

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 14.03.2012
PRONOUNCED ON: 18.05.2012

+ **W.P. (CRL) 247/2012**

NIKHIL MONDAL Petitioner
Through: Sh. Kunal Chatterji and Ms. Maitreya
Banerjee, Advocates.
Versus

UOI & ORS. Respondents
Through: Sh. Neeraj Chaudhari, Advocate, for
UOI.

+ **W.P. (CRL) 248/2012**

SHRI JAMAL SEIKH @ JAMALUDDIN Petitioner
Through: Sh. Kunal Chatterji and Ms. Maitreya
Banerjee, Advocates.
Versus

UOI & ORS. Respondents
Through: Sh. Neeraj Chaudhari, Advocate, for
UOI.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. This judgment will dispose of challenges to two Detention Orders issued by the Central Government whereby Nikhil Mondal @ Tapan [the petitioner in W.P. (Crl) 247/2012] and Jamal Seikh [petitioner in W.P. (Crl) 248/2012] were placed under preventive detention in exercise of the powers

conferred upon the Central Government under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereafter referred to as “COFEPOSA”). These detention orders were served upon Nikhil Mondal @ Tapan on 06.06.2011 and on Jamal Seikh on 07.06.2011. They were confirmed by separate orders dated 23.08.2011 which were passed after the Advisory Board furnished its report to the Central Government.

2. Based on the information and intelligence received by the Directorate of Revenue Intelligence, Kolkata Zonal Unit (hereafter referred to as the “DRI”), that a huge quantity of Fake Indian Currency Notes (hereafter referred to as “FICN”) had been smuggled to India from Bangladesh, to be delivered at Patna in a train on 29.10.2010, the officers of the DRI, Kolkata and Berhampore went to Dhulian Ganga Railway Station. Surveillance was kept on the passengers. It was alleged that three suspects, i.e. Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen were carrying bags containing the FICN. Upon being nabbed they stated that these were to be delivered to someone in Patna who was representing their principal in Nepal. It was also revealed that the plan was to circulate FICN within the country. It was alleged that upon search, two bags containing currency notes in the denominations of ₹500 and ₹1000 were found, and that these notes were believed to be fake. These totalled to ₹ 27,95,500/-. A *Panchnama* to that effect was drawn on 30.10.2010. Import of fake currency is prohibited by the Notification dated 13.04.1999 under Section 11 of the Customs Act which is also liable for confiscation, under

Section 111, in terms of the Notification dated 13.05.2008. Upon opinion being sought, it was revealed that the notes seized were in fact FICN.

3. It was alleged that all the three suspects made statements which were recorded under Section 108 of the Customs Act, 1962 in terms of which it was revealed that Mohd. Sakir Mian was working under instructions of Nikhil Mondal @ Tapan and Jamal Seikh, the present petitioners. They used to arrange for smuggling of FICNs into India and were also associated with one Kamal of Bangladesh. Nikhil Mondal @ Tapan, it was alleged, used to keep the FICNs in his house and other hide-outs. It was revealed that on 10/11.10.2010, Mohd. Sakir Mian, with the petitioners, went to Patna to meet someone who had come-down from Nepal and worked out a plan for smuggling FICN from Nepal to India via Patna. Mohd. Sakir Mian had never seen that person before, who was perhaps related to the present writ petitioner. On 22.10.2010, Mohd. Sakir Mian and Jamal Seikh went to Patna to deliver ₹20 lakhs to a messenger who was from Nepal. It was alleged that Jamal Seikh contacted the individual from his mobile no. 8145872331. Mohd. Sakir Mian also stated that he was entrusted by Nikhil Mondal @ Tapan to hand-over to the other two detenus, bags containing FICNs, which were ultimately the subject matter of the seizures made. Mohd. Sakir Mian had been arrested by P.S. Kaliachack sometime ago and was bailed-out in September 2010. It was alleged that Nikhil Mondal @ Tapan was nabbed on 30.10.2010 from his house on the basis of information derived from the statements of three individuals, and his statement under Section 108 Customs Act was recorded in which he confessed to having engaged the three for the purpose of carrying FICNs from Dhulian Ganga Railway

