended with the contraband in his person was not supplied with the video footage. It was relied on by the detaining authority in both the detaining orders. The refusal to supply the CDs and also provide the detenu with a facility to view them, when they were under detention, to

make an effective representation vitiates the detention order. We see from the list of documents supplied to the detenu that only a photostat copy of the CCTV image was supplied to the detenu. We see from the records handed over to us by both the detenu, that the documents supplied therein bears the original stamp of the Customs authorities. The photo-copies of the images of CCTV footage are undecipherable and the figures seen therein are unable to be identified. Even the photographs handed over to us by the respondents, which are more or less clear and is in sharp contrast with the images handed over to the detenu; only reveals silhouettes and not identifiable figures. The supply of the images of the video footage is inconsequential insofar as the effective opportunity to make a representation against the preventive detention. The detenu should have been supplied with the video footage itself and facility provided for viewing the same.

31. The next aspect we have to look into is the finding of the detaining authority that what has been stated in the depositions voluntarily made before the Customs authority have been corroborated by the call details and the travel details of the deponents which have been elaborately dealt with by the detaining authority in its order. We see from Exhibit P2 produced in both the writ

petitions that the call details of the deponents have been elaborately noticed in a table, in the detaining authority's order, as supplied by the sponsoring authority. We see that Faisal and Adnan Khalid between themselves had made 128 calls between 4th January and 9th February, 2019. There have been calls between all the deponents, some solitary and below two digits; but, there are very frequent calls made between certain deponents. These have been related with the dates presumably on which the depositions revealed smuggling activity having been undertaken. This has also to be connected with the travel details, which details are available from the Passport and e-tickets, which were recovered from the deponents and also on summoning of call details. Looking at the relied on documents supplied to the detenu, we do not find the call details, i.e., the CDR and SDR details which were sought for by Exhibit P13, having been supplied to the detenu. The frequent mobile calls, that too proximate to the dates on which smuggling activities were revealed to have been carried out, was a crucial corroborating material which the detaining authority failed to supply to the detenu. The detaining authority also has not looked into the details and merely relied on the table of details, supplied by the sponsoring authority. The detaining authority on looking at

the call details and the travel documents arrived at a satisfaction that the smuggling activities revealed in the depositions have been established. However the documents looked into for arriving at the satisfaction were not supplied to the detenu.

32. We also looked at the travel details, which are allegedly detected from the Passport and the e-tickets. The photocopy of Passports are seen supplied, but only the first two pages without the stamping of entry and exit into and outside the country; which alone would enable the detenu to offer any explanation as to the said ground. The Passports of the deponents were produced on summons issued. When they were supplied, they were not supplied in full; revealing the entries which should have shown the air travel to outside the country and into the country. None of these details are seen to have been looked into by the detaining authority and in that circumstance we have to find non-application of mind in accepting the sponsoring authority's report. There is no application of mind on the various grounds stated in the impugned order, as to whether there is corroboration offered by the documents produced by the sponsoring authority.

33. Union of India & Ors. v. Arvind Shergill and Ors. [(2000) 7 SCC 601] has been placed before us to

caution us from not acting as an appellate authority. The Hon'ble Supreme Court held that action by way of preventive detention is largely based on suspicion and the Court cannot investigate as to whether the circumstances of suspicion exist warranting restraint of a person. We have to, however, notice the declaration of the Hon'ble Supreme Court in paragraph 4, which is to the following effect:

"The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenu from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid".

The satisfaction arrived at in this case according to us, is not substantiated by the documents on record, which were supplied to the detenu. The need for supply of documents relied on and the necessity for the detaining authority to arrive at a subjective satisfaction of the need for a preventive detention on the basis of substantiating material against the proposed detenu, as supplied by the sponsoring authority are established principles; spoken of by the Hon'ble Supreme Court. We, hence, find the detention order to be bad and both the detenu are liable to be released forthwith.

