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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 02.03.2022
Judgment delivered on: 20.05.2022

\+ **W.P.(CRL) 1911/2019**

ABHISHEK GUPTA ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Saurabh Kripal, Senior Advocate with Mr. Ashish Batra, Mr. Sarthak Sachdev, Ms. Aanehal Mulliek and Ms. Tanima Gaur, Advocates.

For the Respondents : Mr. Vinod Diwakar, CGSC with Mr. Vishal Kr. Singh and Mr. B. N. Dubey, Advocates for UOI/R-1. Mr. Satish Aggarwala, Sr. SPP with Mr. Aditya Singla, Senior Standing Counsel (CBIC), Mr. Utsav Vasudeva and Ms. Sonali Sharma, Advocates for DRI/R-3.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

ANOOP KUMAR MENDIRATTA, J.

1. By way of the present writ petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, petitioner Abhishek Gupta, challenges Preventive Detention Order No.PD-12001/07/2019-COFEPOSA dated 26.03.2019 issued under Section 3(1) of the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974 (COFEPOSA Act) to detain the petitioner in custody for a period of one year. The petitioner also challenges the further order under Section 7(1)(b) of the COFEPOSA Act, 1974 issued on 21.05.2019 directing the petitioner to appear before the Commissioner of Police, NCT of Delhi within seven days of the publication of the order dated 21.05.2019 in the official gazette i.e. on or before 28.05.2019 but published in newspapers only on 11.07.2019.

2. Respondent No.1 is the Union of India/Central Government which issued the impugned order under Section 7 of the COFEPSA Act, 1974 (hereinafter referred to as 'the Act'), pursuant to impugned detention order under Section 3(1) of the Act, 1974 issued by the Detaining Authority (i.e. respondent No.2). The respondent No.3 is the Directorate of Revenue Intelligence, New Delhi- the Sponsoring Authority, on whose proposal the detention order is issued against the petitioner. Respondent No.4 is the Commissioner of Police, Delhi, before whom the petitioner has been directed to appear as per the impugned order issued under Section 7(1)(b) of the Act.

3. In sum and substance, order dated 21.05.2019, which directed the petitioner to appear before the Commissioner of Police, Govt. of NCT of Delhi within seven days of the publication of the said order, reflects that petitioner was required to be detained and kept in Tihar Jail, New Delhi with a view to preventing him from smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future as per Order No.PD-12001/07/2019-COFEPOSA dated 26.03.2019.

4. It is pertinent to note that the impugned Preventive Detention Order is yet to be served on the petitioner. Further, it was observed by this Court vide order dated 22.07.2019 that despite the detention order, which has been rendered on 26.03.2019, the same was not executed upon the petitioner on behalf of the official respondents, and in these circumstances no coercive action be taken against the petitioner.

5. The principal grounds of challenge to the detention order as canvassed in the petition and in the submissions made by the learned counsel for the petitioner are as follows:-

a) That the impugned orders are in grave derogation of settled tenets of law, equity and justice and also in violation of mandatory procedural safeguards established by law and instructions issued in this regard by the Ministry of Finance.

b) That the impugned orders have been obtained by respondent No.3, for 'punitive' rather than 'preventive' purpose, as an alternative to the ordinary laws of the Land providing for criminal prosecution. Despite claiming in the remand application dated 19.12.2018 that - "even conviction can be recorded exclusively on the basis of such statements.", no criminal prosecution has been filed against the petitioner under the ordinary laws of land under Customs Act, 1962. Reliance is also placed on **"*Yumman Ongbi Lembi Leima Vs. State of Manipur & Ors (supra), Munagala Yadamma Vs. State of A.P. & Ors* (2012) 2 SCC 386 *and Rekha Vs. State of Tamil* Nadu (2011) 5 SCC 244".**

c) That even before the petitioner came out on bail, the Import Export Code of the subject four firms which are alleged to be

operated/controlled / used by the petitioner, were placed in Denied Entity List (Black List) vide Orders dated 21.12.2018 and 24.12.2018. Thus, the petitioner was already effectively prevented from acting in any prejudicial manner. The said vital fact exhibits lack of any genuine and real 'necessity' to again apprehend and detain him, now for alleged preventive purpose.

d) That if the orders dated 21.12.2018 and 24.12.2018 obtained by the respondent No.3 from the office of DGFT showing the fact of placing of all the subject firms in the Denied Entity List (Black List) on 21.12.2018 and 24.12.2018 which had foreclosed any future possibility of the petitioner indulging in any of the alleged prejudicial activities, were not placed before the respondent No.2; it would axiomatic that non-placement of such vital documents, having a significant and direct bearing on the subjective satisfaction, was mala fide, illegal and erroneous on the part of the Sponsoring Authority. Consequently, the subjective satisfaction of the Detaining Authority regarding ‘necessity to detain’ is vitiated for non-application of mind on the relevant and vital documents having a significant and direct bearing on the subjective satisfaction.

e) That the powers under preventive detention law have been exercised mechanically without any sense of urgency to detain, in a wholly routine, callous, casual and cavalier manner. The petitioner was granted bail on 24.12.2018. If the respondents were really sincere, anxious and zealous in executing the order of detention for alleged preventive purpose promptly, without any delay, it was expected of them, in the fitness of things, to approach this Court or, at least, the

Court which initially granted the bail to the petitioner for its cancellation, and thereby to enforce his appearance or production. Surprisingly, however, no such steps were taken. On the contrary, it is a matter of record that even after issuance of the impugned Detention Order on 26.03.2019, the petitioner had appeared before the Trial Court on 28.03.2019 and 05.04.2019, but the same was not executed on him. Reliance is further placed on *"**A Mohammed Farook vs Jt. Secy,* (2000) 2 SCC 360".**

f) That the Sponsoring Authority as well as the Detaining Authority are bound to satisfy that the obligations in the nature of procedural safeguards cast on them vide the Instructions issued by the Ministry of Finance, Government of India, for handling COFEPOSA matters were scrupulously followed.

g) That the Sponsoring as well as the Detaining Authority failed to make any effort to serve the Detention Order dated 26.03.2019 on the petitioner upon his repeated appearance before the Trial Court on 28.03.2019 and 05.04.2019. Only after a period of about two months on 21.05.2019 the impugned Order under Section 7(1)(b) of the Act was mechanically issued alleging that the petitioner is absconding or concealing himself to avoid the execution of the impugned Detention Order, and the same was published in Official Gazette. No action under Section 7(1)(a) had been taken till date. Moreover, the impugned Order dated 21.05.2019 contained a direction that the petitioner shall appear within "Seven days of its publication in Official Gazette" i.e. prior to 28.05.2019, before the Respondent No.4. However, the publication of the same in Newspaper to

communicate the same to the petitioner and to all others was made only on 11.07.2019, i.e. after 53 days of publication in official gazette. The petitioner till then was unaware of any Order dated 21.05.2019, and he came to know about the same only on 11.07.2019 upon its publication in Newspaper, which contained the details of the impugned Detention Order dated 26.03.2019 issued under Section 3(1) as well as the impugned Order dated 21.05.2019 issued under Section 7(1)(b) of COFEPOSA Act.

