GIMIK PIOTR

v.

STATE OF TAMIL NADU AND ANR.

(Criminal Appeal No. 2121 of 2009)

NOVEMBER 13, 2009

[DALVEER BHANDARI AND H.L. DATTU, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – s. 3 (1)(i) – Detenu trying to smuggle foreign currency outside the country – Detention order u/s. 3 (1)(i) – Passport also impounded – Challenge to – Held: In matters of personal liberty, standard of proof needs to be high to justify order of preventive detention – Material provided by State not enough to justify curtailment of liberty of appellant under order of preventive detention – Foreign currency cannot be smuggled as person cannot move out of the country on account of his passport being impounded – Thus, detention order not sustainable – Order of High Court set aside.

Appellant-polish citizen, tried to smuggle foreign currency outside the country. The said currency was seized. The detention order was passed u/s. 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 to prevent him from smuggling goods in future. His passport was also impounded. Appellant challenged the detention order. High Court upheld the detention order.

The question which arose for consideration in this appeal are whether the respondent-State can prove satisfactorily that there is propensity and potentiality of the appellant-detenu to engage in smuggling activities in the future, if set free; and whether the impounding of the passport of the appellant so as to prevent him from leaving the country will suffice in satisfying the object sought to be achieved by passing the detention order.

A Allowing the appeal, the Court

HELD: 1.1. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is enacted to curb the thriving smuggling business of foreign currencies, antiques and other valuable items from India B to its neighbouring countries. From the objects and reasons of the Act, the purpose of the Act is to prevent violation of foreign exchange regulations or smuggling activities which are having increasingly deleterious effect on the national economy and thereby serious effect on the C security of the State. The justification for passing the order of detention is suspicion or reasonable probability of the person sought to be detained to prevent him in carrying on smuggling activities in the future. The potentiality or propensity of the person to engage in future prejudicial activities needs to be proved. [Paras 19 and 21] [899-F-G; D 900-D-E]

Union of India vs. Paul Manickam AIR 2003 SC 4622 – referred to.

1.2. Even a single solitary act can prove the propensity E and potentiality of the detenu to carry on with similar smuggling activities in future. The mere fact that on one occasion person smuggled goods into the country may constitute a legitimate basis for detaining a person under COFEPOSA. For this purpose, the antecedents of the person, facts and circumstances of the case needs to be F taken into consideration. In the instant case, the respondents seek to rely extensively on the confession statement made by the detenu, where he had admitted to be carrying the foreign currency in return for monetary consideration. It cannot be said that the confession made G by the appellant proves that, the appellant is a part of a smuggling ring and hence his detention is warranted under the provisions of COFEPOSA. In the statement made before the customs authorities, the appellant has only narrated his antecedents, the nature of business carried on by him while he was in Singapore and how he was H

induced to carry the foreign currency by a person who has business dealings in Singapore. In the statement so made, he has not even suggested that he had indulged himself in foreign currency smuggling activities earlier. It is not the case of the respondents that if he is not detained, he would indulge himself in foreign currency smuggling activities and it is their specific case that he may abet the smuggling activity. [Para 24] [902-C-G]

Pooja Batra vs. Union of India **(2009) 5 SCC 296;** *Gurdev Singh v. Union of India* **(2002) 1 SCC 545, relied on.**

1.3. During the course of the hearing, the counsel for the State, submitted that the mere retention of the passport of the detenu, will not be enough, as the preventive detention order has been passed so as to prevent him from abetting the smuggling of goods by staying in the country. This was argued before the High Court. The High Court accepted this as a satisfactory answer to justify the passing of a preventive detention order. If that be the position, the order of preventive detention could have been passed u/s. 3(1) (ii) of COFEPOSA, as it authorizes the State Government to pass a preventive detention order to preventing him from abetting smuggling of goods. The argument advanced by the respondents is devoid of any logic. In the instant case, the detention order is passed u/s. 3(1)(i) of COFEPOSA. The customs department has retained the passport of the detenu. The likelihood of the appellant indulging in smuggling activities was effectively foreclosed. [Paras 26 and 27] [903-G-H; 904-A-C-E]

