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

% *Judgment delivered on: 21st January, 2020*

\+ **W.P.(CRL) 2317/2019**

MOHAMMAD SEDDIQ YOUSUFI …Petitioner

Through: Mr. Shubhankar Jha, Mr. Vishrut Raj and Mr. Sanjeev Malik, Advocates.

versus

1. UNION OF INDIA THROUGH SECRETARY, MINISTRY OF FINANCE DEPARTMENT OF REVENUE, NORTH BLOCK, NEW DELHI.
2. JOINT SECRETARY (COFEPOSA) MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, 6TH FLOOR JANPATH BHAWAN, JANPATH, NEW DELHI ... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr. Dhruv Pande, Advocate for R-1, R-2.

CORAM:
JUSTICE SIDDHARTH MRIDUL
JUSTICE I.S.MEHTA

JUDGMENT

I.S. Mehta, J.:

1. The present writ petition under Section 226 of Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 essentially in the nature of writ of habeas corpus, has been initiated by the petitioner Mohammad Seddiq Yousufi (hereinafter referred to as 'the detenus'), seeking quashing and setting aside of the impugned

detention order bearing F.NO. PD-12002/19/2010-COFEPOSA dated 13.12.2018 passed under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as 'COFEPOSA Act') issued against him.

2. The brief facts stated are that on 13.06.2018, the Air Intelligence Unit (AIU) of Cochin International Airport Ltd (CIAL), Nedumbassery received an information from CIAL screening staff, who were engaged in screening of checked-in baggage for departure, that they have identified a suspicious baggage. The baggage belonged to the detenu, Mohammad Seddiq Yousufi, an Afghan national. He was travelling from Kochi to Dubai in Emirates Flight No. EK 533. He was issued a boarding pass allocating seat No.11A alongwith checked-in baggage tag bearing No.EK28548. In presence of witnesses and detenu, one checked-in bag was examined and found to contain foreign currencies i.e. US Dollars and Saudi Arabian Riyals which were found concealed inside one sky-blue coloured electric rice cooker of make "Red cherry", one electric coil stove of make "Polomix G Coil Hot Plate" and 6 nos. of readymade shirts. On counting inventory, it was found he was carrying USD 14,18,650/- and Saudi Riyals 8,99,500/-. Total Foreign Currency was equivalent to INR 10,94,05,047.50/- (Rupees Ten crores ninety-four lakhs five thousand forty-seven rupees and fifty paisa only). On his personal search, he was found having INR 13,360/-, USD 200/-, UAE Dirham 190/- and Afghani currency 3,680/-. It was personal money of the detenu and according to department, same was returned. In absence of any document to prove acquisition and possession of said foreign

currency, same were seized on reasonable belief that those were liable for confiscation under provisions of Customs Act, 1962 read with provisions of Foreign Exchange Management Act, 1999. Packing materials were also seized as same were liable for confiscation under Section 119 of the Customs Act, 1962.

3. Statement of detenu was recorded on 14.06.2018 under Section 108 of Customs Act, 1962. Statement of detenu was recorded by Shri. Sunil Kumar, Inspector of Customs in presence of an independent witness as he could not write any language. According to detenu, currency was given to him by one Barullah Khan, who has money exchange shop located at 3 minutes distance from Durga Mandir. On receiving money from Barullah Khan, he packed same inside the bag alongwith clothes. He was asked to hand over same to a person at Dubai, who would contact him on reaching Dubai. He had met Barullah Khan 3 months back when he sold smuggled cigarettes. He further submitted that Barullah Khan was introduced to him by a person named Hamidullah who is a smuggler friend from Afghanistan. The detenu was arrested on 14.06.2018 under Section 104 of Customs Act, 1962 for having committed offence punishable under Section 135 of Customs Act, 1962. He was produced before Additional Chief Judicial Magistrate (Economic Offence), Ernakulam and was remanded to judicial custody for period of 14 days upto 28.06.2018 and his arrest was communicated to Afghanistan Embassy on 15.06.2018. Subscriber of mobile number used by detenu was found to be Bacha Khan, a citizen of Afghanistan. Information received from External Affairs Ministry indicated that initially detenu

was given tourist visa and later he was issued business visa. Travel documents perused by department and materials collected indicate detenu purchased ticket on 05.06.2018 for travelling from Dubai to Delhi on 06.06.2018 and from Delhi to Dubai on 12.06.2018 on payment of USD 330 by cash. On 12.06.2018, ticket for Delhi to Dubai was upgraded to Business Class by paying USD 414. All ticketing is done by cash at Kabul through travel agency by name GSA Kabul Air India.