h) That the impugned orders are liable for judicial scrutiny and review inter alia in the context of relevance, reasonableness, fairness, necessity to detain, nexus with the alleged pre-judicial activity, natural justice, equality, non-discrimination and compliance of all procedural safeguards. It is incumbent on the part of the Respondents to also satisfy this Court, by producing records for perusal of this Court and by placing adequate details in their reply that:-

    i. The proposal for detention of the petitioner was sent by the Sponsoring Authority to the concerned Detaining Authority as early as possible, and in any case within a period of 15 days from gathering such evidence, as was considered adequate by them to detain the petitioner,

    ii. No vital material and information having a definite bearing on subjective satisfaction for necessity to detain, including DEL Orders, has been suppressed by the Sponsoring Authority from the Detaining Authority, and were placed

before the Detaining Authority with the proposal to issue Detention order;

iii. The Detaining Authority has noticed, adverted to and considered the DEL Orders passed by the office of DGFT at the instance of Respondent No. 3 before issuance of the impugned Detention Order;

iv. The subjective satisfaction is not vitiated for non-application of mind to relevant and vital material touching the question of culpability as well as necessity to order the detention,

v. Each vital material was noticed, adverted to and considered in the grounds of detention,

vi. The impugned detention order is not mala fide or discriminatory,

vii. The impugned Order is not to supplant criminal prosecution,

viii. The Detaining Authority was vigilant enough at every stage, and had acted reasonably and with utmost promptitude:

ix. The Detaining Authority has himself formulated / reformulated the Grounds of Detention in accordance with law, before issuance of the impugned Detention Order.

x. The Sponsoring and Executing Authority was vigilant enough at every stage, and had acted reasonably and with utmost promptitude;

xi. The impugned detention order is not in the teeth of the Constitutional imperatives of Article 14 and 21 of the Constitution of India.

6. In support of the contentions, the petitioner further relied upon following judicial precedents:-

(i) ***Rajinder Arora v. Union of India,*** **(2006) 4 SCC 796;**

(*ii*) ***Deepak Bajaj v. State of Maharashtra,*** **(2008) 16 SCC 14;**

(iii) Subhash Popatlal Dave v. Union of India, **(2014) 1 SCC 280;**

(iv) Subhash Popatlal Dave v. Union of India and Another, **(2012) 7 SCC 533;**

(v) Boris Sobotic Mikolic v. Union of India & Ors., **2018 SCC Online Del 9363;**

(vi) Pankaj Kumar Shukla v. Union of India & Ors., **2015 SCC Online Del 9925;**

(vii) Ankit Ashok Jalan v. Union of India & Ors., **(2020) 16 SCC 127;**

(viii) Mohd. Nashruddin Khan v. Union of India & Ors., **W.P. (Crl) No.1924/2020;**

(ix) Mohd. Nashruddin Khan v. Union of India & Ors., **2020 SCC Online Del 1190;**

(x) Manish Gadodia v. Union of India & Ors., **2014 SCC Online 6838;**

(xi) Tsering Dolkar v. Administrator Union Territory of Delhi & Others, **(1987) 2 SCC 69;**

(xii) Hem Lall Bhandari v. State of Sikkim & Others, **(1987) 2 SCC 9;**

(xiii) Ram Manohar Lohia v. State of Bihar & Another, **1966 Cri LJ 608; and**

***(xiv) State of Punjab v. Sukhpal Singh*, (1990) 1 SCC35.**

7. In the additional affidavit filed on behalf of the petitioner, additional ground has also been taken that Section 7(1)(a) and 7(1)(b) of COFEPOSA Act contemplates the issuance of order under Section 7(1)(a) and 7(1)(b) by the "Appropriate Government". The Appropriate Government under Section 2(a) of the COFEPOSA Act implies either the Central Government or the State Government, and in the instant case, it is the Central Government. It is submitted that order dated 21.05.2019 passed purportedly under Section 7(1)(b) of the COFEPOSA Act feigns satisfaction of the Central Government on reasons to believe that the petitioner had absconded or has been concealing himself. Further, from the affidavits filed by the respondents and order dated 21.05.2019, the alleged competent authority i.e. Shri Ravi Pratap Singh, Joint Secretary, CEIB in Ministry of Finance, is specially empowered by the Central Government under sub-section (1) of section 3 of COFEPOSA Act and vide impugned detention order dated 26.03.2019, he directed that the petitioner be detained. It is further submitted that the said competent authority usurped the jurisdiction of the Appropriate Government i.e. the Central Government in issuing the order dated 21.05.2019 purportedly under Section 7(1)(b). The orders dated 28.03.2019 and 05.04.2019 were not placed for consideration and not considered while arriving at satisfaction, necessary for issuing the impugned order dated 21.05.2019, which vitiate the satisfaction, so reached, and renders the order null and void.

8. Reliance is further placed upon ***Ankit Ashok Jalan v. Union of India*, 2020 SCC Online SC 288** to contend that the practice of specially

empowered officers of Central Government, acting as detaining authority, holding itself equivalent to the Central Government or Appropriate Government and performing such acts/functions as are to be undertaken or performed only by the Appropriate Government has been held to be erroneous and legally flawed.

9. It is further contended that the impugned order dated 21.05.2019 under Section 7(1)(b) of COFEPOSA Act is bad in law as neither it has been issued by the Appropriate Government nor by complying with the established procedure under law warranting- (a) satisfaction of the Central Government on reasons to believe with due application of mind, and upon consideration of relevant material, and (b) without expeditious action by the authorities concerned to communicate the same to the detenu for forthwith compliance of the directions under Section 7(1)(b) as mandated by guidelines already issued in this regard.

It is also submitted that the impugned detention order was passed prior to judgment in ***Ankit Ashok Jalan (supra).***

10. Controverting the submissions made on behalf of the petitioner, learned counsel for the respondents No.1 & 2 relied upon the following contentions:-

a) That on the basis of specific information that certain Delhi based exporters were indulging in mis-declaration of export goods to avail export incentive under Merchandise Exports from India Scheme ('MEIS'), investigation was initiated by the DRI (Hqrs.) regarding mis-declaration in exports by M/s Yashee Impex, M/s C.L. International and M/s Gauri Global Exports & Trading. During

examination of live exports consignments, wherein items were declared in export documents as 'Whey Flour (CTH 0404 1020)', Flour of Others (Almo) i.e. Almond Flour (CTH-11063090)' and 'Milk Powder (CTH 0402 9990)', samples of the goods were drawn under Panchnamas. Upon testing of the samples, it was found that Wheat Flour (Maida), Common Salt were being exported in the guise of Whey Flour, Flour of Others (Almo) i.e. Almond Flour and Milk Powder, to avail ineligible benefit under MEIS.

