

S. Krishna and Another Vs. Joint Secretary, Cofeposa, Central Economic Intelligence Bureau

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Court : Karnataka

Decided On : Feb-01-2011

Judge : The Honourable Mrs. Justice Manjula Chellur & K.N. Keshavanarayana

Appeal No. : WPHC.No.61 of 2010

Appellant : S. Krishna and Another

Respondent : Joint Secretary, Cofeposa, Central Economic Intelligence Bureau

Advocate for Pet/Ap. : For the Petitioners : Kiran S. Javali, K. Chandra Shekhara, Advocates. For the Respondent: R1, Dinesh Kumar, CGSC. R2, E.S. Indires, AGA.

Judgement :

(This WPHC is filed under Articles 226 and 227 of the Constitution of India, praying to writ of habeas corpus direction declaring the detention of Shri Firoz Khan @ Feroz Khan S/o. Yusuf Khan, by F.No.673/1/2010-CUS.VIII dated 25.02.2010 as per grounds of detention (Annexure -“A”) as illegal and void ab initio.)

K.N. Keshavanarayana, J.

By this writ petition filed under Article 226 of the Constitution of India, the petitioner has sought for a declaration that the detention of his friend Shri Firoz Khan @ Feroz Khan S/o. Yusuf Khan, resident of Flat No.802, Rhine Apartments, Sturrock Road, Falnir, Mangalore - 575001, (hereinafter referred to as 'Detenue' for short) pursuant to the order of detention No.F.No.673/2010-Cus.VIII dated 25.02.2010 issued by the Joint Secretary of COFEPOSA, Central Economic Intelligence Bureau, Department of Revenue, Ministry of Finance, Delhi, as illegal and void ab initio and to direct release of the detenue - Firoz Khan @ Feroz, S/o. Yusuf Khan, who has been lodged in Central prison, Bangalore.

2) The petitioner has averred that he is a resident of Bangalore City and the detenue is his friend, as such, he is interested in the life, welfare and personal liberty of the detenue. According to the petitioner, the detenue was taken into custody on 27.02.2010 and since then he has been in detention in Central Prison, Bangalore and on 02.03.2010, the grounds for detention order dated 25.02.2010 issued by the Joint Secretary to the Government of India, Ministry of Finance, New Delhi, along with a list of documents relied upon and the copies of the documents referred to in the said list were served on the detenue.

3) The petitioner has contended that the detention of the detenue is illegal and is violative of Article 22(5) of the Constitution of India. Among others the grounds urged in the petition are:

i) Though it is imperative under law that the order of detention should be served on the detenue on his apprehension, the order of detention was not served on the detenue on his apprehension at Mangalore on 27.02.2010 by the Deputy Superintendent of Police (Intelligence) and at the time of his apprehension, only the signature of the detenue was obtained, but no copy of order of detention was furnished to him, as such, the non-service of the order of detention at the time of the apprehension of the detenue, has violated the provisions of the COFEPOSA Act and thereby it has affected his right of representation under Article 22(5) of the Constitution of India against the order of detention.

ii) The non-service of an order of detention has affected the right of the detenue to make effective representation against the order of detention.

iii) Para-28 of the grounds of detention makes reference to both receiving and making payment and if this transaction as recorded in Para-28 forms the basis for satisfaction then the detainee ought to have been detained from acting in any manner, which is prejudicial to the conservation and augmentation of Foreign Exchange. However, the satisfaction recorded in Para-32 relates only to augmentation of Foreign Exchange. Thus in deriving and recording the satisfaction as stated in Para-32 of the grounds of detention matters relating to conservation of Foreign Exchange has weighed heavily on the mind of the Detaining Authorities and this has vitiated the satisfaction reached in Para-32 of the grounds of detention and having been influenced by matters irrelevant head of detention invoked for detention, the order of detention is bad in law.

iv) As the order and grounds of detention are verbatim acceptance of proposal forwarded by Sponsoring Authority by the minor grammatical variance would reveal non-application of mind by the Detaining Authority vitiating the order of detention. The Detaining Authority has formulated the grounds of detention without consideration of documents mentioned in the list at Sl.Nos.1 to 72.

4) By way of additional grounds, the petitioner has contended that the representation made by the detainee to the Advisory Board, which has been forwarded to the Government thorough the Superintendent of Central Prison-Respondent No.2, the same has not been independently considered by Respondent No.1, as such, there is violation of Article 22 rendering the order of detention bad in law.

