

(2017) 02 KL CK 0003

In the High Court Of Kerala

Case No : WP(Crl.). Nos. 478, 479, 481, 482, 496 and 497 of 2015 & 52 and 58 of 2016 (S)

Fazeela Salim

APPELLANT

Vs

Joint Secretary to the Government

RESPONDENT

Date of Decision : 15-02-2017

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3

Citation : (2017) 2 ILRKerala 346 : (2017) 2 KerLJ 582

Hon'ble Judges : Mr. Thottathil B. Radhakrishnan and Mrs. Anu Sivaraman, JJ.

Bench : Division Bench

Advocate : Sri. K.M. Nataraj, Addl. Solicitor General By Sri.Suvin R. Menon, CGC, Advocates, for the Respondent Nos. 1, 3 and 4; Sri. John Varghese, SC, By Sri. Sreelal N. Warriar, SC, for the Respondent No. 4; Senior Government Pleader Sri. B. Jayasurya, Advocates, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Thottathil B. Radhakrishnan, J.—In the sequence in which they are captioned above, these writ petitions are filed questioning the preventive detention of (i) Salim Melathu Makkar, (ii) Fazil K.B., (iii) Jabin K. Basheer, (iv) Noushad P.A., (v) Yasir Ibnu Muhammed, (vi) Saifudheen M.S., (vii) Bibin Scaria and (viii) Shinoy K. Mohandas, detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, for short, the "COFEPOSA Act".

2. The basic substratum of the proposals of the sponsoring authority to detain the aforesaid persons under the COFEPOSA Act and the consideration and issuance of the impugned preventive detention orders by the authority competent to do so, is founded on the bedrock of facts and factors which are cohesive. This is apparent from the fact that paragraphs 1 to 205, enumerated among the grounds of detention of all the detenus, are the same; and it is thereafter that the segregable allegations are pointed out, also with reference to

materials in relation to each detenu covered by the particular detention order. The documents relied upon by the authorities are the same for all the detenus. Keeping aside certain pleadings and submissions with reference to the facts of the individual cases; the pleadings, contentions and arguments by and advanced on behalf of the detenus, as well as those on behalf of the authority which issued the impugned detention orders and those by and on behalf of the sponsoring authority, are those which are to be considered simultaneously and to be decided together. Hence, these eight writ petitions seeking release of eight different persons from preventive detention under the COFEPOSA Act are heard jointly and answered through this common judgment.

3. All the detention orders were issued on 14.10.2015 by the competent authority. All the writ petitions except WP(Cr).No.52 of 2016 and WP (Cr).No.58 of 2016 were filed before the confirmation of the respective detention orders. WP(Cr).No.52 of 2016 in re Bibin Scaria and WP (Cr).No.58 of 2016 in re Shinoy K. Mohandas were filed after the confirmation of the detention orders.

4. Bearing in mind that each case would depend on facts relatable to that case, we proceed to state the relevant contentions as regards each case; which may appear to be an exercise of repetition. We do so, as we have considered the facts and materials of each case independently. They can be noticed as follows:

(a)Contentions on behalf of Salim Melathu Makkar in WP(Cr).No.478 of 2015: The order of detention and grounds of detention reveals non-application of mind and the order of detention is invalid on such ground of non-application of mind. The English version of the order was served at the time of detention and the translation in Malayalam was not served contemporaneously thereby depriving the detenu of knowing the factum of his detention under the COFEPOSA Act and that the detention was effected by serving an order in the language not known to him. The Malayalam version of the detention order was not served at all and non-communication of the Malayalam version has deprived the detenu of the right to make an effective representation. The manner in which the detention order is couched is such that it per se shows non-application of mind and also that the said order of detention is de hors the provisions of the COFEPOSA Act. The specific head or ground of the allegations is not traceable to any of the sub-sections or clauses of Section 3 of the COFEPOSA Act independently and the detention order is vague in nature rendering it bad in law. The order of detention is not in conformity with the provisions of the COFEPOSA Act and therefore, it is in violation of the first facet of Article 22 (5) of the Constitution of India and has also deprived the detenu of his right to make an effective representation. There is improper communication of the order of detention and this has vitiated the second facet of Article 22(5) of the Constitution as well. The Malayalam version and English version of grounds of detention would disclose that there are contrasting contents which would show that the Malayalam version was not a true rendition of the contents of the grounds of detention originally made in English. Different documents and materials including the remand applications,

retraction letters, remand report, court proceedings relating to deposit of passports etc. were not brought to the notice of the detaining authority and those materials have been ignored resulting in breach of Article 22(5) of the Constitution. The noncommunication of the grounds of detention and the materials relied on were thus much short of the requisite benchmarks prescribed for such purpose by the laws.

(b) Similar are the pleadings in WP(Cr).No.479 of 2015 which impeaches the detention of Fazil K.B. Making reference to the relied upon documents, an attempt is made to show that the documents relied on and incorporated with reference to grounds of detention have not been furnished and therefore, there is non-furnishing of relied upon documents and hence, the order of detention is bad in law. Remand reports relating to the other persons have not been placed before the detaining authority by the sponsoring authority and this has vitiated the decision. Apart from reiterating many of the grounds raised in Salim Melathu Makkar's case referred to above, it is specifically pointed out that Section 5A of the COFEPOSA Act does not make the doctrine of severability applicable to the "heads" of detention but only to the grounds of detention.

