

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ANIL K. NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 2<sup>ND</sup> DAY OF SEPTEMBER 2022 / 11TH BHADRA, 1944

W.P. (CRL.)NO.581 OF 2022

PETITIONER:

FASALU RAHMAN, AGED 29 YEARS  
S/O. RAHMAN, THEKKETHODIYIL HOUSE, KAVANOR P.O,  
ELIYAMPARAMBA , MALAPPURAM DISTRICT- 673 639.

BY ADVS.C.DHEERAJ RAJAN  
ANAND KALYANAKRISHNAN  
HASHEEM MUHAMMED P M  
M.RAMESH CHANDER (SR.)

RESPONDENTS:

- 1 UNION OF INDIA, REPRESENTED BY SPECIAL SECRETARY,  
CENTRAL ECONOMIC INTELLIGENCE BUREAU, MINISTRY OF  
FINANCE, DEPARTMENT OF REVENUE, 6TH FLOOR, B-WING,  
JANPATH BHAVAN, JANPATH, NEW DELHI 110 001.
- 2 THE JOINT SECRETARY (COFEPOSA), CENTRAL ECONOMIC  
INTELLIGENCE BUREAU, MINISTRY OF FINANCE, DEPARTMENT  
OF REVENUE, 6TH FLOOR, B-WING, JANPATH BHAVAN,  
JANPATH, NEW DELHI 110 001.
- 3 STATE POLICE CHIEF, KERALA POLICE, KERALA POLICE  
HEADQUARTERS, VELLAYAMBALAM P.O, THIRUVANANTHAPURAM-  
695 010.
- 4 DISTRICT POLICE CHIEF, MALAPPURAM , FEROKE PALAKKAD  
HIGHWAY, UPHILL, MALAPPURAM DISTRICT- 676 504.

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\*ADDL.R5 THE DEPUTY DIRECTOR  
DIRECTORATE OF REVENUE INTELLIGENCE, COCHIN ZONAL  
UNIT, PALARIVATTOM, KOCHI, ERNAKULAM-682025.  
IS IMPEADED AS ADDL.R5 AS PER ORDER DTD.13/07/ 2022  
IN I.A.1/22 IN WP(CRL.)581/22(S) .

BY ADVS.JAISHANKAR V.NAIR

SRI K.A.ANAS- GOVERNMENT PLEADER

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR  
ADMISSION ON 02.09.2022, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:

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**JUDGMENT**

**Anil K. Narendran, J.**

The petitioner is the 1<sup>st</sup> accused in O.R.No.41 of 2021 on the file of the Directorate of Revenue Intelligence, Cochin, alleging commission of an offence punishable under Section 135 of the Customs Act, 1962. On 04.12.2021, 9.73 kgs. of gold in O.R.No.41 of 2021 was seized. The petitioner has filed this writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash the detention order passed against him by the 2<sup>nd</sup> respondent Joint Secretary (COFEPOSA). The petitioner has also sought for a writ of mandamus commanding respondents 3 and 4 to communicate the order issued against him by the 2<sup>nd</sup> respondent under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for brevity, 'COFEPOSA Act').

2. On 06.07.2022, when this writ petition came up for admission, the learned counsel for the petitioner sought time to file an application to implead the concerned Deputy Director, Directorate of Revenue Intelligence. On 07.07.2022,

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the petitioner filed I.A.No.1 of 2022 to implead Deputy Director, Directorate of Revenue Intelligence, Cochin Zonal Unit, as the additional 5<sup>th</sup> respondent. That application was allowed by the order dated 13.07.2022.

3. On 15.07.2022, when this matter came up for consideration, the learned Assistant Solicitor General of India (for brevity, 'ASGI') sought an adjournment to file a counter affidavit on behalf of the additional 5<sup>th</sup> respondent Deputy Director, Directorate of Revenue Intelligence. The learned ASGI pointed out that the document marked as Ext.P2 is copy of a 'Top Secret' communication dated 04.06.2022 of the State Police Chief, Kerala, addressed to the District Police Chief, Malappuram, copied using 'Redimi Note 9 Pro Aiquad Camera'. The learned Government Pleader sought time to get instructions.