5) According to the grounds of detention dated 25.02.2010 served on the detainee, a copy of which is produced as per Annexure-A, the Zonal Office of Directorate of Enforcement, Bangalore, received information that the detainee is indulging in making and receiving hawala payments upon receipt of instructions from the persons resident in Dubai and such Hawala payments were being made from his business as well as residential premises. On the basis of such information, the officers of the Enforcement Directorate, Bangalore, conducted searches in both the business and residential premises of the detainee on 29.09.2009 and 30.09.2009. During the search of the business premises bearing shop No.3, 1st

Floor, Parthasarathy Complex, C.T. Street, Bangalore, Indian Currency of Rs.1 crore 20 lakhs along with certain documents were seized under mahazar/panchanama dated 29.09.2009 and on search of business premises bearing No.18, 2nd Floor, Shalimar Complex, Mangalore, conducted on 30.09.2009 certain documents were seized under mahazar dated 30.09.2009. During the course of search of business premises on 29.09.2009, the officers of the Enforcement Department, Bangalore, found three persons by name Sri. Shoeb Aziz Dhandh, Sri. Raju Bhai @ Rajesh and Sri. Puraram, standing outside the shop. On questioning, the detainee said to have told the officers of the Enforcement Department that the Indian Currency about 60 lakhs stacked inside wooden cupboard was received by him from a party at Indira Nagar, Bangalore, through his employee Mohammed Sayeed @ Baby and three bags containing of Rs.30 lakhs, Rs15 lakhs and 15 lakhs respectively were received by him from three persons who were standing outside the shop. On questioning by the officers, those three persons, who were standing outside the shop, and the employee of detainee admitted to have delivered the amounts as stated by the detainee. Thereafter, the statements of the detainee was recorded by the Assistant Director of Enforcement on 29.09.2009, in which interalia he said to have told that as per the instructions of one Jaffer resident of Dubai he was collecting the amounts from various persons and handing over various amounts to different persons. The detainee said to have made further statements on 30.09.2009. As indicated in the grounds of detention, show cause notices were issued to several persons and organizations disclosed by the detainee in his statements. Searches were conducted, documents were recovered and seized. Based on the documents collected, the authorities were of the opinion that the detainee has been indulging in prejudicial activities of receiving and making hawala payments upon instructions from persons resident outside India in contravention of provisions of Foreign Exchange Management Act and relevant rules and regulations made thereunder. Thereafter, the materials collected were placed before the Detaining Authority namely respondent No.1, who on consideration of those materials and on being satisfied that the detainee has been indulging in activities which have adversely affected the augmentation of the Foreign Exchange and having regard to his high potentiality and propensity to engage himself in such prejudicial activities, being of

the view that unless the detainee is detained, he is likely to continue in the aforesaid prejudicial activities in future also, directed his detention under the provisions of COFEPOSA with a view to prevent him in future from acting in any manner which is prejudicial to the augmentation of Foreign Exchange. Pursuant to the order of detention passed on 25.02.2010, the detainee was apprehended on 27.02.2010 at Mangalore, and he was lodged in the Central Prison, Bangalore, as per the order of detention.

6) The grounds of detention along with the list of documents relied upon and copies thereof were served on the detainee on 02.03.2010 at the Central Prison, Bangalore.

7) Respondent No.1 in the counter filed has contended that the order of detention does not suffer from any illegality nor it has violated any constitutional right of the detainee and therefore has sought for dismissal of the petition.

8) Respondent No.1 has denied the allegation that the order of detention has not been served on the detainee on his apprehension and that merely signature was obtained. According to Respondent No.1, copy of the detention order was served on the detainee on his apprehension at Mangalore on 25.02.2010, which has been duly acknowledged by the detainee and the said fact was also informed to his family members. Respondent No.1 has further contended that all the documents relied upon were placed before her by the Enforcement Directorate Bangalore and on consideration of all the documents and on being satisfied that the detainee has indulged himself in the acts which are adversely affecting augmentation of Foreign Exchange and since she was satisfied that unless detained, the detainee is likely to continue to engage himself in such prejudicial activities in future also, he was ordered to be detained to prevent him from acting in future in such activities in any manner, which are prejudicial to augmentation of Foreign Exchange and therefore, the order of detention does not suffer from any legal infirmities. According to Respondent No.1, the representation made by the detainee has been considered by the appropriate Government and the order passed rejecting the same has been communicated to the detainee through letter dated 16.04.2010. Therefore, Respondent No.1 sought for dismissal of the writ petition.

