

**HIGH COURT OF KERALA****Bench: The Honourable Mr. Justice A.Muhamed Mustaque & The Honourable Mrs. Justice Shoba Annamma Eapen****Date of Decision: 9<sup>th</sup> April 2024**

Case Number: W.P.(CrI.).No.44 of 2024

**SHAFINA SIRAJ. ....Petitioner****V.****UNION OF INDIA & OTHERS. ....Respondents****Legislation and Rules:**

Sections 3(1), 9 Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA)

Foreign Exchange Management Act, 1999 (FEMA)

RBI Notification No.FEMA 6 (R)/2015-RB

**Subject:** Challenging a detention order under COFEPOSA relating to foreign exchange transactions and questioning the subjective satisfaction of the detaining authority.**Headnotes:**

Detention Order under COFEPOSA - Challenged by petitioner, wife of the detenu, Siraj V.E., under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) - Detention order based on search conducted on 19/6/2023 at M/s.Crescent Collection, Kochi, where foreign currencies of 700 U.A.E. Dirham and Indian currency amounting to Rs.5 lakhs were found and seized - Alleged violation

of Foreign Exchange Management Act, 1999 (FEMA) - Detaining authority's reliance on statements of individuals associated with Siraj, including Abdul Hameed, and WhatsApp chats - Petitioner contends lack of materials to infer FEMA violation - Court observes absence of evidence linking Siraj to FEMA violation, particularly noting Abdul Hameed's vague statements about Siraj's dealings - Court emphasizes necessity for concrete evidence of foreign exchange transactions to justify detention under COFEPOSA - Detention order set aside due to lack of substantial evidence, ordering detenu's immediate release, provided no other legal obligations exist.

**Referred Cases:**

- Nenavath Bujji v. State of Telangana and Others [2024 SCC Online SC 367]
- Union of India v. Arvind Shergil and Others [(2000) 7 SCC 601]
- Jameena and Others v. Union of India and Ors. [2021 SCC online Ker. 3572]
- Pebam Ningol Mikoi Devi v. State of Manipur [(2010) 9 SCC 618]
- Ameena Begum v. State of Telangana [2023 SCC Online SC 1106]

**Representing Advocates:****Petitioner: M. Ajay, V.P. Prasad****Respondents: R.V. Sreejith, Jaishankar V. Nair****J U D G M E N T****A.Muhamed Mustaque, J.**

This writ petition challenging a detention order under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) was filed by the wife of the detenu.

2. The petitioner-Shafina Siraj is the wife of Siraj V.E. A search was conducted on 19/6/2023 at M/s.Crescent Collection near Sridhar Cinema Broadway, Kochi. During the search, foreign currencies of 700 U.A.E. Dirham

and Indian currency amounting to Rs.5 lakhs were found and seized. The detention order has been passed under Section 3(1) of COFEPOSA with a view to prevent Siraj from acting in any manner prejudicial to the augmentation of foreign exchange in future. The grounds in the detention order passed were, relying on the statement of Abdul Hameed, an aid of Siraj, recorded on 19/6/2023, analysing the WhatsApp chat on the mobile phone of Abdul Hameed; relying on the statement of Shafina; and the statement of Siraj V.E. The detaining authority concluded that Siraj V.E. is indulged in illegal purchase and sale of foreign currencies in violation of the Foreign Exchange Management Act, 1999 (FEMA). The argument now raised before us is mainly on the ground that there were no materials on record to arrive at subjective satisfaction to pass the detention order. The learned counsel for the petitioner submitted that the detaining authority while relying on the report of the Sponsoring Authority overlooked the statements in the matter as there is no indication of any violation of FEMA. We are not looking into other grounds urged in the matter as we are satisfied that the petitioner has made out a case as there were no materials on record to infer that Siraj had violated the provisions of FEMA.