4. The additional 5<sup>th</sup> respondent has filed a counter affidavit dated 18.07.2022, opposing the reliefs sought for in this writ petition, wherein it is stated that the detention order issued by the competent authority, against the petitioner has not been executed so far, despite best efforts, as he is

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absconding. The scope of the challenge against the detention order before execution is very limited, as held by the Apex Court in **Subhash Popatlal Dave v. Union of India [(2014) 1 SCC 280]**. The obligation to serve a copy of the detention order as well as the grounds of detention, under the provisions of Article 22 of the Constitution of India and Section 3 of the COFEPOSA Act' comes into operation only on execution of the detention order and not prior to that. In **Leema Sebastian v. Union of India [2015 (4) KLJ 49 : ILR (2015) 4 Ker. 712]** a Division Bench of this Court, after referring to various authoritative pronouncements of the Apex Court, held that the person against whom an order of detention under the COFEPOSA Act is passed is not entitled to get a copy of the order of detention at its pre-execution stage. The petitioner has produced along with the writ petition, a copy of 'Top Secret' communication dated 04.06.2022 issued by the State Police Chief to the District Police Chief, Malappuram, as Ext.P2. It is a matter of serious concern as to how a copy of the said letter reached the hands of the petitioner. The State Police is the executing agency in

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preventive detentions under COFEPOSA Act. The detention order will be confidentially communicated to the State Police Chief by the detaining authority and the State Police Chief in turn communicates the detention order with instructions in secret to the concerned District Police Chief, who in turn entrust the officers under him to execute that order. The copy of the secret communication from the State Police Chief is not a document to be supplied to the detenu. Ext.P2 has been sent by the State Police Chief, conveying the detention orders of three detenus. Once a detenu comes to know that similar orders have been issued against his associates, the information in all likelihood will be shared with others and they may abscond. Therefore, absolute secrecy is to be maintained in executing the detention orders. Hence the State Police Chief has marked the communication as 'Top Secret'. However, it is seen that, a copy of that communication reached the hands of the petitioner and he has absconded.

5. Respondents 1 and 2 have filed a counter affidavit dated 26.07.2022, wherein it is stated that the petitioner has produced Ext.P1 detention order in respect of Alavi Urakkottil,

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another accused in the case of well organized smuggling foreign origin gold in huge quantity. The petitioner is also a co-accused in OR No.41 of 2021. Based on his active and vital role in the smuggling activities, the detaining authority has issued a detention order against him, under the provisions of the COFEPOSA Act. However, the petitioner is absconding and concealing himself in order to evade the execution of the detention order issued against him. Ext.P2 document is a 'Top Secret' communication dated 04.06.2022 issued from the office of the State Police Chief. It pertains to execution of three detention orders issued under Section 3(1) of the COFEPOSA Act against three persons including the petitioner. Out of the three detention orders, the detention order issued against Alavi Urakkottil has already been executed by the police. However, the remaining two detention orders could not be executed because of willful abscondence/concealment of the petitioner and another. The petitioner has not approached this Court with clean hands and he tried to misled this Court. Hence, the writ petition is liable to dismissed on that sole ground. The petitioner, who is absconding and concealing

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himself to evade the execution of the detention order cannot allege non-communication of the detention order. Keeping in view the willful abscondence/concealment of the petitioner to evade the execution of the detention order, the Central Government has taken action against him under Section 7(1)(b) of the COFEPOSA Act, vide Ext.R1(a) order dated 21.07.2022.

6. The 4<sup>th</sup> respondent District Police Chief, Malappuram has filed a counter affidavit dated 03.08.2022, on behalf of the 3<sup>rd</sup> respondent State Police Chief, wherein it is stated that on getting the detention orders a special investigation team under the leadership of Deputy Superintendent of Police, Special Branch, Malappuram was constituted vide order dated 17.06.2022 to apprehend the absconding warranties. The detention order dated 31.05.2022 along with communication dated 04.06.2022 was sent to Mankada Police Station vide communication dated 07.06.2022. Subsequently, Alavi Urakkottil was taken into custody from his residence and after serving a copy of the detention order dated 31.05.2022, he was arrested on



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07.06.2022. The intimation regarding his detention was informed to his son. An acknowledgement of the detenu was also obtained in the presence of a witness. After fulfilling all the formalities, Alavi Urakkottil was produced at Central Jail and Correctional Home at 3.00 a.m. on 08.06.2022. An enquiry was conducted through the Deputy Superintendent of Police, Special Branch as to how the confidential and secret communication of the State Police Chief was obtained by the petitioner. The Station House Officer, Mankada, while serving copy of the detention order to Alavi Urakkottil, handed over by mistake, a copy of Ext.P2 communication dated 04.06.2022, which was sent for reference, to the arrested person. Since the petitioner is a co-accused in the crime, he might have somehow obtained copy of the said letter from the relatives of the Alavi Urakkottil. In the affidavit, it is stated that the authorities concerned are taking earnest efforts to execute the detention order issued against the petitioner.