It was pointed out that MEIS was made applicable @10% to certain dairy products under Chapter-4 of ITC HS Code, including Whey Powder and Milk Powder vide DGFT Public Notice No.23/2015-2020 dated 13.07.2018 which was further enhanced to 20% vide DGFT Public Notice No.41/2015-2020 dated 27.09.2018.

b) It was submitted that the petitioner was found involved, through entities in his name and in the name of others (viz. M/s Yashee Impex, M/s. Gauri Global Exports &. Trading and M/s C.L International), in export of low value goods i.e. Wheat Flour ('Maida'), Common Salt by mis-declaring the same as high value goods i.e. Whey Flour, Flour of Others (Almo) i.e. Almond Flour and Milk Powder to avail ineligible export benefit under MEIS (@ 20% of Declared Value). During the course of investigation, 25 containers worth declared FOB value of Rs. 21.8 Crores (approx.) having MEIS benefit worth Rs. 4.14 Crores (approx.) being exported by three exporters named above were intercepted by DRI. Investigation revealed that the Petitioner had indulged in similar mis-declaration in exports with intent to defraud the Exchequer. Further

investigation was stated to be underway. It was in these circumstances that Order dated 26.03.2019 for detention of the Petitioner under COFEPOSA had been issued by competent authority after following due process. Further, Order dated 21.05.2019 directing the Petitioner to appear before the Commissioner of Police, Delhi was subsequently issued by the competent authority in accordance with Section 7(l)(b) of COFEPOSA. The said order was also forwarded by the issuing authority to Respondent No. 3 for publishing in newspapers which was done promptly after observing due formalities. The above two orders were stated to be issued in accordance with law after observing due diligence. It was strongly denied that the said Orders were illegal or *malafide*.

c) That the investigation revealed that the Petitioner had committed offence under Sections 132 and 135 of Customs Act 1962. He was accordingly arrested under Section 104 of Customs Act 1962, served Arrest Memo dated 18.12.2018 and subsequently produced before Magistrate. As a measure of precaution, Respondent No. 3 had shared the facts of mis-declaration in exports by the said Entities, with the DGFT, the government agency issuing the export incentives (MEIS), in order to safeguard government revenue, for suitable action at their end. Thus, effective preventive steps were taken by the DRI on the date of arrest itself.

d) Further, the Sponsoring Authority was only intimated about passing of DGFT Order dated 21.12.2018, placing the exporter entities on Denied Entry List only on 16.04.2019.

e) It is submitted that the petitioner's application before the Ld. CMM, New Delhi for release of passport, is a matter of record and respondent No.3 was informed about the existence of the said application of Abhishek Gupta only in the evening of 28.03.2019 through Notes of Proceedings received from DRI's Counsel at around 5 PM on 28.03.2019. Thus, there was no question of attending Court on 28.03.2019 to have the Detention Order executed. It is also submitted that Respondent 3 had requested their Counsel to inform the Ld. Trial Court that a detention Order under COFEPOSA had been issued against the petitioner, with request to direct the petitioner to surrender before the competent authority. Further, the Officer of this Respondent was present on next date of hearing on 30.03.2019 but the petitioner was not present. The Counsel of Respondent No.3 in the Ld. CMM Court informed in writing that on 30.03:2019, reply to the application could not be filed on that date as the Presiding Officer was not in his chair on 30.03.2019 and that it is wrongly recorded in the order sheet that DRI had sought more time to file reply.

f) That the petitioner is misleading this Court that he withdrew his application on 05.04.2019 and it is a matter of record that the application before the Ld. CMM, New Delhi, to withdraw his application for release of passport is dated 01.04.2019. Further, on 04.04.2019, Respondent No.3's Counsel in Ld. CMM Court informed the Respondent No.3 that the said application for release of passport had been dismissed as withdrawn on 04.04.2019 by the petitioner. Since the Respondent No.3 was intimated by its Counsel on 04.04.2019 itself that the said application had been dismissed as

withdrawn, the officers of Respondent No. 3 did not attend any further proceedings in the matter of the petitioner's application before the Ld. CMM for release of passport.

g) It is submitted that the Detention Order dated 26.03.2019 has been duly issued in accordance with law, for preventive detention purpose of the Petitioner as the Petitioner was found indulging into gross mis-declaration of export goods in the live export consignments as well as in past, to avail undue benefit under MEIS and thus defraud the Exchequer to the tune of crores of rupees. Further, the investigation under Customs Act in the matter was stated to be underway, and, therefore, criminal prosecution under the said Act was yet to be filed.

h) It is denied that mere placing of the exporter entities currently under investigation in DEL by the DGFT obviates the possibility of the Petitioner indulging in smuggling activities in the future. Moreover, investigation revealed that the Petitioner was involved in such fraudulent exports through firms in his name as well as in the name of others. Further, Respondent No. 3 had shared the facts of mis-declaration in exports by the said entities, with DGFT vide DRI letter dated 18.12.2018, in order to safeguard government revenue, for suitable action at their end. The fact that DGFT had issued order placing the exporter firms in DEL list was communicated by DGFT to DRI only on 16.04.2019. Thus, there was no question of intentionally not placing such orders of DGFT before Respondent No. 2 while sponsoring the COFEPOSA proposal.

i) The bail application dated 19.12.2018 of the Petitioner before the Id. Trial Court is stated to have been opposed by the Sponsoring

Authority. It is submitted that non-execution of the detention order is not due to lack of intent by Respondents and in fact, the Petitioner has been intentionally absconding to avoid the execution of the order. Due efforts are stated to have been made to serve the detention order to the Petitioner but could not be executed as the Petitioner (detenu) was not found at his known addresses during visits by the officers of Executing Authority and/or the Sponsoring Authority on 27.03.2019, 30.04.2019 & 11.05.2019. Moreover, officer of Sponsoring Authority is stated to have been present during hearing of passport release application on 30.03.2019 but the Petitioner was not present. Subsequently, Sponsoring Authority was intimated about withdrawal of passport release application on 04.04.2019 and hence, in these circumstances, no officer from DRI was present on 05.04.2019 before the Ld. Trial Court.

j) That due efforts had been made by the Sponsoring Authority to get the detention Order executed, but the same could not be done due to intentional avoidance of the law by the Petitioner. Moreover, Order dated 21.05.2019 under Section 7(l)(b) of Act was published in the Official Gazette on 21.05.2019 itself and that on request of Respondent No. 2 (the issuing authority), the same order was also got published by Respondent No. 3 in local newspapers i.e. The Hindustan Times dated 11.07.2019 in English and in Dainik Jagaran dated 11.07.2019 in Hindi after observing due formalities.

k) It is submitted that prompt action had been taken in accordance with law. However, the petitioner attempted to mislead the Court by surreptitiously re-phrasing preferable actions as mandatory. For Instance, as per para B.8 of the 'Handbook on Compilation of

Instructions issued on COFEPOSA matters from July, 2001 to February, 2007' referred to in Ground F of the petition under reply, detention proposal should be sent as early as possible but preferably within 15 days from gathering such evidence, as will be adequate to detain the person..., whereas the same guideline has been twisted and misquoted by the petitioner as any case within 15 days in sub-para (a) of Ground H of the petition under reply, with the intent to create an impression of delay when there was none. It is further submitted that Section 11 of COFEPOSA relates to revocation of detention orders by the State/Central Government and has been misconstrued by the Petitioner in letter and spirit and in no manner applieds to the instant case.

l) It was submitted that the ratio of the cited judgments does not apply to the present case and there has been no delay in term of any legal requirements by Sponsoring Authority. Further, sincere efforts have been made by the Sponsoring Authority to have the detention order executed; and that there has been no instance of non-placement/non consideration of any vital document by Sponsoring Authority. The said order could not be executed on account of the Petitioner willfully absconding with full intent to avoid the law taking its course.