4. Three mobile phones were seized from detenu, on its analysis at CDAC, Thiruvananthapuram, some video clips indicated his earlier involvement in smuggling activities and his association with two suspects viz., Azmuddin Nazamuddin and Khair Mohammad Akhtari. On 17.03.2018, he was found travelling in AI 933 to Dubai and on arrival at Dubai, he was seen going in a car with Azmuddin Nazamuddin; another video clip showed detenu alongwith Azmuddin Nazamuddin in a room; another clip showed Azmuddin Nazamuddin was counting bundles of US Dollars.

5. On 28.06.2018, department was permitted to have custody of detenu for two days as per order by Additional Chief Judicial Magistrate (Economic Offence), Ernakulam. His statement was recorded under Section 108 of Customs Act on 29.06.2018. According to him, whatever he had deposed on 14.06.2018 was true to best of his knowledge. Thereafter, he was produced before Additional Chief judicial Magistrate (Economic Offence), Ernakulam on 30.06.2018 and was remanded to judicial custody. His bail application which was filed on 06.07.2018 was rejected as per order dated 16.07.2018.

Competent authority issued detention order dated 18.07.2018 under COFEPOSA Act, 1974. Subsequently, detention order was executed on 21.07.2018.

6. The Central Advisory Board heard case of detention of the detenu on 21.09.2018 at Thiruvananthapuram. Detention order was revoked on advice of Central Advisory Board since sufficient grounds for detention was not made out, same was communicated to detenu as per order dated 27.09.2018 issued by Ministry of Finance. In light of revocation order, detenu could not be released from prison as he was remanded by virtue of order passed by Additional Chief Judicial Magistrate (Economic Offence) Court, Ernakulam.

7. With permission of jail authorities, statement of detenu was taken under Section 108 of Customs Act on 22.09.2018 at Central Prison, Thiruvananthapuram. On scrutiny of his passport, it was noticed that detenu had arrived at Delhi on 11 occasions since 05.12.2017 until 13.06.2018. Another photograph received from mobile phone of detenu showed an invoice pertaining to exchange of US Dollars and Saudi Arabian Riyals to UAE Dirhams worth 36,97,093.25/- by one Abdul Latif Jamshedi and purpose of exchange was shown as buying gold. Invoice dated 18.03.2018 was issued by Orient Exchange Company (LLC), they were requested to furnish details of foreign exchange transacted by detenu, Azmuddin Nazamuddin, Khair Mohammad Akhtar and Abdul Latif Jamshedi through overseas branches. The Orient Exchange and Financial Service Pvt. Ltd. by letter dated 04.10.2018 provided currency exchange details done through their sister concern M/s. Orient

Exchange Company (LLC), Dubai. As per details furnished by them, detenu had purchased AED 36,97,970.50/- on 17.03.2018 by selling USD 7,52,920/-, Saudi Riyal 8,00,000/- and Sterling Pound 30,000/-. As per cash declaration document issued by Dubai Customs and submitted by the detenu at M/s Orient Exchange Company (LLC), currency was taken by the detenu from New Delhi on 17.03.2018 while travelling to Dubai by Air India Flight AI 933. Currency declarations issued by Dubai Customs would show detenu and his associates Khair Mohammed Akhtari and Abdul Latif Jamshedi had smuggled foreign currency from India. All of them shown their address at Dubai as 302, Abdullah Building. Declaration given by detenu to Dubai Customs on 17.03.2018 would show he was travelling from Delhi and he had declared foreign currency equivalent to AED 36,85,950.90/-. In order to unearth the modus operandi of organised smuggling of foreign currency and to identify key persons behind the racket, Commissioner of Customs, Cochin vide letter dated 12.11.2018 requested DRI, Delhi to further investigate the matter. In the meantime, on 01.10.2018, remand warrant was extended by ACJM (Economic Offence), Ernakulam till 14.10.2018. Detenu, however, was granted bail on 05.10.2018 on certain conditions including surrender of his passport and that he shall not leave India without prior permission of the Court. A show cause notice dated 05.10.2018 had been issued to detenu under Section 124 of Customs Act, 1962 proposing confiscation of foreign currency valued at INR 10,94,05,047.50/- under Section 113(d), (e) and (h) of Customs Act, 1962 read with provisions of Foreign Exchange Management Act

