

(2015) 07 BOM CK 0201

In the Bombay High Court

Case No : Criminal Writ Petition No. 2076 of 2015

Bittu Choith Harchandani

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 03-07-2015

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3, 3(1), 3(1)(i)
Constitution of India, 1950 — Article 14, 19, 21, 22, 246
Customs Act, 1962 — Section 108
Defence of India Act, 1971 — Section 3(2)(15)

Citation : (2015) ALLMR(Cri) 3365 : (2015) 3 BomCR(Cri) 819

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Sanjay Agarwal i/b. Prompt Legal, for the Appellant; Jayesh P. Yagnik, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J—The order of detention dated 16.4.2015 issued by the second respondent to this Writ Petition is challenged by the detenu's son.

2. The detenu has been lodged at Nasik Road Central Prison in pursuance of an detention order dated 16.4.2015. That order passed by the second respondent is under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA").

3. The petitioner has stated that the detenu was scheduled to depart for Singapore by Jet Airways Flight No. 9W 012 and hence arrived at the Mumbai International Air Port. Because of his alleged suspicious movement, the officer of the third respondent informed others and a discreet watch was kept over him. When the detenu checked in his baggage at the counter, the officers in plain clothes intercepted him. The detenu was carrying assorted foreign currency equivalent to Indian Rs.38,10,565/- which was seized from his possession /

baggage under panchanama dated 21.11.2014. By an arrest memo dated 22.11.2014 the detenu was arrested. It was alleged that he attempted to smuggle the foreign currency out of India. He was produced before the Competent Magistrate's Court and enlarged on bail. While being enlarged, a bail bond was directed to be furnished. It is the case of the detenu that the bail bond incorporated an undertaking by the detenu not to leave the country without prior written permission of the concerned officer or the Court as the case may be.

4. It is then alleged that there was a self incriminating statement recorded and the detenu's signature was obtained thereon forcibly. This statement was retracted on 23.11.2014. The Sponsoring Authority issued rebuttal in response to the retraction on 1.12.2014.

5. There are further communications addressed by the detenu to the Sponsoring Authority in December, 2014, but we are not concerned with the contents thereof. It is common ground that the detention order impugned in this Writ Petition invokes clause (i) of sub-section (1) of Section 3 of COFEPOSA Act, 1974. This detention order was served on the detenu on 20.4.2015. A preliminary representation, according to the detenu, was submitted on 14.5.2015 to the Jail Superintendent, Nashik Road Central Prison, Nashik, for forwarding the same to Advisory Board and the Detaining Authority, "Annexure E" is the copy of the same.

6. It is after setting out the above facts and the circumstances that the detention order is challenged on several grounds. Mr. S. Agarwal, learned Counsel appearing on behalf of the petitioner contended before us that the impugned detention order is vitiated in law. The precise submission of the learned Counsel is that the detention order refers to the detenu entering the terminal of Mumbai International Airport. He checked in at the counter and while his baggage was being checked, he was intercepted. This was not a case where the detenu had in any manner attempted to enter the portion of International Airport from where he could depart or board the flight. On his entry and at checking in point itself he was intercepted. The petitioner sought several documents and it is common ground that an adjudication order under the relevant statute was passed and that was challenged in an appeal. This is a solitary instance alleged, based on which the detaining authority has recorded his subjective satisfaction. However, the bond and which was executed and to which our attention has been invited incorporating the condition of the detenu not being able to leave India without prior permission of the competent Officer or the Competent Court, takes care of the apprehension and particularly within the meaning of the legal provision. Our attention has been invited to the detention order and the submission is that the proposal forwarded by the Sponsoring Authority has been blindly accepted by the detaining Authority. The detention order is vitiated by non application of mind. The argument is that the detention order states that the detenu has to be prohibited in future from smuggling goods and, therefore, it is necessary to make the detention order. However, in the grounds of the detention order at paragraph

12, a subjective satisfaction is recorded by referring to the prior cases and the detenu booked therein. The detenu is termed as a repeated offender. Then, it is stated that in all probability, he may indulge in such prejudicial activities in future and, therefore, he is required to be detained under COFEPOSA and preventive detention is considered necessary to sub-serve the larger public interest of preventing smuggling and conserving and augmenting foreign exchange. Thus, the submission is that there is variance between the subjective satisfaction based on which the detention order is made and the grounds thereof. In other words, the order passed by the detaining Authority does not make any reference to any satisfaction that the detaining Authority has arrived at and of the detenu indulging in smuggling activities in future which would jeopardise the conservation and augmentation of foreign exchange. It is submitted that this was specifically pointed out in the representation, but same has been rejected on 28.5.2015.