Ibrahim Shareef M. Madhafushi vs. Union of India and Ors. **(1992) 1 SCC 1, referred to.**

Sitthi Zuraina Begum vs. Union of India and Ors. **(2002) 10 SCC 448, Distinguished.**

1.4. There was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as person cannot move out of the country on account of his passport being

impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention, in the fact and circumstances of the case. Thus, reasons are recorded for directing the release of the detenu. [Paras 30 and 31] [905-C-G]

Attorney General for India & Ors. vs. Amratlal Prajivandas & Ors. **1994 (5) SCC 54;** *Chowdarapu Raghunandan vs. State of Tamil Nadu* **2002 (3) SCC 754;** *KundanBhai Dhulabhai Shaikh Etc. vs. District Magistrate, Ahmedabad & Ors.* **1996 (3) SCC 194;** *Mahesh Kumar Chauhan @ Banti vs. Union of Indai* **1990 (3) SCC 148;** *Prabhu Dayal Deorah vs. Distt. Magistrate* **1974 (1) SCC 103;** *Rajesh Gulti vs. Government of Delhi and anr.*, **referred to.**

Case Law Reference :

1994 (5) SCC 54	**Referred to.**	**Para 11**
2002 (3) SCC 754	**Referred to.**	**Para 12**
1996 (3) SCC 194	**Referred to.**	**Para 13**
1990 (3) SCC 148	**Referred to.**	**Para 13**
1974 (1) SCC 103	**Referred to.**	**Para 13**
2002 (7) SCC 129	**Referred to.**	**Para 14**
AIR 2003 SC 4622	**Referred to.**	**Para 17**
(2009) 5 SCC 296	**Relied on.**	**Para 22**
(2002) 1 SCC 545	**Relied on.**	**Para 23**
(1992) 1 SCC 1	**Referred to.**	**Para 28**
(2002) 10 SCC 448	**Distinguished.**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2121 of 2009.

From the Judgment & Order dated 15.07.2009 of the High Court of Judicature at Madras in HCP No. 1874 of 2008.

K.K. Mani, Ankit Swarup, for the Appellant. A

R. Shanmugasundram, Promila, S. Thananjayn for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted. B

2. By our order dated 28.10.2009, we had ordered release of the detenu at once, subject to his custody being required in any other proceedings. We had not assigned reasons while doing so and we had observed that the detailed reasons will follow later. C

3. We now proceed to give reasons for allowing the appeal and for setting aside the decision of the High Court.

4. The appeal is directed against the order passed by the Madras High Court in HCP No. 1874 of 2008, dismissing the D petition filed by the appellant for grant of a Writ in the nature of habeas corpus, and thereby sustaining the order of detention passed by the detaining authority under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

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5. The appellant-detenu is a Polish citizen and having business in Singapore. He had come to India on earlier occasions for purchase of antiques and garments (Textiles). He came to India for such business on 5.9.2008 and he was due to return to Singapore on 7.9.2008 via Air India flight IC-557. F However in the Chennai International Airport, he was intercepted by the customs officers. The detenu stated, that, he was carrying 2300 Pounds and 400 US Dollars only. A search of his baggage revealed currency worth 15,500 Euros, 39,700 US Dollars, 16,200 British Pound and Rs. 30,000/-, adding to Rs. 40,72,878/- pasted to six sheaves of newspapers. The currency was seized G under a Mahazar for further action under Customs Act, 1962, read with Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, for trying to smuggle foreign currency outside the country. The detenu was produced before E.O. II Additional Chief Metropolitan Magistrate, H

A Madras on 8.9.2008, who passed an order remanding the appellant to judicial custody. The appellant filed two bail applications, one before the E.O. II Additional Chief Metropolitan Magistrate and another before the Court of Sessions. Both the applications are dismissed.

B 6. The wife of the detenu sent a representation dated 12.9.2008, to the Commissioner of Customs (Airport) Chennai, and the same was rejected as well.