7. Heard the learned Senior Counsel for the petitioner, the learned ASGI and the learned Central Government

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Counsel for respondents 1, 2, and 3 and also the learned Government Pleader for respondents 3 and 4.

8. In **Government of India v. Alka Subhash Gadia [(1992) Supp. 1 SCC 496]**, considering the extraordinary powers of the court under Article 32 and Article 226 of the Constitution of India, the Apex Court held that, the courts have the necessary power and they have used it in proper cases, although such cases have been few, and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the

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said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

9. In **Shafeeq P.K. v. State of Kerala and others [2016 (3) KHC 325]** a Division Bench of this Court was dealing with a case in which the writ petitioner, who was still in Dubai, wants to get rid off the order of detention on the ground that it is passed on vague, extraneous and irrelevant grounds [clause (iv) of paragraph 30 of the decision in *Alka Subhash Gadia - (1992) Supp. 1 SCC 496*]. The Division Bench noticed that the petitioner wants to get rid off the execution of the order of detention against him on grounds which he could raise only after the order of detention is executed. The Division Bench held that the grounds which could be raised challenging the order of detention after its execution cannot always be made a ground for challenging the order of detention at its pre-execution stage. Certain contentions are to be decided on the basis of the averments in the affidavit, the counter affidavit as well as the records. An analysis of facts and contentions which could be undertaken in

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a writ petition challenging the order of detention after its execution, cannot be undertaken in a writ petition challenging the order of detention at its pre-execution stage.

10. In **Subhash Popatlal Dave v. Union of India [(2014) 1 SCC 280]**, one of the issues that came up for consideration of the Apex Court was as follows; Whether having absconded or evaded the execution of the detention order, the proposed detenu could take advantage of such fact and challenge the detention order, which remains unexecuted. Three-Judge Bench (per majority) held that, in the light of ratio of the decisions in **Sunil Fulchand Shah v. Union of India [(2000) 3 SCC 409]** and **Government of India v. Alka Subhash Gadia [(1992) Supp.1 SCC 496]** and the law on preventive detention, it is essentially the sufficiency of materials relied upon for passing the order of detention which ought to weigh as to whether the order of detention was fit to be quashed and set aside and merely the length of time and liberty to challenge the same at the pre-execution stage which obviated the execution of the order of preventive detention cannot be the sole consideration for

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holding that the same is fit to be quashed. When a proposed detenu is allowed to challenge the order of detention at the pre-execution stage on any ground whatsoever contending that the order of detention was legally unsustainable, the court will have an occasion to examine all grounds except sufficiency of the material relied upon by the detaining authorities in passing the order of detention, which legally is the most important aspect of the matter, but cannot be gone into by the court as it has been allowed to be challenged at the pre-execution stage when the grounds of detention have not even been served on him. Thus, if it is held that howsoever the grounds of detention might be weighty and sustainable which persuaded the authorities to pass the order of detention, the same is fit to be quashed merely due to long lapse of time especially when the detenu is allowed to challenge the order of detention even before the order of detention is served on him, the detenu would clearly be offered with a double-edged weapon to use to his advantage, circumventing the order of detention. On the one hand, he can challenge the order of detention at the pre-execution

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stage on any ground, evade the detention in the process and subsequently would be allowed to raise the plea of long pendency of the detention order which could not be served and finally seek its quashing on the plea that it has lost its live link with the order of detention. This would render the very purpose of preventive detention laws redundant and nugatory, which cannot be permitted. On the contrary, if the order of detention is allowed to be served on the proposed detenu even at a later stage, it would be open for the proposed detenu to confront the materials or sufficiency of the material relied upon by the authorities for passing the order of detention so as to contend that at the relevant time when the order of detention was passed, the same was based on non-existent or unsustainable grounds so as to quash the same. But to hold that the same is fit to be quashed merely because the same could not be executed for one reason or the other especially when the proposed detenu was evading the detention order and indulging in forum shopping, the laws of preventive detention would surely be reduced into a hollow

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piece of legislation, which is surely not the purpose and object of the Act.