7. A faint attempt is also made to suggest that the detenu could not exercise his right to make representation effectively and meaningfully because he was not supplied the particulars as sought by him. The documents were also not supplied and that is why the representation could not be said to be complete. For all these reasons, it is submitted that the detention order must be quashed and set aside.

8. A compilation of judgments was submitted by Mr. Agarwal, learned Counsel appearing on behalf of the petitioner and which contains the judgments of the Hon'ble Supreme Court firstly on the principles that the detention order which is vitiated for non application of mind can be set aside and secondly, the mandate of Article 22 of the Constitution of India and reinforcing the same. The decisions on which the reliance is placed are as under:-

(I) Jagannath Misra Vs. State of Orissa, AIR 1966 SC 1140 : (1966) CriLJ 817 : (1966) 3 SCR 134 ;

(II) Ekta Satish Choudhary Vs. State of Maharashtra & Ors., (Judgment dated 17.1.2005 in Writ Petition No. 2518 of 2014)

(III) The State of Bombay Vs. Atma Ram Sridhar Vaidya, AIR 1951 SC 157 : (1951) CriLJ 373 : (1951) 2 SCR 167 ;

(IV) Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another, AIR 1979 SC 541 : (1979) CENCUS 181 : (1979) CriLJ 462 : (1979) 1 SCC 465 : (1979) SCC(Cri) 318 : (1979) 2 SCR 633 ;

(V) Nafisa Sayed Ali Vs. State of Maharashtra & Ors., (2013(4) Bom.C.R.(Cri) 284);

(VI) Mr. Prithvi Sovern Kuntal Vs. The State of Maharashtra and Others, (2001) ALLMR(Cri) 1163 : (2001) 2 BOMLR 104 ;

(VII) Vijay Kumar Dharna alias Koka Vs. Union of India and others, AIR 1990 SC 1184 : (1990) CriLJ 1187 : (1990) 1 Crimes 619 : (1990) 48 ELT 159 : (1990) 1

SCALE 154 : (1990) 1 SCC 606 : (1990) 1 UJ 623 ;

(VIII) Mehrunissa Vs. State of Maharashtra, AIR 1981 SC 1861 : (1981) CriLJ 1283 : (1981) 2 SCC 709 : (1981) SCC(Cri) 592 ;

(IX) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, AIR 1978 SC 851 : (1978) 1 SCC 405 : (1978) 2 SCR 272 .

9. On the other hand Mr. Yagnik, learned Additional Public Prosecutor appearing on behalf of the State and the detaining Authority supported the impugned order. He submits that there is no substance in the grounds of challenge inasmuch as the detention order and the grounds have to be read as a whole. Such reading would reveal that the subjective satisfaction is based on the gravity of the offence and the well organized manner in which the detenu engaged in prejudicial activities. That with a view to prevent him from indulging in smuggling activities in future that he is required to be detained. The subjective satisfaction is, thus, recorded in paragraph 15 of the detention order. There is absolutely no variance inasmuch as in prior paragraphs a mere reference is made to the earlier cases in which the detenu has been booked. It is to highlight as to how he may indulge in the smuggling activities in future that in paragraph 12 the reference has been made. However, the detaining Authority was aware and throughout of the distinction in law and of the detenu being required to be detained with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange and with a view to prevent him from smuggling the goods or abetting such acts etc. Thus, there is conscious and proper application of mind. There is absolutely no substance in the contention that there is variance between the grounds of detention and the subjective satisfaction recorded in the detention order. It is submitted that there is absolutely no denial of right to make representation as all the necessary materials were supplied. Thus, the attempt to read one paragraph in isolation and torn out of context should not result in detention order being set aside. The detention order being in accordance with law, deserves to be upheld and the petition must be dismissed, is his submission.