11. In the short affidavit filed on behalf of respondents No. 1 & 2 in response to the additional affidavit filed by the petitioner, it was submitted that the powers vested in the Central Government under sub-section 1 of section 7 under the COFEPOSA Act, 1974 have been delegated to the Joint Secretary (COFEPOSA), i.e. the Detaining

Authority. Further, the order dated 21.05.2019 is stated to be justified and enforceable through the process of law.

It was reiterated that Joint Secretary to the Government of India, Central Economic Intelligence Bureau, New Delhi who is specially empowered under the COFEPOSA Act, 1974 after subjective satisfaction, issued the Detention Order dated 26.03.2019 under Section 3(1) of the said Act and, hence, the detention order is legally sustainable, proper and valid. It was denied that the competent authority usurped the jurisdiction of the 'appropriate government', i.e. the Central Government. The action taken under Section 7(1)(b) vide order dated 21.05.2019 was stated to be in total sync with the powers vested to the Joint Secretary (COFEPOSA), i.e. the Detaining Authority under Sub-section 1 of Section 7 under the COFEPOSA Act, 1974 in terms of delegation made in the Gazette Notification dated 16.08.2018. The case law quoted by the Petitioner was stated to be not applicable in the present case, as the facts and circumstances are entirely distinguishable.

12. Respondent No.4, in brief, in the counter-affidavit submitted that on 27.03.2019 the Office of answering respondent received a detention order dated 26.03.2019 from the Directorate of Revenue Intelligence whereby the petitioner was directed to be detained. The constituted teams made extensive searches to arrest the petitioner but were of no avail. No clue could be found of the petitioner and his father was intimated of the warrant of arrest issued against the petitioner. It was secretly revealed that the petitioner had absconded with his family and wife to an unfamiliar place. The order dated 21st May 2019 issued vide

F.N. PD12001/07/2019 COFEPOSA was pasted outside the residence of the petitioner but he did not appear before the Commissioner of Police.

13. Rejoinder was further filed on behalf of the petitioner to common counter-affidavit filed on behalf of respondents No. 1 & 2 as well as counter-affidavit filed on behalf of respondent No.4.

DISCUSSION & CONCLUSIONS

14. To appreciate the contentions raised by the petitioner as well as the respondents, the following issues need to be considered.

(i) Whether non placement of the fact before the Detaining Authority that the subject four firms which are alleged to be operated/controlled by the petitioner were placed in Denied Entry List (Blacklist) vide order dated 21.12.2018 and 24.12.2018, prior to passing of the detention order, vitiates the subjective satisfaction of the Detaining Authority in issuing the detention order;

(ii) Whether the detaining authority or the executing agency or sponsoring authority were diligent to serve the detention order on the petitioner at the earliest despite being available for service since the detention order was passed on 26.03.2019 and the petitioner had appeared before the Ld. CMM on 28.03.2019 and 05.04.2019 after the passing of the impugned detention order;

(iii) Whether the publication of the impugned order on 21.05.2019 under section 7(1)(b) of the COFEPOSA Act was mechanical, alleging that petitioner is absconding or concealing himself to avoid execution of the impugned detention order and if the detention order is liable to be set aside for unexplained delay in service of detention order.

15. At the outset, the observations of the Supreme Court in ***Subhash Popatlal Dave v. Union of India*** **(2012) 7 SCC 533** in para 41 to 48 are apt to be noticed with reference to the right to challenge an order of detention at pre-execution stage.

> ***"41.*** *The decision in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] , appears to suggest several things at the same time. The three-Judge Bench, while considering the challenge to the detention order passed against the detenu, at the pre-execution stage, and upholding the contention that such challenge was maintainable, also sought to limit the scope of the circumstances in which such challenge could be made. However, before arriving at their final conclusion on the said point, the learned Judges also considered the provisions of Articles 19 to 22 relating to the fundamental freedoms conferred on citizens and the proposition that the fundamental rights under Part III of the Constitution have to be read as a part of an integrated scheme. Their Lordships emphasised that they were not mutually exclusive, but operated, and were, subject to each other. Their Lordships held that it was not enough that the detention order must satisfy the tests of all the said rights so far as they were applicable to individual cases.*
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> ***42.*** *Their Lordships in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] also emphasised in particular that it was well settled that Article 22(5) is not the sole repository of the detenu's rights. His rights are also*

governed by the other fundamental rights, particularly those enshrined in Articles 14, 19 and 21 of the Constitution and the nature of constitutional rights thereunder. Their Lordships were of the view that read together the articles indicate that the Constitution permits both punitive and preventive detention, provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it are valid. Going on to consider the various decisions rendered by this Court in this regard, Their Lordships in para 5 observed as follows: (Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] , SCC p. 503)

"5. The neat question of law that falls for consideration is whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it. As a corollary to this question, the incidental question that has to be answered is whether the detenu or the petitioner on his behalf, as the case may be, is entitled to the detention order and the grounds on which the detention order is made before the detenu submits to the order."

43. *It is in the aforesaid background that Their Lordships in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] while examining the various decisions rendered on the subject, summed up the discussion in para 30*

of the judgment, wherein Their Lordships again reiterated that: (SCC p. 520)

"30. ... Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention."

Their Lordships observed that: (SCC p. 520, para 30)

"30. ... the powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive action resulting in civil or criminal consequences."

However, the said observations were, thereafter, somewhat whittled down by the subsequent observation that the courts have over the years evolved certain self-restraints in exercising these powers. Such self-imposed restraints were not confined to the review of the orders passed under detention law only, but they extended to orders passed and decisions made under all laws. It was also observed that in pursuance of such self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person should first allow the due operation and implementation of the law concerned and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary and equitable jurisdiction under Articles 226 and 32, respectively and that such jurisdiction by its very nature has to be used

sparingly and in circumstances where no other efficacious remedy is available. However, having held as above, Their Lordships also observed that all the self-imposed restrictions in respect of detention orders would have to be respected as it would otherwise frustrate the very purpose for which such detention orders are passed for a limited purpose.

44. *Consequently, in spite of upholding the jurisdiction of the Court to interfere with such orders even at the pre-execution stage, Their Lordships went on to observe as follows: (Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] , SCC p. 521, para 30)*

"30. ... The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number viz. where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the

proposed detenu, but prevents their abuse and the perversion of the law in question."

45. *Nowhere in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] has it been indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the courts could interfere with an order of detention at the pre-execution stage, with the expression "viz." Their Lordships possibly never intended that the said five examples were to be exclusive (sic exhaustive). In common usage or parlance the expression "viz." means "in other words". There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplars and not exclusive (sic exhaustive). On the other hand, the Hon'ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of the said power.*

46. *It is only in Sayed Taher Bawamiya case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] that another three-Judge Bench considered the ratio of the decision of this Court in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] and observed that the courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon'ble Judges*

observed that while the detention orders could be challenged at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] had been fulfilled. Their Lordships in para 7 of the judgment in Sayed Taher case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] held that the case before them did not fall under any of the five exceptions to enable the Court to interfere. Their Lordships also rejected the contention that the exceptions were not exhaustive and that the decision in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] indicated that it is only in the five types of instances indicated in the judgment in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] that the courts may exercise their discretionary jurisdiction under Articles 226 and 32 of the Constitution at the pre-execution stage.