1999 and Regulations 5 and 7 of Foreign Exchange Management (Export and Import of Currency) Regulations Act, 2015 and penalty to be imposed under Section 114 of Customs Act. According to department, detenu had not replied to it so far. Complaint to prosecute the detenu under Section 135 of Customs Act had been filed by Assistant Commissioner of Customs, Kochi on 26.10.2018. He had also requested to release his passport as he did not have any other identity. According to department, further investigation conducted indicates that detenu is part of an international racket actively engaged in smuggling of foreign currency. It is stated that the currency declaration issued by Dubai Customs on his arrival from India on 17.03.2018 is an explicit evidence that he had been smuggling currency on earlier occasions. Therefore, according to department, seizing foreign currency on 14.06.2018 is not a single incident as he was engaged in currency smuggling during his earlier visits also.

8. Consequently, impugned detention order dated 13.12.2018 was issued. As per detenu he was served with detention order on 24.01.2019 and he made representation before the Central Advisory Board on 13.03.2019. Central Advisory Board rejected the representation on 28.03.2019.

9. Aggrieved from impugned Detention Order and conformation of same dated 28.03.2019, detenu filed present petition on 14.08.2019 on following grounds:

i. No cause of action against the present detenu till date has arisen in presence of the earlier detention order dated 18.07.2018. The earlier detention order was revoked as no sufficient grounds for detention was made out before Central Advisory Board. The subsequent detention order dated 13.12.2018 is based on same facts and circumstances, therefore, same is bad in Law.

ii. The facts of the earlier detention order dated 18.07.2018 and subsequent detention order dated 13.12.2018 is identical in nature, therefore, once the Central Advisory Board on an earlier occasion did not find sufficient grounds to detain the detenu and the Government itself revoked the order under Section 11(1) of COFEPOSA Act, the subsequent detention order dated 13.12.2018 is bad in Law and he relied upon ***Amritlal Shah & etc. v. State of Maharashtra & Ors.*** 1986 SCC Online Bom 342 and ***Ibrahim Bachu Bafan v. State of Gujarat & Ors.*** (1985) 2 SCC 24.

iii. The detenu was not given opportunity of being heard in person with the change of Advisory Board, the right of detenu under COFEPOSA Act has been jeopardised and his representation neither been forwarded/called for nor was considered by any authority. He relied upon ***Smt. Gracy v. State of Kerala & Anr.*** (1991) 2 SCC 1 and ***Pebam Ningol Mikol Devi v. State of Manipur & Ors.*** (2010 9 SCC 618.

iv. The passport of the detenu is already seized and is with the Customs Authority, therefore, detenu's indulgence in any pre-judicial activities is no basis. He relied on ***Moulana Shamshunnisa & Ors. v. Addl. Chief Secretary*** (2010) 15 SCC 72.

10. Ld. counsel on behalf of detenu, Mr. Shubhankar Jha has submitted that detention order dated 13.12.2018 is bad in Law as same does not give any cause of action to detain the detenu. The Ld. Counsel further submitted that no sufficient ground is found to detain the detenu vide confirmation order of Central Advisory Board dated 28.03.2019. Subsequent detention order is based on same facts and circumstances, therefore, instant detention order is bad in Law.

11. The Ld. counsel on behalf of detenu has pointed out that since detenu's passport has already been seized and same is in possession of Custom's Authority, therefore, question of detenu joining the prejudicial activities does not arise at all and detention order becomes bad in law. He relied upon ***Amritlal*** *(Supra)*, ***Ibrahim*** *(Supra)*, ***Smt. Gracy*** *(Supra)*, ***Pebam Ningol*** *(Supra), and* ***Moulana*** *(Supra)* in his written arguments.

12. Per contra, Amit Mahajan, Central Govt. Standing Counsel, has submitted that before passing detention order, investigation was carried out by authorities and found detenu being involved in various smuggling activities of foreign currency and further submitted that detenu was found involved on 11 occasions of said activities. His involvement is based on cogent evidence, made available to the authorities and it is on this basis, authorities after subjective satisfaction that detenu could be indulging in prejudicial smuggling activities etc. in near future passed said detention order and present writ is without merit. He relied on Judgment in ***UOI & Anr. v. Dimple Happy Dhakad*** 2019 SCC OnLine SC 875.

13. The facts on record indicates that detenu was earlier detained vide detention order dated 18.07.2018 which subsequently was revoked on 27.09.2018 on advice of Central Advisory Board as there were no sufficient grounds to detain him.