10. Our attention is also invited to the affidavits in reply which have been filed on behalf of the detaining authority.

11. With the assistance of the Counsel appearing for both sides, we have perused the petition and all annexures. We have also perused the affidavits placed on record and particularly, the affidavit filed by the Deputy Secretary, Home Department, Government of Maharashtra. The detention order, a copy of which is annexed at page 20 of the paper book "Annexure A", states that the detaining authority is satisfied that the detenu is required to be detained with a view to prevent him in future in smuggling goods. In the reasons recorded and which commence from page 21, there is a reference made to the suspicious movement of the detenu and who holds an Indian passport. He was to depart to Singapore by Jet Airways Flight. He was carrying on red coloured strolley bag of

gold star band as check-in-baggage and another black coloured carry bag of Ballantine brand. When asked whether any foreign currency was being carried, the detenu replied in the negative. The Authorities not being satisfied with his reply, examined his baggage, a personal search was carried out. Two independent panchas were called to witness the proceedings and thereafter, the bags were examined. The foreign currency was found and it is equivalent to Indian Rs.38,10,565/-. The foreign currency was seized under the panchanama and the detenu's statement under Section 108 of the Customs Act,1962 was recorded. The detenu admitted of being booked in similar cases of foreign currency smuggling during the years 2007 and 2009. Thereafter, a reference is made to the admissions in the statement and the Authority in paragraph 6 holds that the detenu attempted to smuggle the foreign currency not constituting bonafide baggage out of India in a clandestine manner. The detenu admitted carriage, possession, knowledge, recovery of the foreign currency. That is how the arrest effected is referred and, thereafter, the detenu being released on bail on furnishing personal and surety bond of Rs.1,00,000/-. The order specifically records that the passport was returned to the detenu.

12. Then, there is a reference made to the past record and throughout we have noticed that emphasis is to prevent the detenu indulging in smuggling activities in future. The earlier cases, therefore, have been referred with a view to reinforce the conclusion that the preventive detention order is required to be passed to prevent smuggling activities being indulged in by the detenu and in future.

13. We agree on perusal of the entire material with Mr. Yagnik that this is not a case of any variance between the order of detention and the subjective satisfaction recorded therein, so also the grounds or reasons in support thereof. The subjective satisfaction is clearly based on the ingredients of clause (i) of Sub-section (1) of Section 3 of the COFEPOSA Act,1974. The said provision reads as under:-

"3. Power to make orders detaining certain persons.-(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -

(i) smuggling goods, or....."

14. In a recent judgment delivered by the Hon"ble Supreme Court of India in the case Dropti Devi and Another Vs. Union of India (UOI) and Others, AIR 2012 SC 2550 : (2012) 4 CTC 858 : (2012) 6 JT 159 : (2012) 6 SCALE 80 : (2012) 7 SCC

499 ", the Hon"ble Supreme Court was considering the issue of constitutional validity of Section 3 of the COFEPOSA Act, in the light of the Foreign Exchange Management Act,1999. The submission was that the certain acts and which would constitute an offence under the earlier enactment namely Foreign Exchange Regulation Act,1973 are not subjected to the same treatment under the Foreign Exchange Management Act,1999, therefore, unless sub-section (1) of Section 3 of COFEPOSA is construed accordingly, it would be unconstitutional. Negating this challenge and holding that the same is constitutional, valid and legal, the Hon"ble Supreme Court traced the entire history of the legislation and object and purpose sought to be achieved by enacting it. This is what the Hon"ble Supreme Court held:-

"47. The Constitution recognizes preventive detention though it takes away the liberty of a person without any enquiry or trial. Preventive detention results in negation of personal liberty of an individual; it deprives an individual freedom and is not seen as compatible with rule of law, yet the framers of the Constitution placed the same in Part III of the Constitution. While giving to an individual the most valuable right personal liberty and also providing for its safeguard, the Constitution has perceived preventive detention as a potential solution to prevent the danger to the state security. The security of the State being the legitimate goal, this Court has upheld the power of the Parliament and State Legislatures to enact laws of preventive detention. The Court has time and again given the expression ""personal liberty"" its full significance and asserted how valuable, cherished, sacrosanct and important the right of liberty given to an individual in the Constitution was and yet legislative power to enact preventive detention laws has been upheld in the larger interest of state security.