34. Madan Lal Anand & Ors. v. Union of India & Ors. [(1990) 1 SCC 81] found that each of the grounds are severable and can be sustained independently and if any of the grounds for detention are sustainable, then there could be no interference caused to the order of detention, since such order of detention is deemed to have been made separately on each of such grounds. We have, however, found that none of the grounds as noticed by the detaining authority and specifically referred to by us herein above can be sustained in the absence of the connecting links.

35. We now have to dwell upon two important aspects pointed out by the petitioners. The first, visitation rights of a detenu with reference to a lawyer, enabling proper legal assistance. We specifically directed learned Government Pleader for the State of Kerala, Sri.K.A.Anas, to address us on this aspect. The learned Government Pleader has produced before us across the Bar S.R.O.No.310/2014 dated 06.05.2014, wherein Kerala Prisons and Correctional Services (Management) Rules, 2014 have been framed under the Kerala Prisons and Correctional Services (Management) Act, 2010. Chapter 56 of the Rules speaks of the visitation and communication with the convicts, which very same privileges a detenu under preventive detention is also entitled to. Rule 811 speaks

of visitation rights available with friends, relatives and lawyers, which are permissible once or twice in a week. Further visitation also can be allowed at the discretion of the Superintendent as per Rule 812. In such circumstances, we hold that there can be no restriction insofar as the lawyers are concerned and there can be no day specified in a week for the purpose of such visitation. Whenever a lawyer approaches with an identification, necessarily he has to be permitted to have communication with the detenu; but, however, subject to the detenu opting to have such communication. We are told by the Jail authorities that number of lawyers come to visit a particular detenu and hence we specify that such visitation can only be with the consent of the detenu.

36. The other disturbing factor which was brought to our notice is the insistence of presence of a DRI official in detention under COFEPOSA. In this context, we refer to the decision in Frances Coralie Mullin v. Administrator, UT of Delhi [(1981) 1 SCC 608], of which paragraph 11 is extracted hereunder:

"(11) WE are therefore of the view that sub-clause (I) of clause 3(b) regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Articles 14 and 21 and must be held to be unconstitutional and void. We think that it would be

quite reasonable if a detenu were to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. We may add that the interview need not necessarily take place in the presence of a nominated officer of Customs/Central Excise/enforcement but if the presence of such officer can be conveniently secured at the time of the interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other Jail official may, if thought necessary, watch the interview but not so as to be within hearing distance of the detenu and the legal adviser".

37. There can be no insistence that visitation can be on a particular day nor can there be an insistence for the presence of an officer from the office of the DRI or any other sponsoring or detaining authority. The visitation rights of the lawyer though can be permitted to be carried out in the presence of an official from the office of the detaining/sponsoring authority or any other Jail official, they can only watch the interview but they should not be within hearing distance. We perfectly agree with what the learned Counsel Sri.M.Ajay submitted, as to the interview being mandated to be carried out 'within eye sight, but out of earshot', which shall be the guiding principle.

38. Before we part with the case, we also have to reckon with the submission made by the learned Counsel, with respect to Exhibit P8 reference made by the Government of India, to the Advisory Board and the recitals made therein. It is argued that materials not supplied to the detenu were placed before the Advisory Board. In Exhibit P8 the specific recital in the body of the letter addressed to the Secretary, COFEPOSA Advisory Board is that "*The parawise comments thereon would follow soon*". The copy has been endorsed to the detenu as also the Superintendent of Prison, where they have been detained and the detaining authority. The detaining authority has been specifically directed to be ready with the parawise comments. We, hence, called for the files from the Secretary of the Advisory Board. We are told that there was no parawise comments sent to the Advisory Board directly by the detaining authority nor handed order to the Board at the time of hearing. In such circumstances, we do not think that the detention should be interfered with on that solitary ground, which if supplied to the Advisory Board without notice to the detenu, would definitely have been a ground for interference.