3. We have perused the statement of Abdul Hameed. He is working as an aide to Siraj. He has been working for more than 20 years. Abdul Hameed admitted seizure of 730 UAE Dirhams. The possession of foreign currency within the limit prescribed by RBI is not a violation of FEMA (see Section 9(a) of FEMA) RBI issued a Notification prescribing permissible limit (No.FEMA 6 (R)/2015-RB permissible), no one has a case that Siraj has violated RBI prescribed limit in RBI notification. He stated that he was not dealing in foreign currencies. He also said he has no knowledge regarding dealing of foreign currencies by Siraj. But he said that Siraj deals with foreign currencies at the rate equivalent to Rs.1 crore per day. As we perused the statement as a whole, nothing is discernible regarding the dealing of foreign currencies. How foreign currencies are dealt with by Siraj, and in what manner, is not known to anyone. Abdul Hameed also said that Siraj used to get a commission of Rs.100 per one lakh rupees for transaction of purchases of goods from Mumbai and Siraj used to send details through WhatsApp. This appears to be a Hawala money transaction. We note that this has nothing to do with the foreign exchange violation. We also perused the statement of Shafina Siraj. She spoke about the purchase of property and other transactions and did not speak of any violation of foreign exchange dealings.

We also perused the statement of Siraj. He explained certain figures in the notepad depicting the value of the amount in US\$.

4. The learned counsel for the petitioner argued that the detaining authority had not considered relevant materials to conclude any violation of FEMA. The learned counsel for the petitioner placed reliance on the judgment of the Apex Court in **Nenavath Bujji v. State of Telangana and Others [2024 SCC Online SC 367]**, particularly, referring to the role of the Advisory Board to safeguard the constitutional right of the detenu. The learned counsel submits that the reference was to the Advisory Board consisting of Justice Alexander Thomas, Dr. Justice A.K. Jayasankaran Nambiar and Justice P.B. Suresh Kumar, and the matter was heard by the reconstituted Advisory Board consisting of Dr. Justice A.K. Jayasankaran Nambiar, Justice P.B. Suresh Kumar and Justice Somarajan P. It is submitted that the Board could not afford much time to hear the detenu and his counsel for want of time.

5. The learned counsel Shri R.V. Sreejith appearing for respondents 1 and 2, placing reliance on the judgments of the Apex Court *in Union of India v. Arvind Shergil and Ors [(2000) 7 SCC 601]* and *Jameena and Others v. Union of India and Ors. [2021 SCC online Ker. 3572]*, argued that subjective satisfaction arrived by the detaining authority cannot be questioned before this Court in a like manner questioning an appeal arising from conviction. He submits that, if strong suspicion can be gathered by materials, it would be sufficient enough to pass the detention order.

6. The learned counsel for the petitioner, placing reliance on the judgments of the Apex Court in **Pebam Ningol Mikoi Devi v. State of Manipur [(2010) 9 SCC 618; Ameena Begum v. State of Telangana [2023 SCC Online SC 1106]** and **Nenavath Bujji v. State of Telangana [2024 SCC Online SC 367]**, argued that the detaining authority should have looked at the fact of availability of materials to arrive at a conclusion. In the absence of any materials, they could not have passed an order, impinging the liberty of the citizen.

7. The subjective satisfaction is not an empty formality. No doubt, foreign exchange transactions of 1 crore per day would have serious repercussions on our economy at the same time, the liberty of the citizen also needs to be safeguarded. There must be some materials on record of indulgence of hawala transactions in foreign exchange. Mere possession of 730 UAE Dirhams cannot be said to have violated FEMA. It is not proof of

transaction that is required but some materials to show that transaction of foreign exchange by the person detained. The cross-border hawala dealings cannot exist without there being a transaction. At least some transactions related to the transaction of foreign exchange should be reflected from the statements recorded. None of them have stated. Any transaction taken place in India cannot be said as a violative transaction coming under FEMA Act. In the absence of any materials, the subjective satisfaction could not have been arrived at. We find that the detaining authority might not have applied its mind as not a single transaction had been pointed out offending FEMA. In the absence of such materials on record or at least a statement by someone, we find that the detention order passed is illegal. Accordingly, the detention order is set aside. Detenu is ordered to be released forthwith, provided, if he is not required under law for any other case.

The W.P.(Crl.) is disposed of as above.

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