"48. The power of Parliament to enact a law of preventive detention for reasons connected with (a) defence, (b) foreign affairs, (c) security of India; (d) security of State, (e) maintenance of public order or (f) the maintenance of supplies and services essential to the community, is clearly traceable to Article 22, Article 246 and Schedule Seven, List I Entry 9 and List III Entry 3. With specific reference to COFEPOSA, a nine-Judge Bench of this Court in *Amratlal Prajivandas*¹⁴ has held that the enactment was relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I. In the words of this Court (para 23 pg. 73 of the Report):

"COFEPOSA is clearly relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I."

49. In *Attorney General for India and Others Vs. Amratlal Prajivandas and Others*, AIR 1994 SC 2179 : (1995) 83 CompCas 804 : (1995) CriLJ 426 : (1994) 3 JT 583 : (1994) 2 SCALE 925 : (1994) 5 SCC 54 : (1994) 1 SCR 1 Supp : (1994) 74 TAXMAN 469 constitutionality of COFEPOSA was directly in

issue. The Court made the following weighty prefatory remarks in paragraph 1 (pg. 62 of the Report) highlighting the importance of regulation and control of foreign exchange:

"Till the wind of liberalisation started blowing across the Indian economic landscape over the last year or two, the Indian economy was a sheltered one. At the time of Independence, India did not have an industrial base worth the name. A firm industrial base had to be laid. Heavy industry was the crying need. All this required foreign exchange. The sterling balances built up during World War II were fast dissipating. Foreign exchange had to be conserved, which meant prohibition of import of several unessential items and close regulation of other imports. It was also found necessary to raise protective walls to nurture and encourage the nascent industries. These controls had, however, an unfortunate fall-out. They gave rise to a class of smugglers and foreign exchange manipulators who were out to frustrate the regulations and restrictions profit being their sole motive, and success in life the sole earthly judge of right and wrong. As early as 1947, the Central Legislature found it necessary to enact the Foreign Exchange Regulation Act, 1947 and Imports and Exports (Control) Act, 1947. Then came the Import (Control) Order, 1955 to place the policy regarding imports on a surer footing. In the year 1962, a new Customs Act replaced the antiquated Sea Customs Act, 1878. The menace of smuggling and foreign exchange violations, however, continued to rise unabated. Parliament then came forward with the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). It provided for preventive detention of these antisocial elements".

The Court in paragraphs 3 to 7 referred to COFEPOSA, SAFEMA and FERA, the amendments carried out in these Acts, and the constitutional protection given to COFEPOSA and SAFEMA. The preamble and the provisions of COFEPOSA were noted in paragraphs 9 to 14. The provisions of SAFEMA were noted in paragraphs 15 to 19. In paragraph 20 (pg. 71 of the Report), the Court made following clarificatory observations:

"Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was levelled in the writ petitions on the ground that the said Amendments effected after the decision in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, AIR 1973 SC 1461 : (1973) 4 SCC 225 : (1973) SCR 1 Supp infringe the basic structure of the Constitution, no serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the basic structure. This simplistic argument overlooks the *raison d'être* of Article 31-B at any rate, its continuance and relevance after Bharati and of the 39th and 40th Amendments placing the said enactments in the Ninth Schedule. Acceptance of the petitioners' argument would mean that in case of post-Bharati constitutional amendments placing Acts

in the Ninth Schedule, the protection of Article 31B would not be available against Article 14. Indeed, it was suggested that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31-B. Be that as it may, in the absence of any effort to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said Amendments. We take them as they are, i.e., we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish in what manner the said Amendment Acts violate Article 14."

Then, in paragraph 21, the Court observed that COFEPOSA was a law relating to preventive detention and it has, therefore, to conform to the provisions in clauses (4) to (7) of Article 22. The Court quoted following observations in R.K. Garg v. Union of India & Ors.:

"The court must always remember that ""legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry""; ""that exact wisdom and nice adaptation of remedy are not always possible"" and that ""judgment is largely a prophecy based on meagre and uninterpreted experience"". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Roig Refining Co.*, 94 L.Ed. 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

(emphasis added)

In the above backdrop, the Court considered the question, whether Parliament

was not competent to enact COFEPOSA and SAFEMA in paragraph 23 (pgs. 73-74 of the Report) as follows:

"23. It is argued for the petitioners that COFEPOSA is not relatable to Entry 9 of List I of the Seventh Schedule to the Constitution inasmuch as the preventive detention provided therefor is not for reasons connected with defence, foreign affairs or security of India. Even Entry 3 of List III, it is submitted, does not warrant the said enactment. So far as SAFEMA is concerned, it is argued, it is not relatable to any of the Entries 1 to 96 in List I or to any of the Entries in List III. We are not prepared to agree. COFEPOSA is clearly relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I. While Entry 3 of List III speaks of "security of a State", Entry 9 of List I speaks of "security of India". Evidently, they are two distinct and different expressions. "Security of a State" is a much wider expression. A State with a weak and vulnerable economy cannot guard its security well. It will be an easy prey to economic colonisers. We know of countries where the economic policies are not dictated by the interest of that State but by the interest of multinationals and/or other powerful countries. A country with a weak economy is very often obliged to borrow from International Financial Institutions who in turn seek to dictate the economic priorities of the borrowing State --it is immaterial whether they do so in the interest of powerful countries who contribute substantially to their fund or in the interest of their loan. In the modern world, the security of a State is ensured not so much by physical might but by economic strength --at any rate, by economic strength as much as by armed might. It is, therefore, idle to contend that COFEPOSA is unrelated to the security of the State. Indeed in the very preamble to the Act, Parliament states that the violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy thereby casting serious adverse effect on the security of the State. Be that as it may, it is not necessary to pursue this line of reasoning since we are in total agreement with the approach evolved in *Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon*, AIR 1972 SC 1061 : (1972) 83 ITR 582 : (1971) 2 SCC 779 : (1972) 2 SCR 33) a decision by a Constitution Bench of seven Judges. The test evolved in the said decision is this in short: Where the legislative competence of Parliament to enact a particular statute is questioned, one must look at the several entries in List II to find out (applying the well-known principles in this behalf) whether the said statute is relatable to any of those entries. If the statute does not relate to any of the entries in List II, no further inquiry is necessary. It must be held that Parliament is competent to enact that statute whether by virtue of the entries in List I and List III or by virtue of Article 248 read with Entry 97 of List I. In this case, it is not even suggested that either of the two enactments in question are relatable to any of the entries in List II. If so, we need not go further and enquire to which entry or entries do these Acts relate. It should be held that Parliament did have the competence to enact

them." The Court concluded that Parliament did have the competence to enact COFEPOSA and SAFEMA.

50. The constitutionality of COFEPOSA has been already upheld by a nine-Judge Bench of this Court. Its constitutionality is again sought to be assailed by the petitioners in the present matter on the ground that with the change of legal regime by repeal of FERA and enactment of FEMA (the provisions contained in FEMA did not regard its violation a criminal offence) the intent and object behind the enactment of preventive detention in COFEPOSA had ceased to exist and continuation of impugned provision in COFEPOSA was violative of Article 21 read with Articles 14 and 19 of the Constitution.

52. Para 151(v) in I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others, AIR 2007 SC 861 : (2007) 2 JT 292 : (2007) 1 SCALE 197 : (2007) 2 SCC 1 : (2007) 1 SCR 706 : (2007) AIRSCW 611 : (2007) 1 Supreme 137 leaves no manner of doubt that where the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by the judgment. The constitutional validity of COFEPOSA has already been upheld by this Court in Amratlal Prajivandas¹⁴ and, therefore, it is not open for challenge again. On this ground alone the challenge to the constitutional validity of the impugned provision must fail. Despite this, we intend to consider the forceful submission made by the learned counsel for the petitioners that on repeal of FERA and enactment of FEMA (FEMA did not regard its violation of criminal offence) an act where no punitive detention (arrest and prosecution) is even contemplated or provided under law, such an act cannot be made the basis for preventive detention and any law declaring it to be prejudicial to the interest of the State so as to invoke the power of preventive detention is violative of Articles 14, 19 and 21 of the Constitution and must be struck down.

58. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continues to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind COFEPOSA is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on the national economy. In today's world the physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. The smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA by their misdeeds and misdemeanours directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. We must remember : the person who violates foreign exchange regulations or

indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventative detention of the anti-social elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.

59. The menace of smuggling and foreign exchange violations has to be curbed. Notwithstanding the many disadvantages of preventive detention, particularly in a country like ours where right to personal liberty has been placed on a very high pedestal, the Constitution has adopted preventive detention to prevent the greater evil of elements imperiling the security, the safety of State and the welfare of the Nation.