Station to Patna. He also stated that Jamal Seikh had arranged for procuring FICNs from one Kamal of Bangladesh. He revealed that he was involved in smuggling FICNs for quite a while and had been arrested by the police for the same offence. He also admitted that on 25/26.09.2010, he went to Jogbani with the FICNs and delivered it to someone from Nepal and that a few days later, he engaged two people for transporting FICNs worth ₹19.86 lakhs. He admitted that on 12.10.2010, he went to Patna with Jamal Seikh and Mohd. Sakir Mian for exploring new modes of smuggling by avoiding the New Farakka Railway Station. There, they chalked-out the future course of action. He admitted further to being arrested by the police of P.S. Paisnab Nagar in connection with the circulation of FICN worth ₹7 lakhs previously, in Case No. 13/2007, registered on 07.02.2007 and was wanted in another case in P.S. Jamnagar City Division, being Case No. 48/2003. It was alleged that on the basis of Nikhil Mondal's statement, Jamal Seikh's house was searched and a railway ticket dated 12.10.2010 for the journey from Patna to New Farakka Railway Station was recovered, which corroborated Nikhil Mondal's statement as well as that of Mohd. Sakir Mian. The three individuals who had been previously arrested— Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen, as well as Nikhil Mondal were detained under Section 104 Customs Act for offence punishable under Section 135 and produced before the Chief Judicial Magistrate and remanded to judicial custody. It was alleged in the grounds of detention that the facts revealed by Nikhil Mondal in his statement, as well as the recoveries made from others and the details gathered on the basis of mobile phone statements subsequently secured from the service providers revealed that he was a habitual offender involved in the distribution of

FICNs which adversely affected the economy of the country. The Detention Order in respect of Jamal Sheikh narrated the same facts. It also relied upon the statements made by Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen under Section 108 as well as statement of Nikhil Mondal. Besides this, all particulars and details furnished by various service providers were listed. These made-out the different calls allegedly made by Jamal Sheikh to all the other three and the calls made by them to him at various points of time, corroborating the link he had with them. In his case also, the detention authority was of the opinion that his activities were prejudicial to the economy of the country as import of FICN was deleterious.

4. The Advisory Board in this case, upon a reference, had issued notice to the detenus. Apparently, the other three individuals – Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen, were also issued Detention Orders on 04.05.2011 and 05.05.2011. They and the present petitioners were afforded an opportunity of being heard by the Advisory Board through their notice dated 12.07.2011. After considering these, the Advisory Board apparently recommended the confirmation of the Detention Orders which had been served earlier upon the writ petitioners on 06.06.2011 and 07.06.2011. It was in these circumstances on 23.08.2011, the order confirming their detention was made, in terms of Section 8 (f) of the COFEPOSA, was issued. It was submitted on behalf of the petitioners that the detaining authority acted casually in issuing the impugned order which is liable to be set-aside. Elaborating the contention, learned counsel urged that at best, the petitioners were suspects who could have been and are being

dealt as alleged offenders under the Customs Act and other provisions of law. They were arrested and have been made to stand trial. This circumstance alone was insufficient for the Government to exercise the exceptional power to detain them.

5. It was argued by learned counsel that the detention order betrays complete non-application of mind, and the so-called “satisfaction” recorded by the detaining authority cannot be treated as one under law. It was urged that the incident was one where neither of the petitioners were arrested; their entire involvement in the FICNs racket and recovery were highly suspect and dependent on the confessional or involuntary statement recorded by the three detenus, who were arrested earlier in 2010. It was submitted that the only allegation against Jamal Seikh was the alleged conversations between him and the other detenus, which too is subject to enquiries and trial in the proceedings pending against them. By directing the preventive detention under COFEPOSA, the petitioners were in fact being punished even before the conclusion of trial on vague allegations which had no basis.

6. Learned counsel relied upon the decision of the Supreme Court reported as *UOI v. Paul Manickam & Ors.* 2003 (8) SCC 342 to say that since the petitioners had been arrested and in all likelihood would have been granted bail, the Central Government acted with malice in invoking its powers under COFEPOSA to continue detaining them. Learned counsel also relied upon the judgment reported as *Yumman Ongbi Lembi Leima v. State of Manipur & Ors.* [Crl.A. 26/2012 decided on 04.01.2012] and submitted that the extra-ordinary power to issue detention orders under COFEPOSA has to be justified in each case by existence of exceptional circumstances.