47. *With due respect to the Hon'ble Judges in Sayed Taher Bawamiya case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] , we have not been able to read into the judgment in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] any intention on the part of the Hon'ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon'ble Judges relied on the decision in Sayed Taher Bawamiya case [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] . As submitted by Mr*

Rohatgi, to accept that it was the intention of the Hon'ble Judges in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the court of law. Such powers are untrammelled and vested in the superior courts to protect all citizens and even non-citizens, under the Constitution, and may require further examination.

48. *In such circumstances, while rejecting Mr Rohatgi's contention regarding the right of a detenu to be provided with the grounds of detention prior to his arrest, we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in para 30 of the judgment in Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] , requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which*

were not before the Hon'ble Judges deciding Alka Subhash Gadia case [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] .

16. The parameters on which the detention order can be challenged at the pre-execution stage was further clarified in S***ubhash Popatlal Dave v. Union of India & Another*** **(2014) 1 SCC 280** and observations in para 15 & 49 are relevant.

> ***"15.*** *From the ratio of the aforesaid authoritative pronouncements of the Supreme Court which also include a Constitution Bench judgment [Sunil Fulchand Shah v. Union of India, (2000) 3 SCC 409 : 2000 SCC (Cri) 659] having a bearing and impact on the instant matters, the question which emerges is that if the order of detention is allowed to be challenged on any ground by not keeping it confined to the five conditions enumerated in Alka Subhash Gadia [Govt. of India v. Alka Subhash Gadia, 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] except the fact that there had been sufficient materials and justification for passing the order of detention which could not be gone into for want of its execution, then whether it is open for the proposed detenu to contend that there is no live link between the order of detention and the purpose for which it had been issued at the relevant time. In the light of ratio of the decisions referred to hereinabove and the law on preventive detention, it is essentially the sufficiency of materials relied upon for passing the order of detention which ought to weigh as to whether the order of detention was fit to be quashed and set aside and merely the length of time*

and liberty to challenge the same at the pre-execution stage which obviated the execution of the order of preventive detention cannot be the sole consideration for holding that the same is fit to be quashed. When a proposed detenu is allowed to challenge the order of detention at the pre-execution stage on any ground whatsoever contending that the order of detention was legally unsustainable, the Court will have an occasion to examine all grounds except sufficiency of the material relied upon by the detaining authorities in passing the order of detention which legally is the most important aspect of the matter but cannot be gone into by the Court as it has been allowed to be challenged at the pre-execution stage when the grounds of detention have not even been served on him.

……

49. *The question whether the five circumstances specified in Alka Subhash Gadia case [Govt. of India v. Alka Subhash Gadia, 1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] are exhaustive of the grounds on which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not exhaustive. [Subhash Popatlal Dave v. Union of India, (2012) 7 SCC 533 : (2012) 3 SCC (Cri) 415] But that does not persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law."*

17. In the light of aforesaid legal position, we are of the considered opinion that if a person against whom the preventive detention order is passed comes to the court at pre-execution stage and satisfies the court that such order is clearly illegal, there is no reason why the court should stay its hands and compel him to go to jail even though he is bound to be released subsequently because of the illegality of such order. Reliance in this regard may also be placed upon ***Deepak Bajaj v. State of Maharashtra & Another*** **(2008) 16 SCC 14.**

18. Coming to the present petition, as per the case of respondent No. 3, the petitioner was engaged in smuggling activities referred to in section 3(1) of COFEPOSA Act and resorted to mis-declaration of material particulars to avail undue benefits in exporting goods under MEIS Scheme. Also, the petitioner had been involved in smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods. Further, the Officers of Respondent No. 3 arrested the petitioner on 18.12.2018 for alleged commission of offences punishable under section 132 and 135 of the Customs Act 1962, in respect of the firms M/s C.L. International, of which the petitioner is a partner and M/s Purav International of which the petitioner is the proprietor. The petitioner is also alleged to be involved directly or indirectly in affairs of other two firms, namely, M/s Yashee Impex and M/s Gauri Global Exports and Trading.

19. It is pertinent to notice that the petitioner was released on bail vide order dated 24.12.2018 and the observations made by ld. ACMM while releasing the petitioner on bail may be noticed:-

"……..

It is pertinent to note that u/s 104 (4) of the Customs act 1962 only two categories of offences have been made cognizable i.e. offence relating to prohibited goods and offences relating to evasion of duty exceeding fifty lakh rupees. Sub section 5 of Section 104 of the Act declares all the other offences under the Customs Act as non-cognizable. In other words, mis-declaration regarding the import or exports of any goods is not a cognizable offence. However, such mis-declaration is a non bailable offence under clause C of sub section 6 of section 104 of Act. Thus, the offence in relation to mis-declaration of value of the imported or exported goods is a non-cognizable and non-bailable offence. No fruitful purpose would be served by keeping accused in custody any longer.

In the given facts and circumstances of the case, accused Abhishek Gupta is granted bail on his furnishing a personal bond in the sum of Rs.1,00,000/- with one surety of the like amount subject to conditions that accused shall submit his passport in the court and shall not leave the country without prior permission to the court. The accused persons shall not temper with the investigation or the evidence and shall join the investigation as and when required.

……."

20. Further, the crucial fact to be noticed is that on 18.12.2018 itself the office of respondent No. 3 vide letter DRI.F No. DRI/11Q-C1/50D/EN-23/2018, informed the DGFT that during examination of live exports

consignments of some of the exporters, *prima fa*cie, mis-declaration in description and value of goods had been found and requested in interest of government revenue that post export benefits to the petitioner's company be disallowed till finalization by DRI. Thereafter, the petitioner was produced before Ld. CMM, Patiala House Courts on 19.12.2018 wherein he retracted the statements allegedly recorded during investigation. Further, in view of communication dated 18.12.2018, the office of DGFT issued orders dated 21.12.2018 and 24.12.2018 thereby placing the Importer Exporter Code (IEC) of M/s C.L. International, M/s Purav International, M/s Gauri Global Exports and Trading and M/s Shivoy Enterprises (Earlier known as Yashee Impex) under the Denied Entry List (DEL) earlier known as "Blacklist". Thereby, the said firms were not permitted to avail any export benefits under MEIS under the Foreign Trade Policy.

Further, separate show-cause notices dated 22.04.2019 were issued to M/s Purav International and M/s C.L. International, with copy marked to petitioner Abhishek Gupta as to why the respective company's names should not be kept under Denied Entry List (DEL) and IEC should not be suspended with an opportunity to reply by 08.05.2019. However, it is claimed by the petitioner that no show-cause notice had been served with respect to other two firms on the petitioner.