7. The Government of Tamil Nadu (respondent no.1), with a view to prevent the appellant from smuggling goods in future, C passed detention order against the detenu under Section 3(1) (i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA) and kept him in custody in the Central Prison, Chennai. The detenu requested through a representation dated D 14.11.2008 to the Advisory Board to allow him to represent through a lawyer before the Advisory Board to effectively put forth his case. This plea was not considered by the Advisory Board. The detenu being aggrieved by the order of detention passed under the Act dated 04.11.2008 filed a writ petition before the High Court inter-alia questioning the said order on various E grounds.

8. The contention of the detenu-appellant before the High Court was that the detention order was passed against him on the basis of a single, solitary and isolated act of alleged F smuggling activity is unsustainable in law in the absence of any past antecedent and past prejudicial activities. Further the material on record is not suggestive of any potentiality or tendency on the part of the detenu for future smuggling activities. The appellant also contended that the passport of the appellant has been impounded and, therefore, there is no possibility of the G detenu moving outside the country for the purpose of smuggling. Hence the order of detention cannot be said to be in accordance of the law, as the same has been passed by non-application of the mind by the detaining authority.

9. The respondents resisted the challenge of the appellant

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on the ground that the appellant by his own admission brought the currencies from a foreign country for monetary consideration of $2000. Hence there is possibility of the appellant being engaged in similar activities if he is allowed to move out of the country. As far as retention of the passport by the customs department, the respondents contended that even if the appellant remains in the country, he may engage in abetment of smuggling activities. The nature of past antecedents and activities of the detenu indicate that he is likely to indulge in smuggling activities, if released and therefore, it is necessary to detain him in order to prevent him from engaging in such activities.

10. The High Court placing reliance on the observations made in the case of *Pooja Batra vs. Union of India,* [(2009) 5 SCC 296], has concluded, that, a single incident can prove the propensity and potentiality of the detenu to carry out smuggling activities in the future also. It has also observed that the statement of the appellant that he was smuggling foreign currency on the behest of other people for monetary consideration is another factor that requires to be taken note of to arrive at the conclusion that there was propensity and potentiality of the appellant to engage in future with his smuggling activities. The High Court is also of the view, that, if the appellant remains in India, there is possibility that he will be involved in abetment of smuggling activities. Accordingly, dismissed the writ petition. The decision of the High Court has been impugned before us.

11. The learned counsel for the appellant contended that the detaining authority based on single and solitary instance could not have passed an order of detention under the Act. It is submitted, that, for the purpose of passing detention order, the detaining authority need to show that the detenu is likely to resume the prejudicial activity if not detained. It is further contended that there was no compelling necessity to pass an order of preventive detention when the passport of the appellant is retained by the custom authorities. In aid of his submission, the learned counsel has relied on the observations made by this Court in the case of Attorney *General for India and Ors. vs. Amratlal Prajivandas and Others,* [(1994) 5 SCC 54], wherein

this Court has observed, that, in short, the principle appears to be, "Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.

12. Reference is also made to the decision of this Court in the case of *Chowdarapu Raghunandan vs. State of Tamil Nadu* (2002) 3 SCC 754, wherein it is stated, "that the past conduct of the petitioner is that he is an engineering graduate and at the relevant time he was the Managing Director of a public limited company. There is no other allegation that he was involved in any other anti-social activities. The only allegation is that he visited Singapore twice as a "tourist". Admittedly, the petitioner has filed bail application in a criminal prosecution for the alleged offence

narrating the fact that his so-called statement was not voluntary and was recorded under coercion. The baggages were not belonging to him and there were no tags on the same so as to connect him with the said baggages and the crime. At the time of hearing of this matter also, it is admitted that the baggages were without any tags. It is also an admitted fact that there is nothing on record to hold that the petitioner was involved in any smuggling activity. However, the learned Additional Solicitor-General submitted that in the statement recorded by the Customs Department the petitioner had admitted that previously he had visited Singapore twice as a "tourist", and, therefore, it can be inferred that the petitioner might have indulged and was likely to indulge in such activities. This submission is far-fetched and without any foundation. From the fact that a person had visited Singapore twice earlier as a "tourist", inference cannot be drawn that he was involved in smuggling activities or is likely to indulge in such activities in future. Hence, from the facts stated above it is totally unreasonable to arrive at a prognosis that the petitioner is likely to indulge in any such prejudicial activities".