11. In **Subhash Popatlal Dave [(2014) 1 SCC 280]** the Apex Court noticed that (Chelameswar, J concurring with G.S. Misra, J) preventive detention “does not partake in any manner of the nature of punishment” but taken “by way of precaution to prevent mischief to the community”. See: **Khudiram Das v. State of West Bengal [(1975) 2 SCC 81]** and **Government of India v. Alka Subhash Gadia [(1992) Supp.1 SCC 496]**. Therefore, necessarily such an action is always based on some amount of “suspicion or anticipation”. Hence, the satisfaction of the State to arrive at a conclusion that a person must be preventively detained is always subjective. Nonetheless, the legality of such subjective satisfaction is held by the Court to be amenable to judicial scrutiny in exercise of the jurisdiction conferred under Articles 32 and 226 of the Constitution on certain limited grounds. One of the grounds on which an order of preventive detention can be declared invalid is that there is no live nexus between (i) the material which formed the basis for the State to record

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its subjective satisfaction, and (ii) the opinion of the State that it is necessary to preventively detain a person from acting in any manner prejudicial to the public interest or security of the State, etc. In other words, the material relied upon by the State for preventively detaining a person is so stale that the State could not have rationally come to a conclusion that it is necessary to detain a person without a charge or trial. The question before the Apex Court was as to whether the test of live nexus developed by the Court in the context of examining the legality of the order of preventive detention can be automatically applied to the question of the legality of the execution of the preventive detention orders where there is a considerable time-gap between the passing of the order of preventive detention and its execution. The Apex Court noticed that, in order to answer that question, the Court must analyse the probable reason for the delay in executing the preventive detention orders. There could be two reasons which may lead to a situation by which the preventive detention order passed by the competent authorities under the various enactments could remain unexecuted: (i) the



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absconding of the proposed detenu from the process of law,  
(ii) the apathy of the authorities responsible for the implementation of the preventive detention orders. The Legislature was conscious of the fact that it can happen in some cases that the execution of the preventive detention order could be scuttled by the proposed detenu either by concealing himself or absconding from the process of law. Therefore, specific provisions are made in this regard under various enactments dealing with preventive detention. For example, Section 7 of the COFEPOSA Act, which deals with powers in relation to absconding persons, recognises such a possibility. In a case where the proposed detenu is absconding or concealing himself, the Government may report the matter to the Magistrate having jurisdiction over the place where the proposed detenu ordinarily resides. On the making of such report by the Government, the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 apply to the proposed detenu and his property, as if the order of preventive detention is a warrant issued by the Magistrate under the provisions of the Code of Criminal Procedure. In

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substance, the property of the proposed detenu could be attached and perhaps even be confiscated in an appropriate case. Apart from that the State can also by notification in the Official Gazette direct the proposed detenu to appear before an officer specified in the said notification at such place and time. Failure to comply with such notified direction on the part of the proposed detenu, without a reasonable cause, is made an offence punishable either with imprisonment for a term extending up to one year or with fine or both. If a preventive detention order is to be quashed or declared illegal merely on the ground that the order remained unexecuted for a long period without examining the reasons for such non-execution, the legislative intention contained in the provisions such as Section 7(1)(b) of the COFEPOSA Act would be rendered wholly nugatory. Parliament declared by such provision that a recalcitrant individual against whom an order of preventive detention is issued is under legal obligation to appear before the notified authority once a notification contemplated under Section 7(1)(b) of the COFEPOSA Act is issued. As already noticed, failure to appear without a reasonable excuse would

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be an offence and render the defaulter liable for a punishment of imprisonment. Holding that the preventive detention orders are themselves rendered illegal, on the basis of the live nexus theory (which is valid only for examining the legality of the order vis-à-vis the date on which the order is passed) would not only exonerate the person from the preventive detention order but also result in granting impunity to such person from the subsequent offence committed by him under the provisions such as Section 7(1)(b) of the COFEPOSA Act. Taking note of the law laid down in **Bhawarlal Ganeshmalji v. State of Tamil Nadu [(1979) 1 SCC 465]** **M. Ahamedkutty v. Union of India [(1990) 2 SCC 1]** and **Union of India v. Arvind Shergill [(2000) 7 SCC 601]** those who have evaded the process of law shall not be heard by the Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an

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argument would amount to enabling the law-breaker to take advantage of his own conduct which is contrary to law. Even in those cases where action such as the one contemplated under Section 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal.