39. Having found so, we also have to look at the procedure alleged to have been followed by the Advisory

Board, on which we specifically queried the Secretary of the Board. We are told that the detenu and the detaining authority are heard separately. We were also informed that the detenu is heard, without the presence of Department officials for reason of the detenu being in preventive custody, on the subjective satisfaction of the detaining authority. The entire attempt being to secure his freedom; the detenu would have something to submit before the Advisory Board which he would be averse to state before the officials, under whose detention, he will be returned after the hearing. We respect the concern of the Advisory Board and bow to it, insofar as the detenu and his lawyer, may have something confidential to pass on to the Advisory Board. While that procedure cannot at all be faulted, quite conscious of the fact that the Board comprises of three senior Judges of this Court, we find the procedure of, avoiding the presence of the detenu and his lawyer at the time of the Department being heard, to be in violation of the accepted procedures established in the case of preventive detention.

40. Section 8 of the COFEPOSA Act does not mandate even a hearing, unless it is thought necessary by the Board or the detenu desires so. On the detenu seeking a hearing, it is imperative. But there is no hearing contemplated of

the Department. The Department's presence before the Advisory Board is only when the Board seeks any further information from the appropriate Government or through it. The Advisory Board, it is trite, is empowered to devise its own procedure as there is no *lis* to be adjudicated. In (1989) 1 SCC 193 State of A.P. Vs. Balajangam Subbbarajamma it was held that though the Board may adopt any procedure depending upon varying circumstances, it should satisfy procedural fairness. A three judge Bench in Kavita Vs. State of Maharashtra (1981) 3 SCC 558 held, where : "...a *detenu* makes a request for legal assistance, his request would have to be considered on its own merit in each individual case" (*sic*). In Nandlal Bajaj v. State of Punjab [(1981) 4 SCC 327] the continued detention was set aside for reason of the Advisory Board having declined the request of legal representation to the *detenu*, while the department was allowed to be represented by a lawyer.

41. In A.K. Roy v. Union of India [(1982) 1 SCC 271], a Constitution Bench first grappled with the question of whether legal representation in preventive detention is mandatory. On a combined reading of clauses (1) and (3) (b) of Article 22, their Lordships lamented, it was difficult to hold "*by the application of abstract, general principles or on a priori considerations that the detenu has the right*

of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or unreasonable (sic). We use the word 'lamented' since the text of the decision breathes their Lordship's concern and anxiety at such a basic right having been compromised. All the same their Lordships looking at Article 21, held: "It is therefore necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable(sic)." It was also held : "We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the departments concerned often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not 'legal practitioners' or

legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them.(sic)"

42. Section 8 empowers the Advisory Board to call for any information, as it may deem necessary, from or through the appropriate Government. Needless to say that such information, whether it be by way of documents or by oral clarifications has to be disclosed to the detenu. The detaining authority cannot place material or argue matters not evident from the records already supplied to the detenu. We are sure and do not for a moment assume, that the Advisory Board would permit any such arguments. But, to avoid such grounds being raised and to maintain transparency of and fairness in the procedure, it is imperative that, if the Advisory Board hears the detaining/sponsoring authority or their representatives, they should do so, in the presence of the detenu and his lawyer.

43. We also would caution the Department from making such casual statements in the reference to the

Advisory Board, of parawise comments being followed with. This would impair the sanctity of the procedure before the Board; if it is so furnished without prior notice to the detenu. The detenu is in preventive detention and unable to converse with his lawyer at will. We refer to State of T.N v. Senthilkumar [(1999) 2 SCC 646] where three additional documents were served on the detenu, which were conceded to have been placed before the Advisory Board and the Government. The complaint of the detenu was that the documents alone were served to him, without any information as to who furnished it and for what purpose. It was held that the confusion created in the mind of the detenu, by the mere service of the three documents, without even a covering letter disclosing the purpose for which it was served, vitiated the order. It was observed that unlike punitive incarceration after a full fledged trial; preventive detention is on the subjective satisfaction of the detaining authority, which requires strict compliance of procedural safeguards. A casual or random approach leads to infringement of these safeguards, thus vitiating the very order of detention.