13. This Court in the case of *Kundan Bhai Dhulabhai Shaikh Etc. vs. District Magistrate, Ahmedabad and Ors. Etc.* (1996) 3 SCC 194, has observed that Black marketing is a social evil. Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court, irrespective of enormity and gravity of allegations made against the detenu, has to intervene as was indicated in *Mahesh Kumar Chauhan's case,* [(1990) 3 SCC 148] and in an earlier decision in *Prabhu Dayal Deorah vs. Distt. Magistrate,* [(1974) 1 SCC 103] in which it was observed that the gravity of the evil to the community resulting from anti-social activities cannot furnish sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by law particularly as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial.

14. The counsel for the appellant also relies on the decision of this court in the case of *Rajesh Gulati vs. Government of NCT*

A *of Delhi and another* [(2002) 7 SCC 129], wherein it is held, that, once the customs department has seized the passport of the detenu, the possibility of detenu moving outside the country for the purpose of smuggling was effectively foreclosed, and therefore, there could be no question of detaining the detenu to prevent him from smuggling goods into India.

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15. The learned counsel for the State tried to justify the order passed by the detaining authority.

16. The two issues that require to be decided are:-

C (i) Whether the respondents can prove satisfactorily that there is propensity and potentiality of the appellant to engage in smuggling activities in the future, if set free?

(ii) Whether the impounding of the passport of the
D appellant so as to prevent him from leaving the country will suffice in satisfying the object sought to be achieved by passing the detention order?

17. Preventive detention is not punitive but a precautionary measure. The object is not to punish a person, but to intercept
E or prevent him from doing any illegal activity. Its purpose is to prevent a person from indulging in activities, such as smuggling and such other anti social activities as provided under the preventive detention law. This court in the case of *Union of India vs. Paul Manickam* (AIR 2003 SC 4622), stated the following:-

F "Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is
G resorted to when the Executive is convinced on the materials available and placed before it that such detention is necessary in order to prevent the person detained from acting in a matter prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only precautionary, the matter has necessarily

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to be left to the discretion of the Executive Authority." A

18. Preventive detention essentially deals with the curtailment of a person's liberty and is therefore a potential weapon for human rights abuses. In the US, some state statutes authorize preventative detention, where there is clear and convincing evidence that the defendant is a danger to another B person or to the community, and that no condition or combination of conditions of pretrial release can reasonably protect against that danger. It has been noted that pretrial detention is not to be employed as a device to punish a defendant before guilt has been determined, nor to express outrage at a defendant's C evident wrongdoing, but its sole purpose is to ensure public safety and the defendant's future appearance in court when the government proves that conditions of release cannot achieve those goals. In the UK, preventive detention is used more or less employed in counter-terrorism measures. In India, the Preventive Detention Act was passed by Parliament in 1950. After the expiry D of this Act in 1969, the Maintenance of Internal Security Act (MISA) was enacted in 1971, followed by its economic adjunct the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act in 1974 and the Terrorism and Disruptive Activities (Prevention) Act (TADA) in 1985. Though E MISA and TADA have been repealed, COFEPOSA continues to be operative along with other similar laws such as the National Security Act 1980, the Prevention of Black marketing and Maintenance of Essential Commodities Act 1980.

19. COFEPOSA is enacted to curb the thriving smuggling F business of foreign currencies, antiques and other valuable items from India to its neighbouring countries. From the objects and reasons of the Act, it is clear that the purpose of the Act is to prevent violation of foreign exchange regulations or smuggling activities which are having increasingly deleterious effect on the G national economy and thereby serious effect on the security of the State.