(c) WP(Cr).No.481 of 2015 in re Jabin K. Basheer was amended. That the order of detention and grounds of detention are manifestly erroneous and vitiated by nonapplication of mind and there is breach of Article 22(5) in both its facets and that the detention order is not in consonance with the COFEPOSA Act are pleaded as in the cases of Salim Melathu Makkar and Fazil K.B. referred to earlier. Not much different are the allegations in Jabin K. Basheer's case relating to the alleged non-providing of versions in Malayalam, including that the Malayalam version of the detention order was not served. In this case also, plea relating to the wordings of the detention order with reference to different sub-sections and clauses of Section 3 is also raised. It is the further contention that the detaining authority has not recorded subjective satisfaction with reference to the fact that the passports of all persons investigated and/or arrested, were either in the custody of the sponsoring authority or in the process of deposit or taking over by the courts in terms of the bail orders. It is pleaded that no prejudicial activity much less "smuggling", could be shown to exist. The attempt is to point out a contradiction between Malayalam version and English version of the grounds of detention similar to what has been raised in Salim Melathu Makkar's case and Fazil K.B.'s case. It is also the plea that materials which disclosed that at least one of the accused persons was subjected to manhandling by the departmental authorities to procure confession statement are there and such other materials were not placed or brought to the notice of the detaining authority. Another ground which is also raised in some of the other cases is that while 34 persons were arrested and retraction letters of statements were also received, the remand applications relating to the 34 arrested persons and the retraction letters of 33 persons have not been placed or considered and the remand report of accused no.34 Ismail M.P. and the order passed thereon by the court were not considered, so also the directions given by the courts for deposit of passports of

various accused persons have not been considered. The non-furnishing of different such documents discloses non-application of mind and has adversely affected the decision making process leading to the impugned detention order. The sponsoring authority is accused of suppressing crucial facts from the detaining authority, in particular, the petitions sent by the detenu and his brother Nibin K. Basheer and the materials which disclosed that the Customs officials had threatened to hurt and torture the mother and younger sister of the detenu. The earliest retractions were not considered, it is contended. The statement given by the estranged wife of the detenu has been relied on heavily to issue the detention order. The contentious proceedings stated to be pending before the court as between the detenu and his wife is a relevant factor which ought to have been taken note of. It is pointed out that the entire documents ought to have been placed before the detaining authority and it is not within the domain of the sponsoring authority to sift and choose materials classifying them as relevant and irrelevant. It is further contended that the possibility of Jabin K. Basheer continuing with the alleged activities is apparently on the assumption that he has substantial contacts, which is only a figment of imagination since he has been repatriated to parent department from the Immigration Department. The material contradictions between different statements have not been noted and this also vitiates the impugned detention order.

(d) WP(Cr).No.482 of 2015 is filed in re Noushad P.A. raising the self-same contentions noted above in relation to the quality and sustainability of the detention order and the communication of the order of detention and the grounds thereof. It is also pleaded that truncated documents have been placed before the detaining authority by the sponsoring authority and vital and relevant papers were not produced. The plea that the remand applications, retraction letters etc. of different persons, materials relating to the remand report and order passed by the Additional Chief Judicial Magistrate in the case of Ismail M.P., accused no.34, have not been placed, are also reiterated. The impugned detention order is pleaded as vitiated by non-application of mind and that the doctrine of severability does not apply to save the situation.

(e) On behalf of Yasir Ibnu Muhamed, WP(Cr). No.496 of 2015 is filed on grounds and reasons which can be treated as running contemporaneous with those raised in the cases already noted herein above. The effect of the detention order vis-a-vis the contents thereof was also specifically dilated upon during the course of submission with regard to the sub-sections of Section 3 of the COFEPOSA Act and the clauses of those sub-sections.

(f) In re Saifudheen M.S. also, the plea relating to the contents of the detention order, the communication of the detention order, all the grounds of detention, the allegations relating to non-furnishing of Malayalam version, the incongruity between the English version and the Malayalam version and the consolidation of different grounds referable to the different limbs of Section 3 of the COFEPOSA Act and the nonavailability of the doctrine of severability are reiterated in the

manner in which we have already noted it in the afore noted cases.

(g) WP(Cr).No.52 of 2016 challenging the preventive detention of Bibin Scaria is filed on grounds which are apparently the same as in the earlier noted cases. It also further proceeds to plead that the detenu was granted bail as per order dated 15.7.2015 categorically stating that the investigation could not arrive at a specific conclusion as to what is the connection between the arrest of the detenu and the original seizure of 8 kgs of gold on 24.5.2015. It is further submitted that pursuant to the grant of bail, the detenu is complying with the bail conditions and he has surrendered his passport and that though he was an employee of Bird Worldwide Flight Services, hereinafter in this judgment, "BWFS", for short, as a Ramp Supervisor, there is nothing even through the bank account or other details which were subjected to investigation in detail by the Customs, to have him covered by a preventive detention order. It is also the plea that he has recently married and the writ petitioner, who is his wife was in advance stage of pregnancy while instituting the writ petition in February, 2016 and that the unfortunate implication of the detenu as accused in O.S.No.111 of 2015 has shattered the normal and peaceful life of that couple. Learned counsel argued that on the basis of the materials, there was absolutely no reason to cover Bibin Scaria through preventive detention order that would sustain on the facet of Article 22(5) and the provisions of the COFEPOSA Act authorising preventive detention.