It is pertinent to note that as per reply to para 3.6-3.7 in counter-affidavit it is submitted that as informed by the Sponsoring Authority, it was only intimated about passing of order dated 21.12.2018 placing the exporter entities on Denied Entry List (DEL) only on 16.04.2019 and no such order is available on respondent No.3's record. It may be observed

that no efforts appear to have been made by respondent No.3 to ascertain the outcome of request made to DGFT and only a bald assertion is made that intimation regarding order dated 21.12.2018 was received on 16.04.2019.

The said vital facts placing the firms under Denied Entry List (DEL) and not placing the same before the Detaining Authority have a significant and direct bearing on the subjective satisfaction of the Detaining Authority regarding necessity to detain as the same foreclosed any future possibility of petitioner in indulging in any prejudicial activity. As such, there appears to be lack of any genuine and real necessity to again apprehend and detain the petitioner for alleged preventive purpose and the detention order is liable to be quashed on this ground alone as the subjective satisfaction of the Detaining Authority in issuing detention order stands vitiated.

In view of above, Issue No.1 is decided in favour of the petitioner.

21. It may further be noticed that the petitioner, after his initial production for purpose of remand on 19.12.2018 was released on bail on 24.12.2018. The petitioner was thereafter present before the learned CMM on 28.03.2019 as recorded in order dated 28.03.2019 with reference to application for release of passport and permission to go abroad as per application filed by him. Shri Satish Aggarwal, learned Special PP was present on the date of hearing along with Ms. Pooja Bhaskar, counsel for DRI and sought time to file reply. However, no efforts were made by the respondents to serve the detention order dated 26.03.2019, despite the availability of the petitioner. Thereafter, the application for release of passport was further fixed for reply and

arguments, on 30.03.2019 before the learned ACMM and on the aforesaid date, the matter was further put up for reply and arguments for 05.04.2019 at request of learned Special PP for DRI in presence of learned counsel for the applicant/petitioner. Thereafter, on 05.04.2019, the presence of the petitioner is recorded before the learned CMM and DRI was represented by Ms. Pooja Bhaskar, Advocate. A request was made by the petitioner/applicant for withdrawing the application seeking release of passport and permission to go abroad and the same was allowed by the learned CMM on the same date, after recording the statement of counsel for the applicant/petitioner at the bottom margin of the application.

22. It may be observed that the stand taken by the respondents that respondent No.3 was informed about existence of application of Abhishek Gupta only in the evening of 28.03.2019 through notes of proceedings received from DRI's counsel at around 5:00PM and as such there was no question of attending the court on 28.03.2019 to have the detention order executed, appears to be fallacious. There appears to be failure of respondent to act with promptitude as an advance copy of application is stated to have been served to the counsel for DRI on 27.03.2019.

Further, again the stand of respondent is that the proceedings could not be attended on 05.04.2019 by its officers since the respondent No.3 was intimated by its counsel on 04.04.2019 that application has been dismissed as withdrawn and the application was dated 01.04.2019. The fact remains that presence of the petitioner on 05.04.2019 before Ld. CMM has not been denied and assumption by respondents that petitioner

would not appear, is an afterthought. In the facts and circumstances, the respondents cannot be absolved of their conduct of non taking of steps for service of detention order on 28.03.2019 and 05.04.2019.

No justified reasons have been disclosed by the respondent for non-service of detention order on the petitioner on 28.03.2019 and 05.04.2019 despite availability of the petitioner. In the aforesaid backdrop, despite opportunities to serve the detention order, neither the Detaining Authority nor the Executing Agency as well as Sponsoring Authority was diligent or responsible to serve the detention order on the petitioner. There is absolutely no reasonable justification for non-service of detention order dated 26.03.2019 on the petitioner, from 28.03.2019 to 05.04.2019, despite the petitioner being available to the authorities. No serious attempt appears to have been made by the respondents to serve the detention order soon after the same was made and the same is in complete defiance of constitutional mandate. The purpose of a detention order is preventive in nature and not punitive. As such, strict compliance of the procedural safeguards is fatal to the case of respondents as there was no diligent effort to serve the detention order.

23. Observations in ***Mohd. Farook v. Joint Secretary to Govt. of India,*** **(**2000) 2 SCC 360 are also apt to be noticed in this regard:-

> *"27. In A. Mohd. Farook (supra), the detention order was passed on 25.02.1999, however, it was executed by the Detaining Authority on 05.04.1999. Although the detenue was present in the Court of Addl. Chief Metropolitan Magistrate on 25.02.1999 and 25.03.1999, but neither the Detaining Authority, nor the Executing Authority served the detention*

order on the detenue, at the earliest. In these circumstances, the Supreme Court held as follows:

"9. There is catena of judgments on this topic rendered by this Court wherein this Court emphasised that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the petitioner could not be located at his residence or in his office and therefore the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non execution thereof within a reasonable time. From Annexure P.2 (the proceeding sheet of the M.M. Court Madras) it appears that the petitioner (accused) was present in the court of Additional Chief Metropolitan Magistrate on 25.2.1999 as well on 25.3.1999. Despite such opportunities neither the detaining authority nor the executing agency as well as sponsoring authority were diligent to serve the

detention order on the petitioner at the earliest. In this view of the matter, we are of the opinion that the subjective satisfaction of the detaining authority in issuing detention order dated February 25, 1999 is vitiated. It is in these circumstances it is not possible for us to sustain the detention order."

24. It is contended by the respondents that order dated 26.03.2019 for detention of the petitioner under COFEPOSA had been issued by the competent authority after following due process. Further, since the petitioner was intentionally absconding, order dated 21.05.2019 directing the petitioner to appear before the Commissioner of Police, Delhi was subsequently published by the competent authority in accordance with Section 7(1)(b) of COFEPOSA. The said order is stated to have been forwarded by the issuing authority to Respondent No.3 for publishing in newspaper, which was done on 11.07.2019 after observing due formalities and the orders dated 26.03.2019 and 21.05.2019 are stated to be issued in accordance with law after observing due diligence.

25. To appreciate the aforesaid contention, Section 7 of the COFEPOSA Act may be beneficially quoted:-

"7. ***Powers in relation to absconding persons.-***

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may-

(a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the

First Class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order, and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognizable."

26. It needs to be noticed, in the present case, the petitioner did not violate any of the court orders including the order on bail. Further, he duly

responded to the show-cause notices. No effort was made to serve the detention order on the petitioner and detain him on the dates fixed before the learned ACMM. If the petitioner was refusing to cooperate or was unavailable for the purpose of service of detention order, an application ought to have been filed before the learned ACMM for cancellation of his bail or for issuance of notice to sureties but no such application appears to have been made. Nothing has come on record, if any steps were taken to ascertain the whereabouts of the petitioner from the sureties.

The submission made on behalf of the respondents that petitioner was absconding, does not appear to be probable in the facts and circumstances of the case, as even a show-cause notice dated 21.04.2019 was issued warranting him to show-cause as to why the names of M/s C.L. International and M/s Purav International should not continue to place in Denied Entry List (DEL) and their IEC be not suspended. The receipt of the same by the petitioner reflects his availability and the same has not been suitably explained by the respondents.