60. On the touchstone of constitutional jurisprudence, as reflected by Article 22 read with Articles 14, 19 and 21, we do not think that the impugned provision is rendered unconstitutional. There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the state security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State. Strictly speaking, preventive detention is not regulation (many people call it that way), it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventative detention arms the State with precautionary action and must be seen as such. Of course, the safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the Court is called upon to examine the legality and validity of an order of preventive detention.

62. It is too naive to suggest that in today's economic scenario of abundant foreign exchange and booming foreign trade, contravention of foreign exchange laws does not pose any threat to the national interest for which a person has to be detained.

63. In view of the above, we do not find any merit in challenge to the constitutional validity of impugned part of Section 3(1) of COFEPOSA. "

15. It is no doubt true that the detention order can be set aside, if it is vitiated by non application of mind. The variance between subjective satisfaction based on which the order of detention is passed and the grounds in support thereof, is but one facet of the submission of the order being vitiated by non application of mind.

16. In the case of "Jagannath Misra" (supra) the Hon"ble Supreme Court found that there is certain degree of casualness in passing order of detention. The detaining Authority must apply its mind properly before passing order of

detention. The Authority is obliged while passing order of detention and taking away liberty of the citizen of this country to exercise due care and caution and ensure that the person detained is so detained on grounds which justify the detention in the interest of the country. Further the proceedings in the matter of detention and the order of detention should show that such care and caution was exercised and reflects sense of responsibility while depriving citizen of his liberty without trial. In the matter before the Hon'ble Supreme court, it was found that the order of detention refers to six out of eight possible grounds on which a person can be detained under Section 3(2)(15) of the Defence of India Act. All these eight grounds refers to foreigners i.e. of being of hostile origin. The order really mentions six out of seven possible grounds which can apply to an Indian whose detention is ordered under that case. The Court held that it is possible to detain a citizen on six out of seven possible grounds and if that is done, it is necessary that the Authority detaining the citizen is satisfied on each of that grounds that the detention is necessary thereon. But if it appears that though the detention order mentions a large number of grounds the authority concerned did not apply its mind to all those grounds before passing the order, then, a conclusion can be reached that there is non application of mind and to the real necessity of detention. Thus, there is no warrant for any possibility. Further, in that case the Supreme Court concluded that the Authority was unaware of even clear language of the provision, the order was vitiated by non application of mind. A specific contention as mentioned in paragraph 4 of the judgment of the Supreme Court has been, therefore, accepted. The distinction between the safety of India and which may be assumed to be public safety and maintenance of public order was not reflected and was, therefore, not maintained. Why the detention order necessary and in order to prevent which activities and which could be said to be prejudicial to the safety of India and maintenance of public order must be spelt out.

17. We do not see how this judgment can have any application to the facts and circumstances of the present case. Equally, the reliance placed on the judgment in the case of "Ekta Satish Choudhary" (supra) is misplaced. There as well the Division Bench found that, there was complete variance inasmuch as the facts related to acts of smuggling and not the act of abetment of smuggling. This fundamental and basic distinction having been not adhered to and the order not reflecting application of mind to same that it was quashed and set aside by the Division Bench.

18. That in the matters of preventive detention and in detaining a person without trial, the constitutional mandate must be strictly adhered to, requires no reference to any judgment as this principle is fairly well settled. That need not, therefore, warrant referring to any further precedents including the Judgment of the Supreme Court in the case of "State of Bombay Vs. Atmaram Shridhar Vidya" (supra). Then an attempt was made to draw support from the judgment of the Hon'ble Supreme Court and which has been followed in two Division Bench judgments delivered later, in the case of Abubakar Suleman Vs. The State