(h) In re Shinoy K. Mohandas, WP(Cr).No.58 of 2016 is filed on grounds which include reiteration of all those already noted above and certain other specific issues. It is pointed out that the detenu is never shown to have been involved in any previous criminal offence and being involved in a solitary crime is insufficient to curb the freedom of movement of a citizen. Ext.P4 order of bail was issued with stringent conditions and the detenu was directed not to enter any airport until the charge sheet is filed or for six months whichever is earlier. It is also the plea on behalf of Shinoy K. Mohandas that the detenu who was working in the Airport since last 10 years has been removed from the service and there is therefore no chance for him to indulge in any other activity. It is contended that there is inordinate and unexplained delay in passing the order of detention because Salim Melathu Makkar was intercepted on 24.5.2015 and the detention order was issued against Shinoy K. Mohandas on 14.10.2015. According to the writ petitioner, such delay has snapped the live and proximate link between the alleged prejudicial activity and the order of detention.

5. The sponsoring authority applied for and was impleaded in those writ petitions where it was not arrayed among the respondents at the time of institution. The sponsoring authority as well as detaining authority have filed counter affidavits and also produced certain materials which will be referred to in due sequence as we proceed.

6. In WP(Cr).No.478 of 2015 in re Salim Melathu Makkar, the detaining authority has filed counter affidavit refuting the contentions on behalf of the detenu issue

to issue and has specifically stated, among other things, that the wording and language of the detention order does not admit of any doubt having regard to the meaning of the words used therein. It is pointed out that no prejudice has been caused to the detenu even if there were typographical error and the right and liberty of the detenu to make an effective representation was not denied. The Malayalam version is a free translation and not a verbatim one and that notwithstanding, the grounds of detention were explained to the detenu in his known language and he has acknowledged the same as "I have been told in Malayalam the reasons for being put under preventive detention under the Cofeposa Act and I have understood the same." It is also contended that typographical errors could have crept in when the translation was of documents running around 2900 pages and that by itself has not affected the right of the detenu to make effective representation. The reasons for the detention were told to the detenu in Malayalam in the presence of the Joint Superintendent of Central Prison and such action is a matter of record. Ext.R1(a) is a receipt written in Malayalam by the detenu and countersigned by the prison authority through which the detenu has acknowledged the receipt of grounds of detention, list of relied upon documents and attested copies of the relied upon documents in the presence of the jail authorities and also of having been shown different images contained in two CDs which is part of the relied upon documents. Through application for reception of additional documents, I.A.No.12995 of 2016, Exts.R4(a) to R4(h) are produced supported by an additional affidavit. Those documents evidence the acknowledgment of the detenu as stated above and the endorsement of the officer of the sponsoring authority and signed by the detenu and the jail authority through which it is shown that the grounds of detention were explained in Malayalam to the detenu. Ext.R4(c) is the acknowledgment of the grounds which have already been referred to earlier. Ext.R4(d) evidences that the confirmed order of detention consequent on the opinion of the Advisory Board was served on the detenu and that he acknowledged it. Ext.R4 (e) evidences the acknowledgment of the detenu of having received the copy of proceedings of O.S.No.111 of 2015 which discloses the remand applications and orders. Ext.R4(f) evidences the detenu's acknowledgment of the copy of report submitted by the Superintendent of Customs to the Economic Offences Court, regarding the alleged assault on Ismail M.P. Ext.R4(g) is the list of retractions made before the Customs authorities and the relevant dates in relation to each of those retractions. Ext.R4(h) is the list showing the details of arrest and bail in respect of persons arrested in O.S.No.111 of 2015. An additional affidavit is filed on behalf of the sponsoring authority and an additional counter affidavit has been filed by the detaining authority producing the copies of documents which are in tandem with those produced by the sponsoring authority.

7. In view of the fact that many of the contentions in the other writ petitions impeaching the preventive detention of the other persons covered by the impugned detention order are predominantly same or similar, the plea of the sponsoring authority and the detaining authority through the counter affidavits,

additional affidavits and additional counter affidavits are similar. The plea on behalf of the detenu as to the non applicability of the severability doctrine in Section 5A of the COFEPOSA Act and the alleged mixing up of different "heads" of detention and/or grounds is also countered by the respondents.

8. In opposition to WP(Cr).No.52 of 2016 in re Bibin Scaria, pleadings of facts are included to show that the materials referred to in the grounds of detention include details of bank accounts, call records through mobile phones and other materials which would connect the prejudicial activities of that person to the prejudicial activities attributed to other detenus who are alleged to be part of the smuggling racket.

9. Through counter affidavits filed in opposition to WP(Cr).No.58 of 2016 in re Shinoy K. Mohandas, the intricate connecting links to the satisfaction of the sponsoring authority as between the different persons who are involved in the racket particularly Noushad P.A., Shinoy K. Mohandas and Bibin Scaria and the material showing that Bibin Scaria had obtained remuneration of Rs.70 lakhs are relied on to show that the plea challenging the detention order is unsustainable. It is also pleaded that the conditions in the bail order and all relevant facts and materials were notified to the detaining authority which has arrived at a subjective satisfaction that an order of preventive detention is required to cover Shinoy K. Mohandas as well.

10. Heard the learned senior advocates and the other learned advocates appearing for the petitioners and the learned Additional Solicitor General.