Even order dated 21.05.2019 was published in the Hindustan Times on 11.07.2019, after a long delay and no urgency in any manner was exhibited by the respondents for serving the impugned order No. PD-12001/07/2019-COFEPOSA dated 26.03.2019.

Thus despite the availability of the petitioner and without taking requisite steps for effecting service, the proceedings were further initiated under Section 7(1)(b) of the COFEPOSA Act, wrongly assuming that the petitioner had been evading service.

It may be difficult to accept the explanation of the respondents that the petitioner was eluding the dragnet of the detention order as the fact cannot be lost sight that no serious attempt was made to execute the impugned detention order to take the petitioner into custody despite his participation in the proceedings before the learned ACMM. The Executing Authority is required to satisfactorily explain this inordinate delay in executing the detention order, failing which the subjective satisfaction get vitiated.

Reliance may be placed upon ***Boris Sobotic Mikolic v. Union of India & Ors.*** **2018 SCC OnLine Del 9363.**

On the face of record, there has been a casual approach by the respondents in issuing as well as executing the detention order, by overlooking the instructions, settled procedural safeguards and cardinal principle that such an order is to be passed in rare circumstances. Such action requires utmost promptitude and strict compliance with the procedural safeguards to sustain the validity of the detention order, which is lacking in the instant case.

Thus, when there is unsatisfactory and unexplained delay between the order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner.

27. Reference may also be made to the procedural safeguards circulated vide F.No.702/MAD/S/33/2006-CUS.IX, Government of India, Ministry of Finance, Department of Revenue, COFEPOSA Section on 21.02.2007 to all Sponsoring Authorities and Chief Secretaries to be observed for the purpose of execution of detention order and the relevant extract in para 1 to 7 of F.No.702/MAD/S/33/2006-CUS.IX dated 21.02.2007 of is apt to be noticed, which appears to have been ignored in the present case:-

> *"Attention is invited to this Ministry's letter F.No.671/6/2001-Cus.VIII dated 12th July, 2001 wherein detailed procedural safeguards/requirements to be observed by all the Sponsoring Authorities/Detaining Authorities while proposing/ finalizing the detention proposal and in the execution of the detention orders under the COFEPOSA Act, 1974, were circulated for compliance by all the concerned.*
>
> *2. These instructions interalia state the procedure to be followed for execution of detention orders, particularly emphasizing the need for prompt service of the same. The authorities concerned were also informed that where there is any undue and unexplained delay between the date of issue of the detention order and that of its execution, such a delay is normally adversely viewed since it goes against the very object and purpose of issuing the detention order. These instructions further envisage that there should be a close monitoring at a senior level by the executing and sponsoring authorities and these authorities must invariably keep documentary records of*

the efforts made by them for execution of the detention order from time to time.

3. As regards action against absconders. These instructions interalia envisage that action under Section 7(1)(b) of the COFEPOSA Act should be taken immediately on expiry of one month from the date of detention order in case it remained unexecuted during that period. It has been further stated therein that it would be preferable to wait one more month and if the person is still absconding, action under Section 7(1)(a) of the COFEPOSA Act should be initiated forthwith.

4. Despite these clear instructions, instances have come to the notice of this Ministry where even though the detenu was available at his own address, no real effort had been made to locate the detenu and execute the detention order. The Hon'ble Supreme Court has held in a no. of cases that if the authorities did not make sincere and honest efforts and take any urgent or effective steps the service of the detention order on the detenu, the order of the detention is liable to be set aside.

5. It is generally noticed that the Sponsoring Authorities who originally move the proposal, somehow develop a lax attitude after a detention order based on their proposal has been issued. They tend to harbour a feeling that they have no further role in the matter and it is entirely for the Detaining Authority and the Executive Authority to ensure that the Detention Order is served. This wrong notion needs to be dispelled forthwith. The Sponsoring Authority must keep in

mind the fact that their role and object is not confined merely to having a detention order issued but to have a person detained otherwise the very object of issuing the detention order gets defeated.

6. All the Sponsoring Authorities, Executive Authorities and the Detaining Authorities are once again requested that they must ensure that timely action is taken for execution of the detention order after it has been issued. Simultaneously, they should keep detailed records of the efforts made for execution of the Detention order from time to time, as it would be important to convince the Advisory Board / Hon'ble High Courts, if need arises....."

(Emphasis Supplied)

7. These instructions may please be brought to the notice of all concerned for strict compliance.

28. It may be appropriate to also refer to the conclusions arrived at in ***Rajinder Arora v. Union of India*** **(2006) 4 SCC 796,** wherein the order of detention was quashed at pre-execution stage on various grounds including unexplained delay, non launching of prosecution under the Customs Act and non placement/non consideration of a vital document. Observations of the Supreme Court in para 19 to 26 are apt to be noticed:-

"19. The said counter-affidavit has been affirmed in November 2005. It is beyond anybody's comprehension as to why despite a long passage of time, the respondents have not been able to gather any material to lodge a complaint against

the appellant. It is furthermore not in dispute that even the DGFT Authorities have not issued any show-cause notice in exercise of their power under the Foreign Trade (Development and Regulation) Act, 1992.

20. Furthermore no explanation whatsoever has been offered by the respondent as to why the order of detention has been issued after such a long time. The said question has also not been examined by the Authorities before issuing the order of detention.

21. The question as regards delay in issuing the order of detention has been held to be a valid ground for quashing an order of detention by this Court in T.A. Abdul Rahman v. State of Kerala [(1989) 4 SCC 741 : 1990 SCC (Cri) 76 : AIR 1990 SC 225] stating: (SCC pp. 748-49, paras 10-11)

> *"10. The conspectus of the above decisions can be summarised thus: The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard-and-fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of*

detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the causal connection has been broken in the circumstances of each case.

11. Similarly when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenu with a view to preventing him from acting in a prejudicial manner."

22. The delay caused in this case in issuing the order of detention has not been explained. In fact, no reason in that behalf whatsoever has been assigned at all.

24. A Division Bench of this Court in K.S. Nagamuthu v. State of T.N. [(2006) 4 SCC 792 : (2005) 9 Scale 534] struck down an order of detention on the ground that the relevant material had been withheld from the detaining authority; which in that

case was a letter of the detenu retracting from confession made by him.

25. Having regard to the findings aforementioned, we are of the opinion that Grounds (iii) and (iv) of the decision of this Court in Alka Subhash Gadia [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] are attracted in the instant case.

26. For the reasons aforementioned, the impugned order of detention cannot be sustained, which is set aside accordingly. The appeal is allowed."

In the light of aforesaid discussion and findings on Issue No.2 & 3, the impugned detention order is also liable to be set aside.

29. A contention has also been raised on behalf of the petitioner that provisions of Section 2 (a), 3 and 7 of the Act, in juxtaposition with each other would leave no manner of doubt that the discretionary power to issue and make a report relating to the abscondence of a person in respect of whom the detention order has been made or about his concealment in terms of Section 7 (1) (a) as well as directions vide an order to be notified in the Official Gazette in terms of Section 7 (1)(b) are powers to be exercised only by the 'Appropriate Government'. As such none else, much less the Detaining Authority can ever substitute to exercise such power and such power cannot even be delegated to any other authority. It has been submitted by the learned counsel for the petitioner that there is a completely flawed understanding of the respondents that action under Section 7 could be taken by the Detaining Authority, considering itself to be equivalent to the Central Government.