44. We cannot but observe about the casual manner in which detention orders are passed, without a grasp of the relevant law on the subject. Technicalities in

procedure abound, in the consideration of continuance of a preventive detention. The consideration is surely not proof beyond reasonable doubt or even preponderance of probabilities. Strict adherence, hence is called for and we find very many of the detaining authorities not being properly educated on the law regarding the subjective satisfaction to be entered in ordering preventive detention. Though distinguished from an objective satisfaction, a subjective satisfaction also has to be on substantiating materials, which are also to be supplied to the detenu. Otherwise the orders will be vitiated for non supply of the relevant documents relied on or as in this case there being no application of mind. There is a prevalent tendency to 'cut-paste' the opinion of the sponsoring authority, which any trained legal mind can see through. We just hope that the authorities enjoined to pass detention orders will scrupulously educate themselves on how to arrive at a satisfaction, from the available materials. The subjective satisfaction should emanate from the order of detention and the documents relied on. The defect in procedure, which would vitiate an order of preventive detention, could be either the materials proffered being specious or the materials served on the detenu, being insufficient to establish the link to the

smuggling activity alleged, which form the basis for preventive detention. In the instant case the very crucial video footage from which the entire case was generated was not supplied to the detenu. The corroborating facts, which could have led to a subjective satisfaction of a smuggling ring being in operation, as available from the call details and the travel details were not examined by the detaining authority. The detaining authority merely relied on the opinion of the sponsoring authority. The documents revealing the call details and the travel details were also not supplied to the detenu.

The Writ Petitions (Criminal) are allowed. The detenu in both the writ petitions shall be set at liberty forthwith, if their continued detention is not required in any other case. Registry shall communicate the gist of this judgment to the authorities expeditiously to enable their release.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
V.G.ARUN
JUDGE

Vku/-

APPENDIX OF WP (Cr1.) 377/2019

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 A TRUE COPY OF THE ORDER OF DETENTION
NO PD-12001/12/2019-COFEPOSA ISSUED BY
THE SECOND RESPONDENT DATED 22.5.19
- EXHIBIT P2 A TRUE COPY OF THE GROUND OF DETENTION SERVED
ON THE DETENU BY THE SECOND RESPONDENT
DATED 22.5.2019
- EXHIBIT P3 A TRUE COPY OF THE LIST OF DOCUMENTS ISSUED
TO THE DETENU ALONG WITH THE
GROUNDS OF DETENTION
- EXHIBIT P4 A TRUE COPY OF THE COMMUNICATION
ISSUED BY THE DEPUTY SECRETARY OF THE
FIRST RESPONDENT DATED 20.6.2019
- EXHIBIT P5 A TRUE COPY OF THE REPRESENTATION FROM
THE DETENU TO THE JOINT SECRETARY OF THE
SECOND RESPONDENT DATED 13.7.19
- EXHIBIT P6 A TRUE COPY OF THE REPRESENTATION FROM THE
DETENU TO THE FIRST RESPONDENT DATED 13.7.19
- EXHIBIT P7 A TRUE COPY OF THE REPRESENTATION FROM THE
DETENU TO THE FOURTH RESPONDENT DATED 13.7.19
- EXHIBIT P8 A TRUE COPY OF THE COMMUNICATION ISSUED
BY THE DEPUTY SECRETARY OF THE FIRST
RESPONDENT TO THE SECRETARY OF THE FOURTH
RESPONDENT DATED 19.7.19
- EXHIBIT P9 A TRUE COPY OF THE SUBMISSIONS MADE ON BEHALF
OF THE DETENU SUBMITTED BY THE COUNSEL FOR
THE DETENU BEFORE THE FOURTH RESPONDENT
DATED 23.7.19
- EXHIBIT P10 A TRUE COPY OF THE ORDER
NO PD 12201/12/2019-COFEPOA ISSUED BY THE
DEPUTY SECRETARY OF THE FIRST RESPONDENT
DATED 14.8.19
- EXHIBIT P11 A TRUE COPY OF THE COMMUNICATION
NO PD-15001/20/19-COFEPOSA ISSUED BY THE
DEPUTY SECRETARY OF THE FIRST RESPONDENT
DATED 21.8.19.