11. It is argued on behalf of the detenus, inter alia, that the detention orders are ex-facie invalid and are vitiated by non-application of mind; the similarly detention orders are so worded that they do not even disclose the imputations levelled against each of the detenus; grounds of detention were not served in the language known to the detenus, contemporaneous with the order or within the time prescribed; the version of the detention order in Malayalam was also not made available; thereby depriving the detenus of their effective right to represent against the preventive detention; that Section 5A of the COFEPOSA Act is not available to the detaining authority to sustain the orders of detention, the grounds of detention and the reasons for detention being not severable; relevant materials which would have dissuaded the detaining authority from passing the detention orders were held back; and that relevant documents were not communicated in their entirety and in the language known to the detenus thereby depriving them of the right to make effective representation. Learned counsel also referred to the different precedents of the Honourable Supreme Court through which certain broad principles relating to preventive detention and judicial review in such matters are explained. We will refer to the relevant precedents and principles in that regard as we proceed.

12. Countering the arguments advanced on behalf of the detenus, the learned Additional Solicitor General argued that there is no defect in the orders of

detention and that defects in that order, if at all there is any non-supply of translated version, will not vitiate the detention orders in the cases in hand. It is further argued that no question of non-application of mind can be deciphered on the basis of the materials on record and that the files necessarily disclose that the detaining authority had adverted to and considered the materials placed by the sponsoring authority and such materials were by themselves sufficient for the detaining authority to enter subjective satisfaction of the requirement to cover the detenus through the impugned detention orders. There is no defect in the grounds of detention and there is no situation of prejudice being caused to the detenus by non-placing of any material. The opportunity of the detenus to make effective representation is in terms of Article 22(5) of the Constitution and Section 3(3) of the COFEPOSA Act. It was argued that some of the grounds urged on behalf of the detenus, as to variance in translation and communication of grounds as also certain factors which could have been brought to the notice of the detaining authority, do not in any manner vitiate the detention orders which have been issued on the basis of materials which the detaining authority had considered; and the sufficiency or otherwise thereof, is not a matter for judicial review and that discrepancies, if any, are so minor that they are immaterial. It is argued that no material which could be called as extraneous, has been shown to have been considered and, therefore, the satisfaction of the detaining authority does not warrant interference in judicial review. It is further argued that the grounds against the detenus are severable and even a solitary incident is sufficient to effectuate the invocation of jurisdiction to pass preventive detention order and the reasonable belief on the basis of past conduct would be sufficient. The concept of reasonable belief and impact on the public and the society, at large, are issues to be borne in mind and, therefore, no ground exists to interfere with the impugned detention orders, it is contended. Reference was made to different precedents, including many of those which were referred to by the learned counsel on behalf of the detenus, essentially, pointing out the broad principles and cases in situations dealt with different sets of facts. To the extent relevant, principles and precedents would be referred to by us during the course of consideration.

13. The protection under Article 22(5) of the Constitution of India read with Section 3(3) of the COFEPOSA Act requires that the person against whom an order for preventive detention has been passed shall be given the earliest opportunity of making a representation against the order of detention by communicating to him the grounds of detention, thus enabling him to effectively utilise such opportunity. Liberty of individual in terms of the Constitution is not merely a technical matter but a sacrosanct one. Judicial review of the preventive detention of a person has to be carried maintaining a fine equilibrium on the scales of the statute laws relevant to the preventive detention under challenge and Articles 21 and 22 of the Constitution; as also the constitutional values, principles and prescriptions lying embedded in the entire body of the Constitution, including its Preamble. Such cohesive consideration is indispensable

in view of the fact that the constitutional provisions are so laid, that the rights and duties of the citizens including Fundamental Rights and the rules of governance of the Nation as discernible from the Constitution cannot be read in isolation among themselves. Individual liberty is among the prime salutary doctrines of the collective existence of the great polity governed by the Constitution of India. But when such collective existence is perilously or demonstrably visited in violation of the seminal principles of national governance and collective national existence reflected through the Directive Principles of State Policy taken along with the Fundamental Duties and Fundamental Rights; then, clearly; the situation demands that a sustainable balance is to be ensured as between the physical liberty of the individual, vis-a-vis the physical as well as economic liberty of other citizens in an orderly society governed by Rule of Law. Contextually, it is apposite to bear in mind that the legal history of the precedent law relating to preventive detention in independent India has to be examined in the backdrop of the political alchemy and the socio-economic situations which prevailed, as different laws relating to preventive detention came to be made in India, from time to time. The Defence of India Rules, 1962, ("DIR", for short) had a particular backdrop of facts situation for its making. Later, the Maintenance of Internal Security Act, 1971, included certain other aspects than what were covered under the DIR. The quality and nature of allegations which would have brought a person under cover of preventive detention under those provisions and the statutory provisions of the COFEPOSA Act have purposive and qualitative variations which cannot be ignored while choosing judicial precedents rendered in connection with different legislative provisions, though the cardinal liberty doctrine in re preventive detention recognised as Fundamental Right through the different clauses of Article 22 ought to be read as a lead chord of the Constitution. The evaluation of cases falling under COFEPOSA enforcement cannot be treated under any straight jacket formula applying the precedent law laid down with reference to the earlier statute laws. When we say this, we underscore the need to insist upon full compliance of the constitutional commands handed down while prescribing the Fundamental Right guaranteed under Article 22 of the Constitution of India. Unless liberty issues in contextually different settings which occur in the society with the change of times, are examined bearing in mind the situational requirement in terms of the Constitution and the laws, that will erode the contextual equilibrium to be maintained between individual rights, including liberty issues as well as collective and societal rights to physical freedoms from deprivation of life and also the collective eligibility to have economic and socio-economic liberty and rights of the citizens collectively and individually. The Constitution, always recognised as a vibrant document, which reflects the aspirations of the people as the primary rules of governance of a congenial society has to be appreciated and applied time centric and issue centric. Obviously, change of times and change of the statute laws made under the constitutional power which are to be applied from case to case would necessarily call for a differential approach when dealing with cases under different statutes, without losing the basic constitutional foundations. We

