

## Detention order passed against detenu after considering his past activities of smuggling wasn't illegal

**Summary – The High Court of Bombay in a recent case of Bittu Choith Harchandani., (the Assessee) held that where subjective satisfaction was recorded with reference to past activities of smuggling carried out by detenu, detention order passed against detenu to prevent him from similar activities in future did not suffer from any infirmity**

### Facts

- The detenu had been lodged at Nasik Road Central Prison in pursuance of a detention order dated 16-4-2015. That order passed by the second respondent was under the ('COFEPOSA').
- The order of detention, dated 16-4-2015 issued by the second respondent was challenged by the detenu's son in instant writ petition.
- The petitioner stated that the detenu was scheduled to depart for Singapore by Jet Airways Flight No. 9W 012 and, hence, arrived at the Mumbai International Airport. Because of his alleged suspicious movement, the officer of the third respondent informed others and a discreet watch was kept over him. When the detenu checked in his baggage at the counter, the officers in plain clothes intercepted him. The detenu was carrying assorted foreign currency equivalent to Indian Rs. 38,10,565 which was seized from his possession/baggage under panchanama dated 21-11-2014.
- By an arrest memo dated 22-11-2014 the detenu was arrested. It was alleged that he attempted to smuggle the foreign currency out of India. He was produced before the Competent Magistrate's Court and enlarged on bail. While being enlarged, a bail bond was directed to be furnished.
- It was the case of the detenu that the bail bond incorporated an undertaking by the detenu not to leave the country without prior written permission of the concerned officer or the Court as the case may be.
- It was then alleged that there was a self incriminating statement recorded and the detenu's signature was obtained thereon forcibly. This statement was retracted on 23-11-2014.
- It was common ground that the detention order impugned in instant writ petition invoked clause (i) of sub-section (1) of section 3. This detention order was served on the detenu on 20-4-2015.
- The detention order was challenged on several grounds.

### Held

- The detention order, states that the detaining authority is satisfied that the detenu is required to be detained with a view to prevent him in future in smuggling goods. In the reasons recorded, there is a reference made to the suspicious movement of the detenu and who holds an Indian passport. He was to depart to Singapore by Jet Airways Flight. He was carrying on red coloured strolley bag of gold star band as check-in-baggage and another black coloured carry bag of Ballantine brand. When asked whether any foreign currency was being carried, the detenu replied in the negative. The authorities not being satisfied with his reply, examined his baggage, a personal search was carried

out. Two independent panchas were called to witness the proceedings and thereafter, the bags were examined. The foreign currency was found and it is equivalent to Indian Rs. 38,10,565. The foreign currency was seized under the panchanama and the detenu's statement under section 108 of the Customs Act, 1962 was recorded. The detenu admitted of being booked in similar cases of foreign currency smuggling during the years 2007 and 2009. Thereafter, a reference is made to the admissions in the statement and the authority holds that the detenu attempted to smuggle the foreign currency not constituting *bona fide* baggage out of India in a clandestine manner. The detenu admitted carriage, possession, knowledge, recovery of the foreign currency. That is how the arrest effected is referred and, thereafter, the detenu being released on bail on furnishing personal and surety bond of Rs. 1,00,000. The order specifically records that the passport was returned to the detenu.

- Then, there is a reference made to the past record and throughout it is noticed that emphasis is to prevent the detenu indulging in smuggling activities in future. The earlier cases, therefore, have been referred with a view to reinforce the conclusion that the preventive detention order is required to be passed to prevent smuggling activities being indulged in by the detenu and in future.
- This is not a case of any variance between the order of detention and the subjective satisfaction recorded therein, so also the grounds or reasons in support thereof. The subjective satisfaction is clearly based on the ingredients of clause (i) of sub-section (1) of section 3.
- It is no doubt true that the detention order can be set aside, if it is vitiated by non-application of mind. The variance between subjective satisfaction based on which the order of detention is passed and the grounds in support thereof, is but one facet of the submission of the order being vitiated by non-application of mind.
- In the matters of preventive detention and in detaining a person without trial, the constitutional mandate must be strictly adhered to, requires no reference to any judgment as this principle is fairly well settled. That need not, therefore, warrant referring to any further precedents including the judgment of the Supreme Court in the case of *State of Bombay v. Atmaram Shridhar Vidya* AIR 1951 SC 157.
- In the instant case the argument of the detenu is that there is a bond executed and furnished and which records an undertaking of the detenu that he would not leave India without prior permission of the competent official or the Court. Pertinently, the detenu does not dispute that the passport in the instant case was returned to the detenu. The detenu, thus, was free to utilize the passport. It may be that the passport authority has independent powers and after it was informed of the prejudicial activities of the detenu, it would have prevented departure from India, but that by itself does not mean that the detaining authority in any way is prevented in law from making order of detention. The passport is not surrendered nor is it in custody of the authority. It is with the detenu. There was, therefore, a definite apprehension that the detenu would use his passport to smuggle foreign currency out of India. The satisfaction in that behalf is, thus, based on cogent and

reliable material including the past record of the detenu. Thus, there was an application of mind to germane and relevant factors necessary to invoke section 3(1)(i).

- In the present case, reading of the undertaking shows that it is a condition on which the bail has been granted. The condition *inter alia* is that the detenu shall attend the office of the officer or the Court on every day on which the investigation or trial is held and an undertaking is given by the detenu that he will not leave India without prior written permission of the concerned officer or the Court as may be. This is not enough to nullify the subjective satisfaction and which is recorded in the present case.
- In the limited jurisdiction one cannot probe further as to whether the material on which the satisfaction is recorded in instant case was enough and adequate to make an order of detention. That is a province in which the Court cannot enter in writ jurisdiction. Suffice it to note that the subjective satisfaction is recorded with reference to the past activities of smuggling carried out by the detenu and in order to prevent him from indulging in similar activities in future that the detention order has been made.
- There is no substance in the other contention that the right of the detenu to make representation being hampered. He was provided with all materials that requires him to make effective and proper representation. This is not a case where the material or the grounds were not supplied. Rather this is a case where the detenu desired to have better and further particulars about the documents and their contents. The documents speak for themselves. They were supplied and some of them were clearly referred in the representation. The particulars thereof and as sought were not necessary to make a meaningful representation. Apart therefrom, the complaint in that behalf is identical and based on the same plea regarding alleged variance in the subjective satisfaction in the detention order and the reasons in support thereof. They are already dealt with and rejected. Once it is found that the subjective satisfaction and as recorded clearly spells out the distinction in law, then, one word or sentence from the detention order cannot be picked up and read in isolation or torn out of context. The subjective satisfaction is based on the detaining authority's opinion that it is necessary to detain the detenu so as to prevent him from indulging in smuggling activities in future. On account of the statements made in the affidavits in reply as well, it is held that the detenu's rights guaranteed by article 22 of the Constitution of India are in no way infringed nor is the mandate of the said article in any way violated. There is ample opportunity given to him and to make an affective and meaningful representation. Even on that count, the detention order is not found to suffer from any legal infirmity.
- Thus, writ petition fails and is dismissed.