Neither the likelihood of the detenu being released on bail in a pending case or cases, nor other considerations which are bound to be taken into account in the pending trial would be sufficient for the detaining authority to issue an order of preventive detention. It is only when there are some special or extra-ordinary facts which compel the State to keep the individual in question under preventive detention that would there be a justification for invasion of the right enshrined under Article 21 of the Constitution of India.

7. Learned counsel for the respondents justified the order of detention. It was urged that the material gathered at the time of detention of the three individuals, i.e. Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen in the form of FICN, the statements recorded by them, the searches carried at the house of Nikhil Mondal @ Tapan, confessional statements recorded by him and the other objective material gathered in the form of call details and particulars gathered from the telephonic service providers in respect of the mobile phones of all the detenus established that they were linked together in the smuggling of FICNs. In the case of Nikhil Mondal @ Tapan, a confessional statement had been made after his arrest; it was only on 16.11.2011, i.e. after the confirmation of the detention order that he chose to retract the confession. Such a retraction could not be considered binding and was an after-thought. Reliance was placed on the judgment of the Supreme Court in *Surjeet Singh Chhabra v. Union of India* 1997 (89) ELT 646 (S.C.). It was also submitted that even in terms of Section 108 of the Customs Act, the statement is binding and can be treated as substantive evidence as against the maker and others.

8. Learned counsel urged that the mere fact that some or one of the detenus is facing prosecution is by itself not a constraint on the power of the detaining authority under COFEPOSA; that it is free to issue Detention Orders if the facts of the case so warrant. It was submitted that the confessional statement of Nikhil Mondal @ Tapan and the materials gathered in the course of enquiry after such statements were compelling pointers to the deep involvement of both the petitioners in the FICNs smuggling racket. The petitioners were involved in several other cases and in some, were facing prosecution. Having regard to these, the satisfaction recorded by the detaining authority *vis-à-vis* the need to pass Detention Order, cannot be interfered with or termed arbitrary.

9. It is evident from the above discussion that the Detention Orders in this case were made in May 2011; they were served upon both the writ petitioners on 06.06.2011 and 07.06.2011 when they were in the custody of the police. The Detention Orders mentioned about the arrest of three other individuals were made in October 2010. At that time, apparently more than ₹ 27,95,500/- were recovered during an operation in Dhulia Ganga Railway Station.

10. The statement of the detenu – Nikhil Mondal @ Tapan who was nabbed or arrested on 30.11.2010, was recorded under Section 108 of the Customs Act the same day. According to the statement, three individuals had been tasked by him to deliver the notes. He also named two other incidents involving smuggling of ₹ 9.86 lakhs from Bangladesh by Jamal Seikh and another of ₹ 20 lakhs on 22.10.2010 again involving Jamal Seikh. His statement, however, revealed existence of two previous cases. Identical

allegations were leveled against Jamal Seikh in the grounds of detention served upon him along with the order issued in May 2011, served upon him on 07.06.2011. The decision in *Haradhan Saha v. The State of West Bengal & Ors.* 1975 (3) SCC 198 by the Constitution Bench of the Supreme Court clarifies that the power to issue preventive detention order is not circumscribed by the existence of a prosecution arising-out of an incident(s) involving the detenu. Ultimately what is necessary is that there should be objective material for the detaining authority to arrive at the satisfaction that the preventive detention order is necessary in terms of the governing statute. In this case, there is no dispute that the incident alleged in this case was that of the seizure of ₹ 27,95,500/- FICNs at Dhulian Ganga Railway Station from three named individuals - Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen.

11. Other two detenus were served with Detention Order as records of this case would reveal. The statements of these detenus led to the search and arrest of Nikhil Mondal @ Tapan. He implicated Jamal Seikh, the co-accused detenu writ petitioner. The collective material put against these two individuals is their alleged involvement not only in the FICNs recovery made in end-October 2010 but also their alleged involvement in other previous contemporaneous incidents, involving dealings in FICNs. Thus, for instance, Nikhil Mondal @ Tapan spoke in his statement under Section 108 of the Customs Act, of other transactions which had been either directed by or to which Jamal Seikh was a privy, involving more than ₹19 lakhs, ₹20 lakhs and ₹7 lakhs. Details of criminal cases pending on similar allegations were also revealed. The detaining authority further relied upon the mobile

call details of the two writ petitioners as well as three individuals who were arrested in October 2010.