may refer to the decision of the Division Bench of this Court in *Abulais v. State of Kerala* [2017(1) KLT 650] in which the precedent handed down by the Honourable Supreme Court of India in *Subhash Popatlal Dave v. Union of India* and another [(2014) 1 SCC 280] was noted to the effect that every Judge of constitutional courts vested with the authority to adjudicate the legality of any State action challenged on the ground that such action is inconsistent with civil liberties guaranteed under the Constitution, must always keep in mind while exercising such authority, the prescribed principle quoted in that judgment from *American Communications Association v. Douds* (339 US 382 (1950)), which reads as follows:

"The task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday. The see-saw between freedom and power makes up most of the history of governments, which, as Bryce points out, on a long view consists of repeating a painful cycle from anarchy to tyranny and back again. The court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyse or impair authority to defend existence of our society, and to reject as false claims in the name of security which would undermine our freedoms and open the way to oppression."

14. Of relevance now, are the following:

(a) Salim Melathu Makkar was detained on 17.10.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 20.10.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation in Malayalam, dated 19.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 20.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. That detenu's wife filed the captioned WP (Cr).No.478 of 2015 dated 21.11.2015.

(b) Fazil K.B. was also detained on 17.10.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 20.10.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation in Malayalam, dated 19.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 20.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. That detenu's wife filed the captioned WP(Cr).No.479 of 2015 dated 21.11.2015.

(c) Jabin K. Basheer was detained on 16.10.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 20.10.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation in Malayalam, dated 19.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 20.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. Mother of that detenu filed the captioned WP(Cr).No.481 of 2015 dated 21.11.2015.

(d) Noushad P.A. was also detained on 16.10.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were WPCR478/15 & con.cases -: 34 :- served on the detenu on 20.10.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation in Malayalam, dated 19.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 20.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. That detenu's wife filed the captioned WP(Cr).No.482 of 2015 dated 21.11.2015.

(e) Yasir Ibnu Muhammed was detained on 16.11.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 20.11.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation in Malayalam, dated 21.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 28.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. The mother of that detenu filed the captioned WP(Cr).No.496 of 2015 dated 7.12.2015.

(f) Saifudheen M.S. was detained on 12.11.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 19.11.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a

representation in Malayalam, dated 27.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 28.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. The mother of that detenu filed the captioned WP(Cr).No.497 of 2015 dated 7.12.2015.

(g) Bibin Scaria was detained on 16.10.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 20.10.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation in Malayalam, dated 19.11.2015 before the Joint Secretary, COFEPOSA, New Delhi. He submitted another representation dated 23.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India.

(h) Shinoy K. Mohandas was also detained on 16.10.2015. Grounds of detention, list of the documents relied upon and the copies of relied upon documents along with Malayalam translations of grounds of the detention, list of the documents relied upon and the relied upon documents were served on the detenu on 20.10.2015. Two CDs containing video footages were also shown to him. Detenu's acknowledgment in that regard, duly attested by the Joint Superintendent, Central Prison, Thiruvananthapuram was also obtained. The detenu submitted a representation dated 11.11.2015, typed in English before the Secretary, Ministry of Finance, Government of India. He submitted another representation dated 19.11.2015, written in Malayalam before the Joint Secretary, COFEPOSA, New Delhi.

15. Central Advisory Board (COFEPOSA) heard the cases of all the eight detenus in relation to whom these writ petitions are filed at Custom House, Cochin from 25.12.2015 to 29.12.2015.

16. (a) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Salim Melathu Makkar that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Salim Melathu Makkar that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Salim Melathu Makkar was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(b) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Fazil K.B. that both his representations have been carefully examined and considered and that they have been rejected. The Deputy

Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Fazil K.B. that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Fazil K.B. was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(c) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Jabin K. Basheer that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Jabin K. Basheer that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Jabin K. Basheer was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(d) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Noushad P.A. that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Noushad P.A. that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Noushad P.A. was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(e) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Yasir Ibnu Muhammed that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Yasir Ibnu Muhammed that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Yasir Ibnu Muhammed was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(f) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Saifudheen M.S. that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Saifudheen M.S. that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said

person. The detention order was confirmed and Saifudheen M.S. was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(g) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Bibin Scaria that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Bibin Scaria that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Bibin Scaria was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

(h) Through memoranda dated 5.1.2016 and 7.1.2016, the Deputy Secretary, CEIB, New Delhi informed Shinoy K. Mohandas that both his representations have been carefully examined and considered and that they have been rejected. The Deputy Secretary, CEIB, New Delhi, vide order dated 14.1.2016 informed Shinoy K. Mohandas that his case was placed before the Advisory Board and that the said Board opined that there exists sufficient grounds for detention of the said person. The detention order was confirmed and Shinoy K. Mohandas was detained for a period of one year from the date of detention and the said order of confirmation of detention was served on the detenu on the date of confirmation itself under acknowledgment.