20. Section 3(1) of COFEPOSA reads:-

"3. Power to make orders detaining certain persons. (1) The H

A 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 B 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 C (ii) abetting the smuggling of goods, or (iii) engaging in transporting or concealing or keeping smuggled goods, or (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or D in abetting the smuggling of goods, it is necessary so to do, make an order directing that such person be detained."

21. The Act contemplates two situations for exercise of the power of preventive detention, viz., to prevent violation of foreign exchange regulations and to prevent smuggling activities. The E justification for passing the order of detention is suspicion or reasonable probability of the person sought to be detained to prevent him in carrying on smuggling activities in the future. In other words, what needs to be proved is the potentiality or propensity of the person to engage in future prejudicial activities.

F 22. It is a well established principle of law that even a single incident is enough to prove the propensity and potentiality of the detenue so as to justify the order of preventive detention as laid down by this court in the case of *Pooja Batra vs. Union of India,* [(2009) 5 SCC 296] :-

G "As already discussed, even based on one incident the Detaining Authority is free to take appropriate action including detaining him under COFEPOSA Act. The Detaining Authority has referred to the violation in respect of importable goods covered under Bill of Entry No. 589144 H dated 25.04.2007. In an appropriate case, an inference

could legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activities, however, for that purpose antecedents and nature of the activities already carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him." A B

This court further observed:-

"If there is no adequate material for arriving at such a conclusion based on solitary incident the Court is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India. Further subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. In the matter of preventive detention, what is required to be seen is that it could reasonably be said to indicate any organized act or manifestation of organized activity or give room for an inference that the detenue would continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not repeat this activity in future. In other words, while a single act of smuggling can also constitute the basis for issuing an order of detention under the COFEPOSA Act, highest standards of proof are required to exist. In the absence of any specific and authenticated material to indicate that he had the propensity and potentiality to continue to indulge in such activities in future, the mere fact that on one occasion person smuggled goods into the country would not constitute a legitimate basis for detaining him under the COFEPOSA Act. This can be gathered from the past or future activities of the said person." C D E F

23. In the case of *Gurdev Singh vs. Union of India,* [(2002) 1 SCC 545] this court held:- G

"Whether the detention order suffers from non-application of mind by the detaining authority is not a matter to be examined according to any straight-jacket formula or set H

principles. It depends on the facts and circumstances of the case, the nature of the activities alleged against the detenue, the materials collected in supported of such allegations, the propensity and potentiality of the detenue in indulging in such activities, etc. The Act does not lay down any set parameters for arriving at the subjective satisfaction by the detaining authority. Keeping in view the purpose for which the enactment is made and the purpose it is intended to achieve, the Parliament in its wisdom, has not laid down any set standards for the detaining authority to decide whether an order of detention should be passed against a person. The matter is left to the subjective satisfaction of the competent authority."

24. What emerges from the abovementioned cases is that, even a single solitary act can prove the propensity and potentiality of the detenu to carry on with similar smuggling activities in future. The mere fact that on one occasion person smuggled goods into the country may constitute a legitimate basis for detaining a person under COFEPOSA. For this purpose, the antecedents of the person, facts and circumstances of the case needs to be taken into consideration. In the present case, the respondents seek to rely extensively on the confession statement made by the detenu, where he had admitted to be carrying the foreign currency in return for monetary consideration. The respondents contend that the confession made by the appellant proves that, the appellant is a part of a smuggling ring and hence his detention is warranted under the provisions of COFEPOSA. This submission of the respondent's learned counsel, in our view, has no merit. In the statement made before the customs authorities, the appellant has only narrated his antecedents, the nature of business carried on by him while he was in Singapore and how he was induced to carry the foreign currency by a person who has business dealings in Singapore. In the statement so made, he has not even suggested that he had indulged himself in foreign currency smuggling activities earlier. It is not the case of the respondents that if he is not detained, he would indulge himself in foreign currency smuggling activities and it is their specific case that he may abet the

smuggling activity. In matters of personal liberty, the standard of proof needs to be high to justify an order of preventive detention. In our considered view, there were no compelling reasons for the detaining authority to pass the impugned order. Therefore, the order of detention is unsustainable. A