9) We have heard Sri. Kiran S. Javali, learned counsel appearing for the petitioner. Respondent No.1 is represented by Sri. Dinesh Kumar, CGSC, while Respondent No.2 is represented by Sri. E.S. Indires, the Additional Government Advocate.

10) Though several grounds had been urged in the writ petition, during the course of arguments, Sri. Kiran S. Javali, learned counsel for the petitioner, urged the following grounds:-

i) The order of detention dated 25.02.200 was not delivered to the detainee.

ii) The grounds of detention are verbatim adoption of the proposals submitted by the Enforcement Directorate, as such, there was non-application of mind by the Detaining Authority to the materials, as such, it has affected the process of satisfaction.

iii) As could be seen from the contents of Para-28 of the detention order, the detainee was indulged in activities which are in the nature of affecting the conservation as well as augmentation of Foreign Exchange whereas the satisfaction recorded in para-32 of the grounds of detention relates only to augmentation of Foreign Exchange and from this it is clear that in deriving and recording the satisfaction at Para-32 of the grounds of detention, the matters relating to conservation of Foreign Exchange has weighed heavily on the mind of the Detaining Authority and such irrelevant material having influenced the mind of Detaining Authority has vitiated the satisfaction as stated in Para-32 of grounds of detention.

iv) Though the statement made by the detainee is an admissible material for the Detaining Authority in forming satisfaction, before formation of such opinion, if the authorities comes to know that the detainee has retracted his statement it should be placed before the authority and same are also to be considered by the authority. However, in the case on hand only retracted statement made by the detainee to the Directorate of Revenue Intelligence was placed before the Detaining Authority, whereas the statement said to have been made by the detainee was not placed before the Detaining Authority. Therefore, on account of not placing the relevant material before the Detaining Authority, the process of

satisfaction has been vitiated rendering the order of detention illegal.

v) Assuming for the purpose of argument that the alleged statement made by the detainee to the DRI authorities had been placed before the Detaining Authority, the same should have formed part of the material made available to the detainee and since a copy of such statement had not been supplied to the detainee, it has affected the right of the detainee to make an effective representation. If for any reason the placement of detainee's retracted statement to the DRI authority before the Detaining Authority were to be held as an irrelevant material, since the irrelevant material has been considered by the Detaining Authority, it has vitiated the order of detention.

vi) The representation made by the detainee to the Advisory Board has not been considered by the Government and this has vitiated the order of detention. Even after raising this ground in that behalf, the Government has not considered the representation of the detainee and has not passed any order thereon.

11) In support of the above contentions, the learned counsel placed reliance on the following decisions:-

1. 1981 SCC (Cri) 25 (Smt. Icchu Devi Choraria - Vs. Union of India and Others)
2. 1981 SCC (Cri) 38 (Smt. Shalini Soni and Others Vs. Union of India and Others.)
3. AIR 1979 SC 447 (Ashadevi Vs. K. Shivraj and another).
4. AIR 1979 SC 451 (Lakshmi Shanker Srivastava Vs. State [Delhi Administration]).
5. AIR 1991 SC 1375 (K. Satyanarayan Subudhi Vs. Union of India and others).
6. AIR 1991 SC 1376 (Mathew alias Mathachan Vs. State of Kerala).
7. 2000 SCC (Cri) 1318 (Prem Prakash Vs. Union of India and Others).
8. 2000 SCC (Cri) 1319 (National Insurance Company Limited Vs. Behari Lal and Others).

9. AIR 1989 SC 364 (Ayya alias Ayub Vs. State of Uttar Pradesh and another).
10. AIR 1989 SC 371 (Smt Angoori Devi for Ram Ratan Vs. Union of India and others).
11. AIR 1994 SC 1479 (Moosa Husein Sanghar Vs. State of Gujarat and others).
12. AIR 1994 SC 1484 (Jarnail Singh Vs. The Secretary, Ministry of Home Affairs and others).
13. 2006 1 SCC (Cri) 61 (Rajesh Vashdev Adnani Vs. State of Maharashtra and Others).