- EXHIBIT P12 A TRUE COPY OF THE COMMUNICATION
NO OD-150001/21/2019-COFEPOA DATED 6.9.19
ISSUED BY THE DEPUTY SECRETARY OF THE
FIRST RESPONDENT
- EXHIBIT P13 A TRUE COPY OF THE REQUEST FOR DOCUMENTS AND
MATERIALS SUBMITTED BY THE DETENU BEFORE THE
FIRST RESPONDENT DATED 25.9.19
- EXHIBIT P14 A TRUE COPY OF THE APPLICATION PREPARED
FOR THE DETENU UNDER THE RTI ACT AND
ADDRESSED TO THE SPICO CENTRAL PRISON,
POOJAPPURA DATED 18.9.19
- EXHIBIT P15 A TRUE COPY OF THE REQUEST FOR INFORMATION
ADDRESSED TO THE FIFTH RESPONDENT PREPARED
FOR THE DETENU UNDER HIS INSTRUCTIONS
DATED 18.9.19
- EXHIBIT P16 A TRUE COPY OF THE COMMON ORDER OF
THE SIC, KERAL IN CP NO 762 AND
763(3)/2019/SIC DATED 1.10.19
- ADDL.EXHIBIT P17 A TRUE COPY OF THE COMMUNICATION ISSUED
BY THE DEPUTY SECRETARY OF THE FIRST
RESPONDENT F.NO.PD-15001/20/2019-COFEPOSA
DATED 14.10.19.
- ADDL.EXHIBIT P18 A TRUE COPY OF THE COMMUNICATION ISSUED
BY THE DEPUTY SECRETARY OF THE FIRST
RESPONDENT F.NO.PD-15001/21/2019-COFEPOSA
DATED 14.10.19.
- ADDL.EXHIBIT P19 A TRUE COPY OF THE PASSPORT NO.S5265116
OF SRI.CHIRAYIL PRATHEESH
- ADDL.EXHIBIT P20 A TRUE COPY OF THE PASSPORT NO.P4629800
OF SRI.CHIRAKAL SHAMSEER.

APPENDIX OF WP (Cr1.) 378/2019

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF IMPUGNED ORDER PASSED UNDER SECTION 3(1) OF THE COFEPOSA AGAINST DETENU
- EXHIBIT P2 TRUE COPIES OF GROUND OF DETENTION AND LIST OF DOCUMENTS.
- EXHIBIT P3 TRUE COPY OF THE REPRESENTATION DATED 13.7.2019 TO THE DIRECTOR GENERAL, CENTRAL ECONOMIC INTELLIGENCE BUREAU
- EXHIBIT P4 TRUE COPY OF THE REPRESENTATION BEFORE THE HON'BLE JOINT SECRETARY (COFEPOSA) DATED 9ON 13.7.19
- EXHIBIT P5 TRUE COPY OF THE REPRESENTATION DATED 13.7.2019 TO THE ADVISORY BOARD
- EXHIBIT P6 TRUE COPY OF THE LETTER DATED 16.7.2019
- EXHIBIT P7 TRUE COPY OF THE COMMUNICATION DATED 19.7.2019
- EXHIBIT P8 TRUE COPY OF THE ORDER DATED 14.8.19
- EXHIBIT P9 TRUE COPY OF THE ORDER DATED ON 21.8.2019
- EXHIBIT P10 TRUE COPY OF THE SCN F.NO DRI/COZU/CHN/10/ENG.10/2019 DATED 28.8.2019
- EXHIBIT P11 TRUE COPY OF THE ORDER DATED ON 6.9.2019

[TRUE COPY]