25. Moving over to the second issue, it is not in doubt that the appellant carried foreign currency in person which is in contravention of the amount stated in Regulation 5 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2000. The issue in question is, whether, the act of the appellant justifies a preventive detention order to be passed against him. The detention order was passed under Section 3(1)(i) of COFEPOSA. The sub-section authorizes the Central Government or the State Government to pass an order of preventive detention to prevent the person from carrying on with the smuggling activities. The reasons stated in the order is that, the appellant is detained as a remand prisoner and thereafter he would be released on bail. Therefore according to respondent no.1, there is possibility that he will indulge in illegal activity and smuggling of goods when out on bail. Para 6 of the detention order goes on to state:- B C D

> "6. The State Government are also satisfied that on the facts and material mentioned above, if you are released on bail, you will indulge in such activities again and that further recourse to normal criminal law would not have the desired effect of effectively preventing you from indulging in such activities though your passport has been submitted in the court. The State Government, therefore, considers that, it is necessary to detain you under Section 3(1)(i) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing you from indulging in the smuggling of goods in future." E F G

26. During the course of the hearing, the learned counsel appearing for the State, submits that the mere retention of the passport of the detenu, will not be enough, as the preventive detention order has been passed so as to prevent him from abetting the smuggling of goods by staying in the country. This H

A was argued before the High Court. The High Court accepted this as a satisfactory answer to justify the passing of a preventive detention order. In the counter affidavit filed on behalf of respondent no.1 and 3 in para 3 it is stated:-

> "It is accepted by the detenue himself in the representation
> B that he cannot even survive in India. Therefore for the survival, till he goes out of this country, there is all likelihood for him to indulge in such activities indirectly and illegally without the passport and can also abet in such activities. Hence, the averments made in these grounds are
> C unsustainable and untenable and the detention order passed is valid in law."

27. In our view, if that be the position, the order of preventive detention could have been passed under Section 3(1) (ii) of COFEPOSA, as it authorizes the State Government to pass a
D preventive detention order to preventing him from abetting smuggling of goods. The argument advanced by the respondents is devoid of any logic. In the present case, the detention order is passed under Section 3(1)(i) of COFEPOSA. The customs department has retained the passport of the detenu. The likelihood of the appellant indulging in smuggling activities was
E effectively foreclosed. As observed by this Court in Rajesh Gulati's case, that the contention that despite the absence of a passport, the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation.

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28. The counsel appearing for the State relied on the observations made by this court in the case of *Abdul Sathar Ibrahim Malik vs. Union of India and others* with *Ibrahim Shareef M. Madhafushi v. Union of India and Others,* [(1992) 1 SCC 1] with particular reference to para 4 of the judgment. A
G careful perusal of the aforesaid paragraph reveals that the court did not answer the question of the passport being impounded. In the said case, the detention order was based on possession of 50 gold biscuits of foreign origin being found in person of the detenu. It was also found that the detenu was a part of a larger
H international smuggling ring and therefore court sustained the

order of detention passed by the detailing authority. This court did not go into the issue as to whether the impounding of the passport of the detenu was enough to curb the potentiality of smuggling and to render the order of preventive detention unjustified. A

29. The other case on which reliance was placed by the learned counsel appearing for the State, was the case of *Sitthi Zuraina Begum vs. Union of India and Others,* [(2002) 10 SCC 448]. In our view, the findings and conclusions reached in this case would not assist contention of the respondents, as the court held in that case that the impounding of the passport of the detenu effectively foreclosed the chances of the detenu engaging in smuggling activities in the future. B C

30. In our considered view, the submission of the learned counsel for the appellant requires to be accepted. In the instant case as the facts reveal, that, there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the fact and circumstances of the case. D E F

31. In view of the foregoing discussion, we, after having considered the submissions of the learned counsel on both sides, by our order dated 28.10.2009, had directed the release of the detenu and have now recorded the reasons therefor.

N.J. Appeal allowed. G