

A SMT. MOULANA SHAMSHUNNISA & ETC.

v.

ADDITIONAL CHIEF SECRETARY & ORS.
(Criminal Appeal Nos. 2391-2392 of 2010)

B DECEMBER 15, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR.
PRASAD, JJ.]

C **CONSERVATION OF FOREIGN EXCHANGE AND
PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974:**

D *Order of detention – Observation of detaining authority that in case detainee was released from jail, he could continue his smuggling activities within the country notwithstanding his inability to travel abroad for seizure of his passport – HELD: Order of detention quashed.*

E *Smt. Icchu Devi Choraria Vs. Union of India & Ors. 1981 (1) SCR 640 = 1980 (4) SCC 531; and Kamleshkumar Iswardas Patel Vs. Union of India & Ors. 1995 (3) SCR 279 = 1995 (4) SCC 51; Rajesh Gulati Vs. Govt. of NCT of Delhi & Anr. 2002 (7) SCC 129; and Gimik Piotr Vs. State of Tamil Nadu and Ors. 2009 (15) SCR 889 = 2010 (1) SCC 609 – relied on.*

F **Case Law Reference:**

	1981 (1) SCR 640	relied on	para 3
	1995 (3) SCR 279	relied on	para 3
	2002 (7) SCC 129	relied on	para 3
G	2009 (15) SCR 889	relied on	para 3

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 2391-2392 of 2010.

MOULANA SHAMSHUNNISA & ETC. v. ADDITIONAL CHIEF SECRETARY

From the Judgment & Order dated 26.05.2010 IN W.P. No. 68 of 2010 (HC) and dated 13.07.2010 in W.P.H.C. No. 118 of 2010 of the High Court of Karnataka at Bangalore.

K.K. Mani, Abhishek Krishna for the Appellant.

Rashmi Nandakumar, Anitha Shenoy for the Respondents.

The Order of the Court was delivered by

ORDER

HARJIT SINGH BEDI, J. 1. These appeals arise out of the following facts:

The son of the appellant, Nazhar Ahmed by name, was detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) by the order of the Additional Chief Secretary to the Government, Home Department dated 20th January, 2010. As per the case put up against the detenu, he had been arrested at the Bangalore International Airport after he had been found in possession of 4.35 kgs. of Gold Jewellery which he had not declared to the Customs. He moved an application for bail which was rejected by the Special Court for Economic Offences. He thereafter filed an appeal before the City Civil and Sessions Judge, Bangalore (which was numbered as Criminal Miscellaneous No.4858 of 2009) which was ultimately allowed and bail was granted to him on the 5th December, 2009. He was however detained under the COFEPOSA on the 24th January, 2010. He was thereafter produced before the Advisory Board and the Board too confirmed his detention for a period of one year from the date of his detention. A writ petition was thereafter filed by the petitioner impugning the detention of her son. Before the High Court, several submissions were made :

- (i) that the advisory board did not send a report within 11 weeks from the date of the order of detention as required by Section 8(c) of the COFEPOSA ;

- A (ii) that in view of the seizure of the passport of the
detenu by the respondents, the apprehension of the
detaining authority that the petitioner's son would
continue his smuggling activities could not be
accepted as it would not have been possible for him
B to leave India without a passport.

In reply, the Government's stand was that the report of the
Advisory Board has been submitted within time and that the
Additional Chief Secretary had made the detention observing
C that there were clear chances that the detenu would continue
his smuggling activities despite the seizure of his passport as
the smuggling activities could continue even within India after
he had been released on bail.

2. The High Court examined both the contentions and held
D that there was no violation of Section 8 (c) of the COFEPOSA
and insofar as the second contention was concerned, the
apprehension that if enlarged on bail the detenu could continue
with his smuggling activities without even travelling abroad was
a possibility, and as such, the detention order was justified. The
E writ petitions were, accordingly, dismissed.

3. Mr. K.K. Mani, the learned counsel for the appellants
has raised substantially one plea before us. He has pointed out
that this court had upheld the vires of several preventive
detention statutes primarily on the ground that adequate
F safeguards for the protection of the rights of a detenu had been
provided while noticing that smuggling activities by individuals
was a matter of deep concern to India and its economy, but if
the procedural safeguards were in any manner not observed,
the detention order would fail. The learned counsel has in this
G connection relied on the observations made by this Court in
Smt. Icchu Devi Choraria Vs. Union of India & Ors. [1980 (4)
SCC 531] and *Kamleshkumar Iswardas Patel Vs. Union of
India & Ors.* 1995 (4) SCC 51]. He has pointed out that in the
light of the observations in these two judgments, if the detaining
H

MOULANA SHAMSHUNNISA & ETC. v. ADDITIONAL 1065
CHIEF SECRETARY [HARJIT SINGH BEDI, J.]

authority was oblivious of certain significant facts with regard to the detention that itself was a ground for the quashing of a detention order. In this background, he has submitted that the observations of the detaining authority and the High Court therefore, that in case the detenu was released from jail, he could continue with his smuggling activities within India, notwithstanding that he could not travel abroad as his passport had been seized, was not acceptable as there was no material to justify this conclusion. In this connection, the learned counsel has placed reliance on *Rajesh Gulati Vs. Govt. of NCT of Delhi & Anr.* [2002 (7) SCC 129] and *Gimik Piotr Vs. State of Tamil Nadu and Ors.* [2010 (1) SCC 609].

4. In *Rajesh Gulati's case (supra)*, the question that came to be canvassed on behalf of the detenu was that as his passport continued to be in the possession of the customs authorities, there was no question of the appellant travelling abroad or indulging in any smuggling activity. This plea was accepted by this court by observing that it was not the case of the detaining authority at any stage that the detenu would be able to continue with his smuggling activities within India, though he could not go abroad his passport having been seized. It was observed thus :

"15. xxxxxxxxxxxxxx

xxxxxxxxxxxxxxxxxxx

The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority. These findings are sufficient to invalidate the impugned detention order and it is not necessary to consider the other issues raised by the appellant."

This opinion has been further fortified by this court in *Gimik Piotr's case (supra)*. In para 32, it has been held as under :

A “32. In the present case, the detention order was passed
under Section 3(1) (i) of COFEPOSA. The Customs
Department has retained the passport of detenu. The
likelihood of the appellant indulging in smuggling activities
was effectively foreclosed. As observed by this Court in
B Rajesh Gulati 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.”

C And again in para 35 ;

“35. 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 facts
and circumstances of the case.”

5. The learned counsel for the respondents has, however,
contended that the respondent had been intercepted on specific
intelligence and he had been arrested twice earlier on similar
charges. We are of the opinion that this fact is immaterial
insofar as the present detention order is concerned.

6. We, accordingly, allow these appeals and quash the
detention order dated 24th January, 2010.

H R.P.

Appeals allowed.