Unreported Decisions:

1) Dimple Prakash Shah Vs. Union of India and Ors. (W.P.(Crl.) 447/2010) (High Court of Delhi)

2. (Charles Patrick Vs. Union of India and Ors. (Crl.A.586/2006)

(SC - Crl. Appellate Jurisdiction)

12) Per contra, Sri. Dinesh Kumar, CGDSC, submitted as under:-

i) The material placed before this Court would clearly establish that the order of detention dated 25.02.2010 was served on the detenue at the time of his apprehension on 27.02.2010 at Mangalore and the detenue has duly acknowledged the receipt of the copy of the order of detention and therefore, it is not open to the petitioner to contend that copy of the order of detention has not been served on the detenue and merely his signature was obtained to that effect. The very fact that the detenue has not stated anything in his representation nor anything before the Advisory Board about non-service of copy of the order of detention would indicate that the copy of the order of detention has been served on him. Therefore, there is no substance in the contention that a copy of the order of detention has not been served on the detenue.

ii) There is no basis to contend that the grounds of detention are verbatim adoption of the proposal submitted by the Enforcement Directorate. Perusal of the grounds of detention would clearly indicate the application of mind by the competent authority while passing the order of detention.

iii) What has been stated in Para-28 of the grounds of detention would merely indicate as to the manner in which the detainee has indulged in receiving and making hawala payment and the ultimate satisfaction derived by the Respondent No.1 with regard to the prejudicial act on the part of the detainee which adversely affected augmentation of the foreign exchange. Since augmentation as well as conservation of foreign exchange are interlinked and inter-related, no irrelevant material has been considered while reaching satisfaction, therefore the order of detention is perfectly in accordance with law.

iv) As the contents of the statement made by the detainee to the DRI authorities are re-produced by the detainee in his retraction statement submitted to DRI authorities, non-placement of the original statement made to DRI authorities has not in any way vitiated the order of detention nor the process of application of mind. The representation made by the detainee has been considered by the appropriate Government and the order has been passed rejecting the same and this fact has also been communicated to detainee through the letter dated 16.04.2010 and since the representation said to have been made by the detainee to the Advisory Board and the representation submitted to the Competent Authority are one and the same, there was no need or an occasion for separately considering the representation submitted to the Advisory Board.

v) After the receipt of the report of the Advisory Board, the Appropriate Government has passed an order of detention and since there is no legal infirmity or lacuna either in the process or in the order of detention, as such, the petition is liable to be dismissed.

The original file was also made available for perusal.

13) In the light of the above, the point that arises for our consideration is, -

Whether detention of the detainee is illegal and void ab initio as contended by the petitioner? If so, whether the detainee is entitled for an order of release?

14) Before considering various grounds urged, it is necessary to note the provisions of law and also the settled principles of law while considering the legality of the preventive detention orders and also the constitutional protection afforded to such detainee.

15) In this case, we are concerned with the order of preventive detention passed under COFEPOSA Act. As per Section 3(1) of this Act, the Central Government or the State Government or any officer of Central Government especially empowered for the purpose etc., 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, it is necessary so to do, make an order directing that such person to be detained.

16) As per sub-section (3) of Section-3, for compliance of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of the 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 5 days, and in exceptional circumstances and for the reasons to be recorded in writing not later than 15 days, from the date of detention. Clause (5) of Article 22 of the Constitution directs that, when any person is detained in pursuance of the order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

17) In Smt. Aruna Kumari's Vs. Government of Andhra Pradesh, AIR 1988 SC 227, the Apex Court while considering the question as to whether the Courts can consider the propriety and sufficiency of the grounds on which the satisfaction of the detaining authority is based, has held thus:-

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Besides, it has long been established that the subjective satisfaction of the detaining authority as regards the factual existence of the condition on which the order of detention can be made namely, the grounds of detention constitute the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. Nor can the Court, on a review of the grounds, substitute its own opinion for that of the authority.

18) In the case of *Ichchu Devi Choraria Vs. Union of India and Others* (1981 SCC (Cri) 25), the Apex Court has upheld the importance of the personal liberty which is termed as one of the most cherished value of the man kind. In Para-3 of the judgment, the Apex Court has observed thus:-

“3. We may point out straightway that we are not at all happy at the thought that our order may have resulted in setting free a possible smuggler. We are not unmindful of the fact the COFEPOSA Act has been enacted for the purpose of eradicating the evil of Smuggling which is eating into the vitals of the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the court releasing a person detained under this Act, it is quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the courts to ensure that this power exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The Constitution has therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of

personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This court has also through its judicial pronouncements created various legal bulwarks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenue must be set at liberty, howsoever wicked or mischievous he may be. The law cannot be subverted, particularly in the area from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This Court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammelled by the fact that this is a case where a possible smuggler is seeking his release from detention.”

19) In *Ayya @ Ayub Vs. State of U.P.* (AIR 1989 SC 364), in Para-7, the Apex Court has observed thus:-

Xxxx xxxx xxxx xxxx xxxx

Personal liberty, is by every reckoning, the greatest of human freedoms and the laws of preventive-detention are strictly construed and a meticulous compliance with the procedural safeguards, however, technical, is strictly insisted upon by the courts.