14. It is the allegation of the respondent department after revocation of detention order, it came into notice of authorities with cogent evidence that detenu is involved in smuggling of different foreign currencies in considerable magnitude and in well planned manner, which has been clandestinely organized and carried out. The statement of detenu that he used to smuggle around 300 cartons of cigarettes from Dubai/Kabul on his arrivals has no reasonable explanation for his 11 visits other than cigarette smuggling. Detenu's visit only for smuggling cigarette does not appear to be true as expense for visits do not tally with profit he makes by smuggling 300 cartons of cigarettes. His visits to Dubai on Business Class tickets otherwise is not profitable to him unless he is involved in smuggling activities of foreign currency. 300 cartons of cigarette does not fetch good profit to him. **The video footage of detenu's arrival at Delhi, travelling details of detenu, Azmuddin Nazmuddin and Khair Mohammad Akhtari and photographs of said persons, point that he is part of a well-organized racket which is engaged in smuggling of foreign currency in high magnitude.**

15. The contention of the Ld. counsel for detenu that facts of earlier detention order dated 18.07.2018 and facts of present detention order dated 13.12.2018 is identical and same is without jurisdiction loses its significance

as the instant detention order is based on fresh investigation carried out by the department which pertains to *modus operandi* of detenu's travel between Delhi and Dubai 11 times in six months i.e. from 05.12.2017 to 14.06.2018. Moreover, there is no finding whether facts in earlier detention order dated 18.07.2018 is identical to instant detention order, either party earlier had not approached the High Court under Article 226 of Constitution of India, therefore, revocation of earlier detention order does not *ipso facto* bars passing the fresh detention order against the detenu. It is apparent from page No. 49 of present petition filed by detenu that detention order passed against the present detenu is on the basis of subsequent investigation carried out by authorities and on subjective satisfaction arrived at.

16. The contention of the Ld. counsel for detenu that representation has not been considered by the Advisory Board loses its significance as petitioner himself mentioned that the representation was sent to Delhi whereas Advisory Board was in Kerala.

Moreover, in the hearing on 28.03.2019 before the Advisory Board, the detenu alongwith his counsel was present. **Once the detenu himself alongwith his counsel was present before the Advisory Board and Advisory Board concluded the proceedings without detenu raising any such objection before them, the subsequent plea of ineffective representation evidently is an afterthought and is not available to the detenu.**

17. The contention of the Ld. counsel for detenu that impugned detention order is bad as passport of the detenu is already seized by Customs Authority and same is in their possession, and as such, there

is no opportunity/occasion avialable to the detenu to travel aboard or engage in prejudicial activities, is without merit.

The Apex Court in ***UOI v. Ankit Ashok Jalan*** 2019 SCC OnLine SC 1498 has laid down the following guidelines:

Even if a person is in judicial custody, he can be put on detention provided there must be an application of mind by the detaining authority.

> *i. The order of detention validly can be passed against a person in custody and for that purpose it is necessary that the grounds of detention must show whether the detaining authority was aware of the fact that the detenu was already in custody.*
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> *ii. The detaining authority must be further satisfied that the detenu is likely to be released from custody and the nature of activities of the detenu indicate that if he is released, he is likely to indulge in such prejudicial activities and therefore, it is necessary to detain him in order to prevent him from engaging in such activities.*
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> *iii. The satisfaction of the detaining authority that the detenu is already in custody and is likely to be released on bail and on being released, he is likely to indulge in the same prejudicial activities with the subjective satisfaction of the detaining authority.*

18. In the instant case, authorities after investigation and on evaluation of the evidences i.e.

i. His 11 visits between Delhi and Dubai as per his passport;

ii. Video clippings from detenu's mobile showing his involvement in smuggling of foreign currency with help of certain other persons;

iii. Materials produced by Orient Exchange Company (LLC) showing declaration by detenu for his dealing in foreign exchange.

was **subjectively satisfied that detenu is engaging himself in smuggling of foreign currency** and if he is released on bail, there is every likelihood of his indulgence in prejudicial activities, therefore, it was necessary to detain him in order to prevent him from engaging in **such activities**.

19. The judgment relied upon by the Ld. counsel for detenu is misplaced.

20. Thus, in light of discussion made above we find no merit in the present writ petition, same is dismissed. No order as to costs.

I.S.MEHTA
(JUDGE)

SIDDHARTH MRIDUL
(JUDGE)

JANUARY 21, 2020