12. The learned Senior Counsel for the petitioner, after arguing for some time, seeks permission to withdraw this writ petition, as instructed by the learned instructing counsel.

13. As already noticed hereinbefore, the document marked as Ext.P2 is a 'Top Secret' communication dated 06.04.2022 of the State Police Chief addressed to the District Police Chief, Malappuram. The 4<sup>th</sup> respondent District Police Chief has sworn to a counter affidavit dated 03.08.2022, on behalf of the 3<sup>rd</sup> respondent State Police Chief wherein, it is stated as follows;

"An enquiry was conducted through the Deputy Superintendent of Police, Special Branch how the confidential and secret communication of the State Police Chief was obtained by the petitioner. The Station House Officer, Mankada while serving copy of the

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detention order to Alavi Urakkottil a copy of Ext.P2 communication dated 04.06.2022, which was sent for a reference was also handed over by mistake to the arrested person. Since the petitioner is a co-accused in the crime, he might have somehow obtained copy of the said letter from the relatives of the Alavi Urakkottil.”

14. As pointed out in the counter filed by respondents 1 and 2 and also the Additional 5<sup>th</sup> respondent, it is a matter of serious concern as to how a copy of Ext.P2 ‘Top Secret’ communication reached the hands of the petitioner, who is the 1<sup>st</sup> accused in O.R.No.41 of 2021 on the file of the Directorate of Revenue Intelligence, Cochin. The detention order issued against the petitioner has not been executed so far, despite best efforts, as he is absconding. The State Police, which is the executing agency in preventive detentions under COFEPOSA Act, has to maintain absolute secrecy in executing the detention orders. The explanation offered in the counter affidavit dated 03.08.2022 filed by the 4<sup>th</sup> respondent District Police Chief, on behalf of the 3<sup>rd</sup> respondent State Police Chief, which we have extracted hereinbefore is not at all satisfactory. It shows the apathy of the concerned officers in

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the State Police, who are responsible for the execution of the detention order. In the counter affidavit dated 03.08.2022, the 4<sup>th</sup> respondent has stated that the authorities concerned are taking earnest efforts to execute the detention order issued against the petitioner.

15. Considering the facts and circumstances of the case, as borne out from the pleadings and materials on record, we deem it appropriate to direct the 3<sup>rd</sup> respondent State Police Chief to conduct a detailed enquiry through an officer not below the rank of Superintendent of Police as to how Ext.P2 'Top Secret' communication dated 04.06.2022 reached the hands of the petitioner. Based on the report of enquiry, appropriate action shall be taken against the concerned officers, who are responsible for not maintaining absolute secrecy of that communication. The action taken report of the State Police Chief shall be filed before this Court, on or before 28.11.2022.

16. In the above circumstances, based on the submission made by the learned Senior Counsel for the petitioner, referred to hereinbefore at paragraph No.12, this

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writ petition is dismissed as withdrawn, subject to the directions contained hereinbefore at paragraph 15.

Sd/-

**ANIL K. NARENDRAN, JUDGE**

Sd/-

**P.G. AJITHKUMAR, JUDGE**

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APPENDIX OF WP(CRL.) 581/2022

PETITIONER EXHIBITS

Exhibit P1                    THE TRUE COPY OF THE ORDER DATED  
31.05.2022 ISSUED BY THE 2ND RESPONDENT  
TO MR.ALAVI URAKKOTTIL.

Exhibit P2                    THE TRUE COPY OF COMMUNICATION DATED  
04.06.2022 ISSUED TO MR. ALAVI URAKKOTTIL  
FROM THE 3RD RESPONDENT.

RESPONDENT EXHIBITS

Exhibit R1(a)                TRUE COPY OF THE GAZATTE NOTIFICATION  
DATED 21.07.2022