Reliance has been further placed upon ***Ankit Ashok Jalan Vs. Union of India & Ors.,*** (2020) 16 SCC 127.

Relying upon the same, it has also been submitted that the impugned detention order and order under Section 7 (1)(b) were issued prior to the judgment in ***Ankit Ashok Jalan*** (supra) and even a writ petition as well as counter affidavit and rejoinder were filed before the said judgment. The proceedings, as such, are stated to be completely vitiated in law, since the Detaining Authority assumed the role and jurisdiction as well as to use the power that are vested only with 'appropriate Government' for the purpose of initiating proceedings under Section 7 of the COFEPOSA Act.

30. On the other hand, it has been contended on behalf of the respondents that powers vested in the Central Government under Sub-section 1 of Section 7 under the COFEPOSA Act, 1974 have been delegated to the Joint Secretary (COFEPOSA) i.e. the Detaining Authority. It is denied that the Competent Authority usurped the jurisdiction of the Appropriate Government i.e. Central Government. The action taken under Section 7 (1)(b) is stated to be in total sync with the powers vested with the Joint Secretary (COFEPOSA) i.e. the Detaining Authority under Sub-section 1 of Section 7 under the COFEPOSA Act, 1974 in terms of delegation made in the Gazette Notification dated 16.08.2018. The case law cited by the petitioner is further stated to be not applicable in the facts and circumstances of the present case and distinguishable.

31. It may be appropriate to reproduce the Notification dated 16.08.2018 issued by the Ministry of Finance, Department of Revenue, which reads as under:-

*"**MINISTRY OF FINANCE***

(Department of Revenue)

(Central Economic Intelligence Bureau)

ORDER

New Delhi, the 16th August, 2018

***S.O.** 4045 (E). - In pursuance of provision of rule 3 of the Government of India (Transaction of Business) Rules, 1961 and supersession of all previous order on this subject the Competent Authority hereby directs that the powers vested in the Central Government under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), shall be exercised by the officers in the Ministry of Finance (Deparment of Revenue).*

Sl No.	*Provisions of the Act*	*Powers delegated*	*Officers to whom designated*
1	*Sub-section 2 of Section 3*	*All powers*	*Secretary or Director General, Central Economic Intelligence Bureau or Joint Secretary (COFEPOSA) in the Department of Revenue, Ministry of Finance.*
2	*Section 5*	*All powers*	
3	*Sub-section 1 of Section 7*	*All powers*	
4	*Clause (b) of Section 8*	*All powers*	*Deputy Secretary (COFEPOSA) or Under Secretary (COFEPOSA) in the Department of Revenue, Ministry of Finance.*
5	*Clause (f) of Section 8*	*Cases where the Advisory Board had reported that there is on sufficient cause for detention*	*Joint Secretary (COFEPOSA) or Deputy Secretary (COFEPOSA) or Under Secretary (COFEPOSA) in the Department of Revenue, Ministry of Finance.*

6	*Section 11*	*Power to consider and dispose of representations from and on behalf of COFEPOSA detenues.*	*Secretary or Director General, Central Economic Intelligence Bureau in the Department of Revenue, Ministry of Finance.*
7	*Section 12*	*All powers*	

2. This notification shall come into force with effect from 28.06.2016.

[F.No.671/09/2016-Cus-VIII]

L. SATYA SRINIVAS, Jt. Secy."

32. It may be noticed that the twin questions which arose for consideration as referred in paras 11.1 and 11.2 in ***Ankit Ashok Jalan*** (supra) were as under:-

> *"First, on the issue whether a representation can independently be made to and must be considered by the detaining authority, who is a specially empowered officer of the Government concerned.*
>
> *Secondly, whether, in certain circumstances, the detaining authority ought to defer consideration of such representation till the report is received from the Advisory Board."*

33. With reference to the first issue, whether a representation can independently be made to and must be considered by the Detaining Authority who is specially empowered Officer of the Government concerned, it was observed that the apparent conflict in ***State of Maharashtra Vs. Sushila Mafatlal Shah,*** (1988) 4 SCC 490 and ***Amir Shad Khan Vs. L. Hmingliana,*** (1991) 4 SCC 39 came up for consideration before a Constitution Bench of the Supreme Court in

Kamleshkumar Ishwardas Patel Vs. Union of India, (1995) 4 SCC 51 and the Supreme Court did not accept the law laid down in ***Sushila Mafatlal Shah*** (supra). It was accordingly observed in para 13 in ***Ankit Ashok Jalan*** (supra) as follows:-

"13. With the judgment of the Constitution Bench of this Court in Kamleshkumar, the law on the first issue is well settled that where the detention order is made inter alia under Section 3 of the COFEPOSA Act by an officer specially empowered for that purpose either by the Central Government or the State Government, the person detained has a right to make a representation to the said officer; and the said officer is obliged to consider the said representation; and the failure on his part to do so would result in denial of the right conferred on the person detained to make a representation. Further, such right of the detenue has been taken to be in addition to the right to make the representation to the State Government and the Central Government. It must be stated in Para 12 of the grounds of detention in the instant case, as quoted hereinabove, is in tune with the law so declared by this Court."

Thus, it may be seen that the ratio laid down in ***Ankit Ashok Jalan*** (supra) primarily relates on the issue whether a representation can independently be made to and must be considered by the detaining authority, who is a specially empowered officer of the Government concerned. However, there does not appear to be any mandate that the appropriate Government has no power to delegate the same to the Joint

Secretary (COFEPOSA) i.e. the Detaining Authority. The powers vested in the Central Government under Sub-section 1 of Section 7 under the COFEPOSA Act, 1974 appear to have been duly delegated to the Joint Secretary (COFEPOSA) i.e the Detaining Authority as per notification dated 16.08.2018 and there does not appear to be any irregularity in this regard.

34. In view of above, we are unable to be persuaded that the Detaining Authority has wrongly assumed the role and jurisdiction as well as use the powers vested with the Appropriate Government for the purpose of proceedings under Section 7 of the COFEPOSA Act, 1974.

35. In the facts and circumstances, we are of the considered view that the purpose of detention order is a preventive measure and if the detenu is not served or detained at the earliest possible, keeping in view the spirit of Article 22(5) of the Constitution of India, the purpose is defeated. A sense of urgency needs to be exhibited by the respondents, if the preventive detention order is to be justified. The entire exercise for service of detention order appears to have been undertaken in a casual and cavalier manner, which, in our considered view is fatal to the case of the respondents. The non placement of the vital fact that the firms had been placed in Denied Entry List (DEL) before the Detaining Authority prior to passing of detention order also vitiates the subjective satisfaction of the Detaining Authority.

36. In view of aforesaid discussion, we allow the present Writ Petition and quash the detention order No.PD-12001/07/2019-COFEPOSA dated 26.03.2019 issued under Section 3(1) of the Conservation of Foreign

Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act).

ANOOP KUMAR MENDIRATTA
(JUDGE)

SIDDHARTH MRIDUL
(JUDGE)

May 20, 2022
SD