12. This Court has carefully considered the submissions made on behalf of the petitioners. The decisions in *Yumman Ongbi Lembi Leima (supra)* as well as in *Paul Manickam (supra)* are clear that detaining authorities should not exercise their powers casually and should apply their minds. Trivial allegations or isolated incidents should not ordinarily result in preventive detention orders. The detaining authority, however, in each case has to be satisfied that the material before it is of such nature that the normal law of the land would be insufficient to deal with him, and that the propensity of the individual to indulge in the objectionable behavior is such that he ought to be detained in the exercise of the extra-ordinary powers which the preventive detention laws enact. In *Rekha v. State of Tamil Nadu through Sec. to Govt.* 2011 (4) SCC 260, this aspect had been highlighted by the Supreme Court which deplored the tendency of the detaining authorities to issue preventive detention orders without specific allegations which could lead to the conclusion that the individual, if left free, would indulge in similar objectionable behavior.

13. Long back, in *Haradhan Saha (supra)*, the Supreme Court had highlighted that a preventive detention order cannot be characterized as illegal or in abuse of or in excess of powers conferred by the Statute merely because on the same incident, the prosecution for a crime is pending consideration. The Court emphasized that having regard to the special value attached to personal liberty, in every case where the executive authority chooses to invoke its power and pass order of preventive detention, the

Court has to be satisfied that there were objective materials on which the detaining authority had applied its mind and based its subjective satisfaction.

14. In the present case, the seizure of ₹27,95,500/- triggered an investigation in the course of which two individuals - Nikhil Mondal @ Tapan and Mohd. Sakir Mian were arrested. The arrest of the former earlier led to the confessional statement being recorded in November 2010. Significantly, Nikhil Mondal did not retract from this confessional statement initially but did so only in end-November 2011. The argument on behalf of Jamal Seikh that besides the statement of Nikhil Mondal @ Tapan, which implicates him, and the statements of the other detenus, there is no objective material justifying the detention order, is not correct. Firstly, the statement under Section 108 of the Customs Act is admissible in law. It in any event constitutes materials that can be legitimately seen and taken into account by the detaining authorities. So far as the other materials are concerned, both statements by Nikhil Mondal @ Tapan's reveal that he and Jamal Seikh were involved in at least three other incidents. Their identities were also known by Mohd. Sakir Mian, Santhi Basak @ Geeta Sen and Tumpa Basak (Goswami) @ Tumpa Sen. The statements of some of them also corroborate the statement of Nikhil Mondal @ Tapan. Furthermore, all the five individuals possessed mobile phones which were seized at the time of their arrest. The mobile call particulars made available to the detaining authority reveal that the present writ petitioners were in touch with each other continuously as well as at the relevant time and also were in touch with other co-detenus. No doubt, both the writ petitioners are facing prosecution for violation of provisions of Customs Act but at the same time this Court is

alive to the circumstance that the detenu are facing trial and are named as accused in two other FIRs. Added to this is the fact that in two other instances, the writ petitioners have been made accused of smuggling FICNs. If these incidents were the only one, the argument on behalf of the writ petitioners could, to some extent, might have been justified. However, the involvement of these petitioners in other transactions and their involvement in at least two other criminal cases on identical allegations were considered to be sufficient by the detaining authority to confirm their detention on the basis that they had the propensity to indulge in the same proscribed behavior.

15. Having regard to the overall conspectus of the facts of this case, we are of the opinion that the statement of Nikhil Mondal @ Tapan, the *prima facie* corroboration of that statement through the mobile call particulars mentioned in the grounds of detention, the involvement of detenus in other cases and their prosecution in some of them were reasonable basis for the issuance of impugned preventive detention order. As a result, the Court does not find any merit in these petitions. They are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

MAY 18, 2012