17. The sponsoring authority's proposals to detain the persons covered by the impugned preventive detention proceedings under the COFEPOSA Act were on the basis of the facts and factors, to be treated as allegations, generating the grounds for preventive detention of those persons and available as part of the grounds of detention as communicated to each among the detenus. They are as follows:

i. Noushad P.A. was allegedly involved in smuggling, abetting smuggling, concealing and dealing with smuggled goods. He operated three channels for smuggling gold through Cochin International Airport, hereinafter referred to in this judgment as "Airport", and smuggled in approximately 1928 kgs of gold into India. His three channels were coordinated through different combinations of persons. The first channel was one through the coordination of his brother Faisal P.A., who is an absconder even at the time of issuance of the preventive detention order. That channel involved Yasir Ibnu Muhammed, Fazil K.B., Shinoy K. Mohandas and Bibin Scaria among which Shinoy K. Mohandas and Bibin Scaria obtained the involvement of other persons including the staff of Airport for smuggling operations. That channel was utilised for smuggling in approximately 390 kgs of gold. The second channel was coordinated by Faizal P.A. (absconder) involving M.S.Saifudheen and was instrumental to get the involvement of

requisite other persons including staff of airport. Approximately 38 kgs of gold was smuggled utilising that channel. Noushad P.A. and Jabin K. Basheer operated the third channel which was utilised for smuggling in approximately 1500 kgs of gold into India.

ii. Salim Melathu Makkar acted as a carrier and was involved in bringing 14 kgs. of gold in three occasions. He was introduced into smuggling by his brother-in-law Fazil K.B. and tickets for Salim Melathu Makkar were arranged by Noushad P.A. and Faisal P.A. (absconder). He is alleged to have concealed, the gold brought from abroad, in the ferry bus inside the Airport which was later smuggled out by the airport staff. He allegedly transported the smuggled gold received from the airport staff and he along with Fazil K.B. met Bibin Scaria near airport to discuss about smuggling. He had phone contacts with Shinoy K. Mohandas.

iii. Shinoy K. Mohandas coordinated the smuggling operations among airport staff and had recruited Bibin Scaria into the gang and they induced other staff to operate with them. Evidence of purchase of property worth Rs.40 lakhs and deposits worth Rs.24 lakhs was obtained. He smuggled approximately 400 kgs of gold through Airport for the syndicate and had also obtained remuneration to the tune of Rs.70 lakhs. Material evidence showed that he had contacts with Salim Melathu Makkar, Fazil K.B. and Yasir Ibnu Muhammed.

iv. Jabin K. Basheer was involved in smuggling 1500 kgs of gold for Noushad P.A. through Airport. The modus operandi was to have the smuggled in gold being carried by the carrier passengers into the toilet of the Immigration Hall, and to conceal the same in the air conditioning duct and thereafter being carried by Jabin K. Basheer on his body to outside the airport and to transport the gold in his car and hand over it to Noushad P.A. or his men. Assets worth Rs.5 crores were unearthed from him during the investigation. All those assets were acquired in recent years. Reconstruction of the smuggling scene by Jabin K. Basheer showed his expertise in retrieving the gold from the AC duct of the toilet of the Immigration Hall.

v. Yasir Ibnu Muhammed introduced Shinoy K. Mohandas (another detenu) and Baburajan K. Hassan to Noushad P.A. who, according to the Department, is the kingpin. He had also coordinated the smuggling operations, arranged carriers, received gold smuggled out of the airport from airport staff and handed it over to Noushad P.A., the kingpin. Yasir Ibnu Muhammed had abetted smuggling of about 190 kgs of gold through carrier passengers engaged by him. Till he was detained, Yasir Ibnu Muhammed was absconding.

vi. Fazil K.B. is the brother-in-law of Salim Melathu Makkar (another detenu). He abetted smuggling and transporting and coordinated smuggling operations among the staff of airport and also introduced Salim into smuggling. He received smuggled gold from airport staff, paid remuneration, transported the gold in his car, handed over the gold to the members of smuggling syndicate and received

his remuneration. He transferred Rs.90,000/- from his account to the account of Bibin Scaria (another detenu) as remuneration for smuggling. He abetted in smuggling of about 350 kgs of gold for Noushad P.A. He was absconding till he was detained by the Kerala Police, and he refused to give statement.

vii. Saifudheen M.S. was involved in smuggling, abetting smuggling and transporting. He recruited his ex-colleagues and friends in Airport and smuggled about 38 kgs of gold through Airport. Saifudheen brought gold from abroad, received smuggled gold from airport staff and paid remuneration. Faisal P.A. and Ismail M.P.(uncle of Saifudheen and a close aid of Noushad) had come to Airport with him to receive smuggled gold. Material evidence showed that Saifudheen had contacts with Faisal P.A.(absconder) and Bibin Scaria (another detenu). When a group of airport staff stole the smuggled gold, Noushad P.A. and Saifudheen entered the Airport, threatened them and received the gold from them. Saifudheen M.S. was absconding till he was detained by Kerala Police.

viii. Bibin Scaria was involved in smuggling, abetting smuggling and transporting of gold. He worked under Shinoy K. Mohandas (another detenu) and smuggled 11 kgs of gold by himself and 64 kgs of gold with his colleagues and received Rs.6 lakhs as remuneration for smuggling gold. Another detenu Salim along with Fazil K.B.(another detenu) met Bibin Scaria near Airport to discuss about smuggling. He received Rs. 90,000/- from the account of Fazil K.B. to his account and used his car and another car handed over to him by Fazil K.B. for transporting gold.