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But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by the genius of its administration

so as to strike the right balance between individual-liberty on the one hand and the needs of an orderly society on the other. But the realities of executive excesses in the actual enforcement of the law have put the courts on the alert, every ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but vary according as the “pressures of the day” and according as the intensity of the imperative that justify both the need for and the extent of the curtailment of individual liberty. Adjustments and readjustments are constantly to be made and reviewed. No law is an end in itself. The “inn that shelters for the night is no journey’s end and the law, like the traveler, must be ready for the **morrow**.”

20) With regard to subjective satisfaction of the authorities who passes preventive detention orders, in In Ayya @ Ayub’s case (supra) the Apex Court has observed at para-10, as under:-

“There are well recognized objective and judicial tests of the subjective satisfaction for preventive detention. Amongst other things, the material considered by the detaining authority in reaching the satisfaction must be susceptible of the satisfaction both in law and in logic. The tests are the usual administrative law tests where power is couched in subjective language. There is, of course, the requisite emphasis in the context of personal liberty. Indeed the purpose of public-law and the public law courts is to discipline power and strike at the illegality and unfairness of Government wherever it is found. The sufficiency of the evidentiary material or the degree of probative criteria for the satisfaction for detention is of course in the domain of the detaining authority.”

(underlining is by us)

21) Keeping these guidelines and principles in mind, we shall proceed to consider the various grounds urged on behalf of the detainee.

22) Re: Non-service of order of detention on the detainee:

There is no serious dispute that the detainee was apprehended by the Executing Authorities on 27.02.2010 at Mangalore and he was lodged in Central Prison, Bangalore. It is the contention of the petitioner that at the time of apprehension, the detainee was not served with the copy of the detention order, but merely his signature was obtained by the authorities. It is his further contention that on 02.03.2010, the authorities though served the grounds of detention and the list of documents on which the authorities have relied along with copies thereof, copy of the detention order was not served, therefore, the detention of the detainee is illegal.

23) The well-settled legal position is that, at the time of apprehending a person under preventive detention laws, copy of the detention order should be served on him and under Clause (5) of Article 22 of the Constitution it is obligatory for the authority making the order to communicate the detainee the grounds on which the order has been made and should afford an opportunity to the detainee of making representation against such order. Sub-section (3) of Section-3 of the COFEPOSA Act has fixed the time limit of 5 days for compliance of requirement of clause (5) of Article 22 of the Constitution. Therefore, it is necessary to find out as to whether the detainee was not served with a copy of the detention order at the time of his apprehension. Respondent No.1 has refuted this allegation and has contended that, at the time of apprehension of the detainee, a copy of the detention order was served on him on the same day which he duly acknowledged and thereafter, he was lodged in Central Prison at Bangalore. According to Respondent No.1, the wife and daughter of the detainee were also informed about the detention of the detainee. Before this Court, the petitioner filed an application seeking direction to the Executing Authority to produce the original documents with regard to service of copy of the detention order on the detainee. In reply, the 2nd respondent has produced the attested zerox copies of the endorsement and acknowledgments with regard to service of copy of the detention order on the detainee on 27.02.2010. According to Respondent No.2, the original acknowledgments have been sent to the authority, who passed the detention order.

24) We have perused the attested copies of the acknowledgment and also the endorsements in this regard, which are produced by Respondent No.2. These

documents clearly indicate that the copy of the detention order marked for service on the detainee was served on the detainee at the time of his apprehension and he has duly acknowledged the receipt of the same. Even according to the contention of the petitioner, the authority merely took the signature of detainee but did not provide copy of the detention order. However, in the light of the specific endorsement made by the accused acknowledging the receipt of the copy of the detention order, the contention of the petitioner that the authorities without providing the copy of the detention order merely obtained the signature of the detainee cannot be accepted. It is pertinent to note that the detainee in his representations submitted to the authorities has not raised any contention that he was not served with a copy of the detention order at the time of his apprehension. Therefore, in our opinion, there is no force in this contention raised on behalf of the detainee. Therefore, the said contention is rejected.

25)Re: Whether the detention order is vitiated on account of non-application of mind by the authority in formulation of grounds.