of Maharashtra and Others, (2013) ALLMR(Cri) 29 (Criminal Writ Petition No. 2614 of 2012 decided on 25.10.2012.) The Division Bench applied the ratio of the Supreme Court Judgment in the case of Gimik Piotr Vs. State of Tamil Nadu and Others, AIR 2010 SC 924 : (2010) CriLJ 877 : (2009) 14 JT 273 : (2009) 13 SCALE 706 : (2010) 1 SCC 609 : (2009) 15 SCR 889 . In the "Gimik Piotr" case, it was apparent that the passport was not returned to the detenu but was seized by the authority. This was a crucial and relevant aspect. If the passport was surrendered and was in custody of the detaining Authority or the competent Authority, then, the apprehension that the detenu would smuggle the currency out of India is to a certain extent taken care of and, therefore, that should have been referred to and despite that if the detaining authority is satisfied that it is necessary to detain the person and in order to prevent him from indulging in smuggling activities in future, then, that was required to be specifically set out. The detention order in those matters reflected total non application of mind because the detaining Authority demonstrated total ignorance of the seizure and surrender of passport. That is how the ruling in "Gimik Piotr" case was followed and applied by the Division Bench of this Court.

19. In the present case the argument of the learned counsel appearing on behalf of the detenu is that there is a bond executed and furnished and which records an undertaking of the detenu that he would not leave India without prior permission of the competent official or the Court. Pertinently, the learned Counsel does not dispute that the passport in the case before us was returned to the detenu. The detenu, thus, was free to utilize the passport. It may be that the passport authority has independent powers and after it was informed of the prejudicial activities of the detenu, it would have prevented departure from India, but that by itself does not mean that the detaining authority in any way is prevented in law from making order of detention. The passport is not surrendered nor is it in custody of the Authority. It is with the detenu. There was, therefore, a definite apprehension that the detenu would use it to smuggle foreign currency out of India. The satisfaction in that behalf is thus based on cogent and reliable material including the past record of the detenu. Thus, there was an application of mind to germane and relevant factors necessary to invoke Section 3(1)(i) of the COFEPOSA.

20. In the present case, reading of the undertaking and a copy of which has been annexed at page 94 of the paper book shows that it is a condition on which the bail has been granted. The condition inter alia is that the detenu shall attend the office of the officer or the Court on every day on which the investigation or trial is held and an undertaking is given by the detenu that he will not leave India without prior written permission of the concerned officer or the Court as may be. This is not enough to nullify the subjective satisfaction and which is recorded in the present case.

21. We cannot in our limited jurisdiction probe further as to whether the material on which the satisfaction is recorded in this case was enough and adequate to

make an order of detention. That is a province in which we cannot enter in writ jurisdiction. Suffice it to note that the subjective satisfaction is recorded with reference to the past activities of smuggling carried out by the detenu and in order to prevent him from indulging in similar activities in future that the detention order has been made.

22. In such a situation, the law laid down in the later decision in the case of "Nafisa Syed Ali Vs. State of Maharashtra & Ors." (supra) or "Prithvi Sovern Kuntal Vs. State of Maharashtra & Ors." (supra) will not apply. These matters and cases noted the patent variance between subjective satisfaction recorded in the order and the grounds or reasons in support thereof. The order reflects non application of mind to the surrender and seizure of the passport and that being in the custody of the passport authority or the competent authority investigating the crime. Once on facts the situation is different, then, none of these decisions can be of any assistance to the detenu.

23. We also do not find any substance in the other contention that the right of the detenu to make representation being hampered. He was provided with all materials that requires him to make effective and proper representation. This is not a case where the material or the grounds were not supplied. Rather this is a case where the detenu desired to have better and further particulars about the documents and their contents. The documents speak for themselves. They were supplied and some of them were clearly referred in the representation. The particulars thereof and as sought were not necessary to make a meaningful representation. Apart therefrom, the complaint in that behalf is identical and based on the same plea regarding alleged variance in the subjective satisfaction in the Detention Order and the reasons in support thereof. We have already dealt with and rejected it. Once we have found that the subjective satisfaction and as recorded clearly spells out the distinction in law, then, we are in agreement with Mr. Yagnik that one word or sentence from the detention order cannot be picked up and read in isolation or torn out of context. The subjective satisfaction is based on the detaining authority's opinion that it is necessary to detain the detenu so as to prevent him from indulging in smuggling activities in future. On account of the statements made in the affidavits in reply as well, we are satisfied that the detenu's rights guaranteed by Article 22 of the Constitution of India are in no way infringed nor is the mandate of the said Article in any way violated. There is ample opportunity given to him and to make an effective and meaningful representation. Even on that count, we do not find that the detention order suffers from any legal infirmity.

24. As a result of the above discussion, this Writ Petition fails and is dismissed. Rule is discharged.