18. Having regard to the nature of the contentions and arguments on behalf of the different detenus, it is apposite to notice certain facts and factors relating to each of the detenus as discernible from the materials on record, including the statements, and on the basis of submission made during the course of hearing. These include the following:

i. Noushad P.A. knows English and Malayalam and runs a money transfer business at Muvattupuzha in Ernakulam district. He studied up to the 10th Class. He is stated to be the kingpin of the smuggling operations which were carried through three different channels as already noted above.

ii. Salim Melathu Makkar knows Malayalam and English. He studied up to Pre-degree. He had worked in Saudi Arabia for 10 years. He owns an autorickshaw and drives it.

iii. Shinoy K. Mohandas, a post graduate had worked as Deputy Manager(BWFS) at the Airport and knows Malayalam, English and Hindi.

iv. Jabin K. Basheer, who knows English and Malayalam, holds a B.Com degree and is a Civil Police Officer in Kerala Armed Police since 2011, presently under suspension. He had worked as a Security Assistant on deputation at Bureau of Immigration, Airport from 2011 to 2015.

v. Yasir Ibnu Muhammed knows English and Malayalam and is a postgraduate in

Business Management and had graduated from the University of Bedfordshire, United Kingdom. vi. Fazil K.B. worked as a salesman in a jewellery.

vii. Saifudheen M.S., who knows English and Malayalam, graduated in Aeronautical Engineering and had worked in the Airport for one year.

viii. Bibin Scaria, who knows English and Malayalam, holds a B.A.(Economics) degree and IATA and had worked as a Ramp Supervisor in BWFS at the Airport for years.

19. We have perused the original files of the sponsoring authority and the detaining authority.

20. We have also seen the advice tendered by the Central Advisory Board (COFEPOSA), who heard all the eight detenus from 25.12.2015 to 29.12.2015, as noted in paragraph 15 above.

21. The materials disclosed that the detention order and the grounds of detention were served on the respective detenus under due acknowledgment. The list of Relied Upon Documents and copies of the Relied Upon Documents were also served on each detenu. The video footages were also shown to them, as can be seen from the acknowledgments made in writing by each of the detenus in the presence of Jail authorities. The acknowledgment of receipt of the detention order, the grounds of detention, the list of the Relied Upon Documents and the copies of the Relied Upon Documents are signed by each of the detenus and those acknowledgments are counter signed by the Jail authority who was present while those materials were served.

22. Article 22(5) of the Constitution of India provides that when any person is detained in pursuance of an order under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the ground on which the order has been made and shall afford him an earliest opportunity of making a representation against the order. Sub-section (3) of Section 3 of the COFEPOSA Act provides that for the purpose of clause (5) of Article 22 of the Constitution of India, communication to a person detained in pursuance of a detention order, of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention. That provision also prescribes the limits as to time within which such communication has to be made.

23. On the basis of the materials which have been admittedly communicated, what needs to be therefore examined, is as to whether the materials communicated included the grounds on which the detention order has been made and whether those materials would enable the detenu to make a representation, making of which is the legitimate right of the detenu in terms of Article 22(5).

24. It is argued on behalf of the detenus that the order of detention issued through the Joint Secretary to Government of India, who was specially empowered under Section 3(1) of the COFEPOSA Act is one which does not disclose the grounds of detention inasmuch as the contents of that order are apparently an admixture of different limbs and components of various clauses of Sub-section (1) of Section 3 of the COFEPOSA Act and there is no specific indicator on the face of the order of detention as to what is actually meant by the detaining authority and the said order is issued in such a manner as the real import of the intention of the detaining authority in making the order is not communicated to the detenu. The detention order in each case says that the said order is issued "with a view to prevent him from engaging in abetting, smuggling and transporting of the smuggled goods in future." The use of the words "abetting, smuggling and transporting of smuggled goods" in one go, as activity in which the particular detenu is likely to engage in future; according to the submissions on behalf of the detenus; is not referable to the different grounds enumerated in Sub-section (1) of Section 3 of the COFEPOSA Act and that Section 5A of the COFEPOSA Act, would not save the detention orders.

25. The conjunction used as between the different clauses (i) to (v) of Sub-section (1) of Section 3 of the COFEPOSA Act is "or". The use of the phrase "engaging in" as a forerunner to the words "abetting, smuggling and transporting of the smuggled goods in future" has to be therefore understood as engaging in abetting and engaging in smuggling and engaging in transporting of smuggled goods in future. The contents of Ext.P1 to any ordinary prudent literate person would be to understand it so. The dissection and meat mincing attempted on the words of the detention order are merely afterthoughts and generated only for the purpose of building an argument in law and not on facts. We say this particularly because the files of each case would disclose the veracity of the uncontroverted statement in the counter affidavit filed by the detaining authority specifically pleading, without any contradiction through any reply affidavit that each of the detenus had acknowledged the order of detention, the grounds of detention, the list of Relied Upon Documents and the Relied Upon Documents with the translations in Malayalam, the mother tongue of the detenu, and it has been endorsed by every detenu that he has been told in Malayalam, the reasons for being put under preventive detention under the COFEPOSA Act and that he has understood the same. The fact that the detenus are not illiterate and their knowledge of Malayalam and English languages, are matters which cannot be disputed in view of the language, contents and quality of the representations made by or on behalf of each of them. Those materials noticed along with the level of education that each of them have, clearly indicate that they have the ability to understand the contents of the detention order and the grounds of detention as also the contents of the materials served on them in English and Malayalam. A variation in the form in which translation is expressed does not vitiate the requirement to communicate the order and grounds of detention. See for support *Devji Vallabhbhai Tandel v. Administrator of Goa, Daman & Diu* and