It is the contention of the petitioner on behalf of the detainee that there is total non-application of mind by the authority who passed the detention order, as the grounds on which the detention order is based is verbatim adoption of the proposal submitted by the sponsoring authority viz., the Enforcement Directorate and this has vitiated the process of subjective satisfaction. In this regard, reliance is placed on the decision of the Delhi High Court in the case of Dimple Prakash Shah Vs. Union of India (WP (Crl.) 447/2010 dated 20.04.2010) and also the decision of Supreme Court in Rajesh Vashdev Adnani Vs. State of Maharashtra (2006 (1) SCC(Crl) 61).

26) In Rajesh Vashdev Adnani's Case, the Apex Court has held that, keeping in view the safeguards envisaged under Article 22 of the Constitution, it was absolutely essential for the Detaining Authorities to apply their mind not only at the time of granting approval but also at the time of detention order and grounds thereof are prepared. In Dimple Prakash Shah's case, after considering the submissions made in this regard and by perusing the proposals submitted by the sponsoring authority and the grounds prepared by the Detaining Authority, on the

facts of that case, the Delhi High Court held that the proposals submitted by the sponsoring authority has been verbatim adopted by the authority viz., Enforcement Directorate while formulating the grounds of detention. Therefore, the detention order is vitiated. In the case on hand, perusal of the file does not indicate that the grounds of detention are verbatim adoption of the proposals submitted by the sponsoring authority viz., Enforcement Directorate. Therefore, we find no substance in this contention.

27) Re: Whether the detention order is vitiated on account of irrelevant material having influenced the minds of the Detaining Authority.

It is the contention on behalf of detainee that the contents of Para-28 of the grounds of Detention indicate that the detainee was indulged in activities which are in the nature of affecting conservation as well as augmentation of foreign exchange, whereas satisfaction recorded by the authority in Para-32 and the ground of detention was only regarding augmentation of foreign exchange and thus, in deriving and recording satisfaction at Para-32 of the grounds of detention, the matters relating to augmentation of foreign exchange has weighed heavily on the mind of the Detaining Authority and this has vitiated the satisfaction as stated in Para-32 of the grounds of detention. We find no substance in this contention. To consider the correctness of this contention, it is necessary to extract Paras-28 and 32 of the grounds of detention.

“28. The Indian Currency/documents seized from your aforesaid premises and the SMS messages sorted in your mobile phone and various statements recorded by the department’s officers reveal your regular and continuous prejudicial dealings of receiving and making of illegal Hawala Payments from/to various persons upon instructions of Shri Jaffer, a person resident outside India. The transactions appearing in these seized documents itself total upto such hawala payments of over Rs.86.04 Crores, besides the huge cash of Rs.1,20,00,000/- pertaining to prejudicial Hawala payment that was recovered and seized from you. This clearly indicates that you are involved into receiving and making of such Hawala Payments in a well organized manner. Thus, it stands established that you have been continuously engaged in receiving and distributing of payments in India,

from/to various persons under the instructions from abroad.

32. In view of the foregoing, I have no hesitation in arriving at the conclusion that you have been engaging yourself in activities, which have adversely affected the augmentation of foreign exchange. Considering the nature and gravity of the activity in contravention of the provisions of Foreign Exchange Management Act, 1999 read with Rules and Regulations made thereunder, your role therein, the well-laid out manner in which you have been indulging in such prejudicial activities and your dubious conduct, all of which reflect your high potentiality and propensity to engage yourself in such prejudicial activities in future, I am satisfied that unless detained, you are likely to continue to engage in the aforesaid prejudicial activities in future also. Therefore, it is necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with a view to prevent you in future from acting in any manner which is prejudicial to the augmentation of foreign exchange. I am also satisfied that the nexus i.e. proximity between the date of incident and the date of issue of detention order and the object of detention is well-maintained.”

28) As could be seen from the contents of Para-28 extracted above, what has been stated therein is that the detainee has been continuously engaged in receiving payments in India from various persons and distributing the same to various persons under the instructions from abroad. Sub-section (3) of Section 3 of COFEPOSA Act deals with the acts, which are prejudicial to conservation as well as augmentation of foreign exchange. In a given case, the act complained of may involve both conservation and augmentation of foreign exchange and in some cases, it may be either conservation or augmentation of foreign exchange. In the case on hand, the whole allegation against the detainee was that as per the instructions of a person residing abroad, the detainee was receiving amounts from various persons in India and was distributing the same to various persons as per the instructions. This according to the authorities has resulted in augmentation of foreign exchange on account of foreign currency not being brought into India. Reading of entire Para-28 of the grounds of detention does not indicate even remotely that the act complained against the detainee was prejudicial to the conservation of foreign exchange. Reading of Para-28 of the grounds of detention

would only indicate that the act complained against the detainee was prejudicial to the augmentation of foreign exchange and therefore, it cannot be said that the matters relating to conservation of foreign exchange has weighed on the mind of the Detaining Authority. In this view of the matter, it cannot be further said that any irrelevant material has influenced the mind of the Detaining Authority. Therefore, we reject this argument.

29) Re: Non-placement of the statement said to have been made by the detainee to the DRI, before the Detaining Authority.

The legal position as to what kind of materials should be placed before the Detaining Authority at the time of passing the detention order for recording satisfaction, has been held crystallized.

30) In *Ahsadevi Vs. K. Shivaraj* (AIR 1979 SC 447), at Para-6, their Lordships observed thus:-

“6. It is well settled that the subjective satisfaction requisite on the part of the Detaining Authority, the formation of which is a condition precedent to the passing of the Detention Order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the Detaining Authority one way or the other are ignored or not considered by the Detaining Authority before issuing the detention order.”

31) After referring to an earlier decision of the Supreme Court, in *SK. Nizamuddin Vs. State of West Bengal*, (AIR 1974 SC 2353), in *Ashadevi's* case (*supra*), their Lordships have further observed at Para-6 as under:

“The principle that could be clearly deducted from the above observations is that if material or vital facts which would influence the mind of the detaining Authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the Detaining Authority it would vitiate its subjective satisfaction rendering the Detention Order illegal. After all the Detaining Authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to

the scope and purpose of the statute vitiate the subjective satisfaction and renders the Detention Order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order.”

32) In *Ayya @ Ayub's case* (supra), the Apex Court while considering the effect of non-consideration of piece of evidence by the Detaining Authority on the legality of the Detention Order, at Para-13, has observed thus:-

“13.What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the Detaining Authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence, which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The Detaining Authority might very well have come to the same conclusion after considering this material, but in the facts of the case the omission to consider the material assumes materiality.”

33) In the case on hand, the perusal of the list of documents relied upon and served on the detainee indicates that the Sponsoring Authority placed retracted statement of the detainee made to DRI before the Detaining Authority and the same has been looked into by the Detaining Authority. The list of documents relied upon admittedly does not indicate that the statement said to have been made by the detainee before the DRI had been placed before the Detaining Authority. Therefore, what is required to be considered is whether the non-placement of the statement said to have been made by the detainee to the DRI before the Detaining Authority has in any way vitiated the process of satisfaction thereby rendering the Detention Order illegal. The contention of the respondent in this regard is two folds,-

a) The statement made by the detainee to the DRI authorities was not a relevant material to be placed before the Detaining Authority, as such, non-placement of

the said statement has not vitiated the process of satisfaction reached by the Detaining Authority.

b) Assuming that the said statement was a relevant material, the whole of the said statement having been extracted in the retracted statement sent by the detinue and since the said retracted statement had been placed before the Detaining Authority, the Detention Order is not vitiated.

34) From the materials placed before this Court it is noticed that after the registration of the case against the detinue, both the Enforcement Directorate and DRI Authorities registered separate cases against the detinue and the detinue was interrogated by both the authorities in respect of the acts alleged against the detinue both under conservation of foreign exchange and prevention of smuggling activities and the detinue said to have made statements before both the authorities independently in respect of the activities falling within the domain of each of these authorities. The Detention Order passed against the detinue was in relation to the conservation of foreign exchange activities carried on by him. Therefore, it cannot be said that the statement said to have been made by the detinue before the DRI cannot be said to be a relevant material in respect of activities said to have been carried on by the detinue in respect of conservation of foreign exchange. No doubt, the DRI Authorities appear to have sent a copy of the statement made by the detinue before the DRI authorities, to the Enforcement Directorate. However, on that ground it cannot be said that the said statement was a relevant material required to be placed before the Detaining Authority before passing Detention Order. In view of this there was no occasion for the authorities to furnish a copy of the said statement. The Apex Court in an unreported decision. In *Charles Patric Vs. Union of India* (Crl.A.No.586/2008 D/D 21.04.2010) referring to decision in *Shalini Soni Vs. Union of India* ((1980) 4 SCC 544), *Ichhu Devi Choraria Vs. Union of India* (1980 4 SCC 531) and *Mst. L.M.S. Ummu Saleema Vs. Sh. B.B. Gujaral and Anr.* ((1981) 3 SCC 317) has held that, only such documents as were relied upon by the Detaining Authority and were essential for making an effective representation were to be supplied and failure to do so would be a violation of the fundamental right guaranteed under Article 22(5) of the Constitution of India. It was further noticed that in *Ummu Saleema's* case, it has