Another [(1982) 2 SCC 222]. Any defect in the order or its communication, including translations does not vitiate the order when the files, on our examination, bespeak due application of mind by the detaining authority and the availability and consideration of the materials relied on by the sponsoring authority. For further support, see *Kamarunnissa v. Union of India and Another* [(1991) 1 SCC 128], which precedent also lays down the principle that nonmentioning of the different clauses of Section 3 (1) of the COFEPOSA Act does not render the detention order invalid.

26. When the detenus are shown to be conversant with English and Malayalam languages, it would be an imprudent judicial exercise, if we were to hold that the translations of the documents into Malayalam should be examined in such a manner as to find out whether there is any jumbling or mixing up of its contents. Except in exceptional situations, translations do not result in deprivation of effective communication or distortion of the contents of the documents in the translated versions. Having examined the translations, in particular, the specific portions pointed out on behalf of the detenus, we do not find our way to come to the aid of the detenus on this count. We also stand advised in this regard by the salutary doctrine of common course of human conduct, which is one of the sound principles of commonsense and which deserves to be duly and effectively applied in such matters. The nature of allegations and the manner of activities, as also the nature of employment of different persons, including in the field of business; one being employed in the Police force, another being employed inside the Airport and such other factors, essentially, indicate that the manner in which the detenus were conducting themselves in their daily private official and business lives, would itself be sufficient that it leaves no matter of doubt that all of them are conversant enough with English and Malayalam languages to understand the contents of the detention order, its scope and effect and the grounds of detention as also the materials relied on against each of them. There is no breach of Article 22(5) of the Constitution of India in this regard, on an independent examination of the materials. If we were to take a precedent on the issue, we would refer to *Sheetal Manoj Gore v. State of Maharashtra and Others* [2006 (7) SCC 560].

27. It is the settled position of law that when an order of preventive detention is challenged in a court of law, the enquiry by that court will not be into the truth or otherwise of the facts which are mentioned as the basis of the grounds in the communication made to the detenu under Article 22 (5). The examination of the materials by the court will be confined to the purpose of seeing whether the order of detention is passed on no material at all. Having examined the materials, we are satisfied that the order has been passed on materials on record. We are, therefore, not to go further to examine whether the materials were adequate for the satisfaction of the competent authority, which again need not be materials, which would be evidence, which ought to stand scrutiny of the court in a criminal trial. If the formalities prescribed by the Constitution and the COFEPOSA Act have been complied with, there would be no further examination by the Court, on an application seeking interference with preventive detention. In

support of these principles, see *Ramesh v. D.M.* [AIR 1986 SC 315], *State of Gujarat v. Adam* [AIR 1981 SC 2005] and *Abdulla Kunhi v. Union of India* [(1991) 1 SCC 476].

28. Having examined the original records, and the materials as were communicated to each of the detenus along with the detention orders and the grounds of detention, we are of the view that the orders of detention have been issued on the basis of materials which are not extraneous to the purpose of statutory provisions which have been invoked by the detaining authority and the sponsoring authority. No plea of absence of due application of mind is available on the materials in the cases in hand.

29. Having noticed that adequacy or sufficiency of relevant materials is not a matter for consideration in writ jurisdiction dealing with preventive detention, many of the arguments raised by the petitioners, including on the alleged non-availability of certain factors, are not of any importance. The contents of the statements of the detenus given to the Customs Authorities or the effect of the retractions are matters which can be deciphered on the basis of the materials on record. Similarly, the pendency of the criminal proceedings, bail orders and different remand applications and remand orders are all materials on record. This is not as if the sponsoring authority had omitted to place any material of such importance which had resulted in deprivation of appropriate decision at the hands of the detaining authority in terms of law. The materials which were available with the detaining authority have been provided by the sponsoring authority and the materials which have been communicated to the detenus along with the grounds of detention were materials which cannot be treated as irrelevant. That being so, sufficiency or otherwise is not a matter of review. Hence, we do not find any reason to go into an examination as to whether non-production of certain other materials had vitiated the decision making process carried out by the detaining authority on the basis of the available materials.

30. In a couple of cases, personal reasons and nonavailability of opportunity to be involved in the activity of the Airport are pointed out. The fact that one of the detenus who was then on deputation with the Emigration Department, had later been repatriated to the parent department, that is State Police Force, is also pointed out. The plea of another is that he stands precluded through bail orders from entering the Airport venue. We are not impressed that these factual situations, even if they are true, are insufficient to hold that the detaining authority could not, or, ought not, to have entered satisfaction as to the requirement of passing the impugned detention orders.

31. For the aforesaid reasons, we are satisfied that no ground exists to interfere with the impugned orders of detention and grant the reliefs as sought for in the writ petitions. These writ petitions, hence, fail. In the result, these writ petitions are dismissed.