been held that, a mere causal or passing reference which may be made in the course of the narration of facts would not entitle a detainee to ask for document unless and until it could be further said it had been relied upon by the Detaining Authority. Therefore, in our opinion, the non-placement of the copy of the statement of the detainee to the DRI authorities before the Detaining Authority has not in any way vitiated either the process of satisfaction or the order of detention. In this regard, we also find considerable force in the submission of the learned counsel for the Respondent No.1 that, even if it is assumed that such a statement was required to be placed before the Detaining Authority, the very retracted statement by the accused addressed to the DRI authorities contains the statement of the detainee in full which were retracted and since admittedly the retracted statement formed part of the documents which were placed before the Detaining Authority, it cannot be said that the statement said to have been made by the detainee to the DRI authorities was not placed before the Detaining Authority. Therefore, on this ground we cannot hold that the process of satisfaction is vitiated nor that it has rendered the order of detention illegal.

35) Perusal of the grounds on which the Detention Order came to be passed does not indicate that any reference has been made to the alleged retracted statement of the detainee submitted to DRI authorities. Therefore, it cannot be said that irrelevant materials have been taken into consideration by the Detaining Authority while recording satisfaction. Hence, we reject the arguments in this regard.

36). Re: Non-consideration of representation by the detainee to the Advisory Board by the appropriate Government.

As noticed supra, Clause (5) of Article 22 of the Constitution gives right to the detainee to make a representation against the order of detention.

37) In *Icchu Devi's* case referred to supra, their Lordships have laid down as to what is the obligation on the part of the Detaining Authority to consider the representation of the detainee. The observations as found in Para-10 reads thus:-

“10. It is now settled law that on a proper interpretation of Clause (5) of Article 22, the Detaining Authority is under a constitutional obligation to

consider the representation of the detainee as early as possible, and if there is unreasonable delay in considering such representation, it would have the effect of invalidating the detention of the detainee vide vide V.J. Jain Vs. Pradhan.
.....”

38) In the case on hand, the accused was apprehended on 27.02.2010 within five days as contemplated under the provisions of sub-clause (3) of Section 3 of COFEPOSA Act, the grounds on which the Detention Order was made along with the list of documents relied upon, as also copies thereof were furnished to the detainee on 02.03.2010. Thereafter, it appears the detainee made representation to the Detaining Authority, the appropriate Government as also to the Advisory Board. As per Clause (b) of Section 8 of COFEPOSSA Act, reference was made to Advisory Board within the time specified thereunder. Perusal of the original file produced by the learned counsel for Respondent No.1 for our perusal indicates that the representation made by the detainee was considered by the appropriate Government and an order came to be passed rejecting the same and this fact was communicated to the detainee through letter dated 16.04.2010. The complaint made by the detainee in this behalf is that the representation made by him to the Advisory Board has not been considered independently.

39. In Moosa Husein Sanghar Vs. State of Gujarat and Ors. (AIR 1994 SC 1479) it is held that, merely because the representation has been addressed to the Advisory Board and not to the State Government did not absolve the State Government from the constitutional obligation flowing from Article 22(5) to consider the said representation. Here in the case on hand, the representation of the detainee was to all the authorities viz., Detaining Authority, appropriate Government and also to the Advisory Board. Such representations submitted by the detainee to the Government and Detaining Authority was considered by the Government and the same has been rejected. Therefore, question of considering the representation submitted to the Advisory Board independently does not arise. In Moosa Husein Sanghar's case (supra), the Apex Court has explained the obligation on the part of the Government to consider the representations in Para-13 as under:-

“These decisions show that in a case where the representation has been received before the case is referred to the Advisory Board, the appropriate Government must consider the same before the matter is referred to the Advisory board and it would be justified in not considering the same only if there is no reasonable time to consider and dispose of the representation before the case is referred to the Advisory Board and in such case, the representation may be forwarded to the Advisory Board along with the case of the detainee.”

40) In view of the fact that the representation made by the detainee has already been considered and the same has been rejected by the Government, question of again considering the representation submitted to the Advisory Board independently does not arise and only on this ground it cannot be said that the Detention Order is vitiated. In this view of the matter, we find no ground to brand the order of detention either as illegal or as vitiated. Therefore, we find no ground to declare the Detention Order as illegal and to order release of the detainee.

Accordingly, the writ petition is dismissed.

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