
(1986) 08 GUJ CK 0001

In the Gujarat High Court

Case No : Spl. Criminal Application No. 93 of 1986

Bhavna Chandrakant Acharya

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-08-1986

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 10, 3, 8, 9(I)
Constitution of India, 1950 — Article 22(4)

Citation : AIR 1987 Guj 90 : (1987) 11 ECC 336 : (1987) 2 GLR 685 : (1988) 1 RCR(Criminal) 184 : (1987) 1 RCR(Criminal) 99

Hon'ble Judges : P.R. Gokulakrishnan, C.J.;S.B. Majmudar, J;R.A. Mehta, J

Bench : Full Bench

Advocate : M.G. Karmali and A.R. Thakkar, for the Appellant; S.D. Shah and J.M. Panchal, for the Respondent

Judgement

Gokulakrishnan, C.J.—This matter comes up before this Full Bench on a reference made by a Division Bench of this Honourable Court by its order dated 1-5-1986 passed in Special Criminal Application. No. 93 of 1986. The question referred to this Bench is as follows:

"Whether, when a declaration u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is found to be bad on any ground, the original detention u/s 3(1) unaided by such declaration also falls to the ground and the detenu is required to be released, even though the detenu has not undergone detention for a period of one year which he would be required to undergo in absence of the declaration u/s 9(1) of the Act?"

2. The short facts of this case for the purpose of appreciating the reference are as follows:

The petitioner in the Special Criminal Application is the wife of the detenu by name Chandrakant Ishwarlal Acharya. On 9-10-1985, the Deputy Secretary to the Government of Gujarat, Home Department, in exercise of the power

conferred by sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, detained Shri Chandrakant Ishwarlal Ramanandi @ Chandrakant Ishwarlal Acharya and kept him in the Central Prison, Ahmedabad in pursuance of Section 5 of the said Act. The grounds of detention were served on the detenu on 10-10-1985 and a list of documents was also served on the detenu. On 4-11-1985, the Additional Secretary to the Government of India declared u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 that he is satisfied that the detenu is likely to smuggle goods into and through the coast of Gujarat, which is an area highly vulnerable to smuggling, as defined in Explanation 1 to Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The said declaration was served on the detenu on 18-11-1985. On 11-12-1985, the detenu made representation, both to the State Government and to the Central Government. The State Government rejected the representation on 20-12-1985, while the Central Government rejected the representation on 23-12-1985. The Advisory Board, constituted u/s 8 of the said Act, has reported u/s 8(f) of the said Act, that there was and there is, in its opinion, sufficient cause for the continued detention of Shri Chandrakant Ishwarlal Acharya who has been detained under order No. SB IV. PSA/1185/110 dated 9-10-1985 made by the Government of Gujarat, Home Department. On the strength of this report, the Government of Gujarat, in exercise of its power conferred under sub-section (f) of Section 8 of the said Act, confirmed the said detention order and continued the detention of Chandrakant Ishwarlal Acharya. The wife of the detenu has questioned the impugned order of detention, the impugned declaration and the impugned order of confirmation by a writ of habeas corpus praying that the detenu be released from detention forthwith and be set at liberty. While considering the said writ petition, a Bench of our High Court found that the declaration u/s 9(1) of the Act cannot stand on the facts and circumstances of the present case. If that be so, the question arose as to whether the original detention of the detenu as per Annexure "A" is also vitiated on account of the declaration u/s 9(1) having been found to be bad. Mr. M. G. Karmali, the learned counsel appearing for the petitioner in that writ petition, contended that there is substitution of the period of detention for one year by two years and not extension for one year more when a declaration u/s 9(1) is issued, though the effect thereof is to extend the period from one year to two years. He further contended that the representation which the detenu made was against the detention and he would not have a second opportunity to make a representation as regards the original detention separately once it is found that the declaration u/s 9(1) is bad. The learned counsel then submitted that the detention is one and integrated and not in two parts and, therefore, once a declaration u/s 9(1) is found to be bad, the detention is required to be quashed and the detenu is required to be released forthwith. Finally, the learned counsel contended before the Division Bench that for detention u/s 3(1) and Section 9(1), joint representation is made. This has been rejected. If such a detention u/s 9(1) is bad, the whole of detention falls to the ground as per Section 8(f). The

Bench, after considering all these objections and also referring to certain decisions cited on behalf of the petitioner and the Government thought it fit to refer the matter to a Full Bench.

3. Mr. Karmali, the learned counsel appearing for the petitioner, reiterated the arguments which we have extracted above. We do not think it is necessary for us to consider as to whether detention as such can be sustained or not. To answer the reference made to the Full Bench, it is necessary to consider the relevant provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Section 3 reads as follows:

"3. Power to make orders detaining certain persons.- (1) The Central Government or the State Government or any Officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any Officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from -

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an Officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purposes of Clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention."

On 9-10-1985, order under this section was made for detaining the detenu and he was kept in the custody in the Central Prison, Ahmedabad. Section 8 deals with the constitution of the Advisory Board and its report when a reference is made to the Board regarding the detention. It runs as follows:

"8. Advisory Boards. - For the purposes of sub-clause (a) of Clause, (4), and sub-clause (c) of Clause (7), of Article 22 of the, Constitution, -

(a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons possessing the qualifications specified in sub-clause (a) of Clause (4) of Article 22 of the Constitution;

(b) save as otherwise provided in Section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted under Clause (a) to enable the Advisory Board to make the report under sub-clause (a) of Clause (4) of Article 22 of the Constitution;

(c) the Advisory Board to which a reference is made under Clause (b) shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case, it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;

(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified shall be confidential;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

Section 9 deals with cases in which and circumstances under which persons may be detained for periods longer than three months without obtaining opinion of Advisory Board. Section 10 deals with maximum period of detention and it runs as follows:

"10. Maximum period of detention-

The maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 do not apply and which has been confirmed under Clause (f) of Section 8 shall be a period of one year from the date of detention or the specified period, whichever period expires later and the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 apply and which has been confirmed under Clause (f) of Section 8 read with sub-section (2) of Section 9 shall be a period of two years from the date of detention or the specified period, whichever period expires later.

Provided that nothing contained in this section shall affect the power of the appropriate Government in either case to revoke or modify the detention order at any earlier time."

4. In the case of any person detained under the detention order to which the provisions of sub-section (1) of section 9 apply, the powers of the Advisory Board and its report are regulated as under:

As far as clause (a) of section 8 is concerned, there is no change. As far as clause (b) is concerned, for the words "shall, within five weeks" the words "shall, within four months and two weeks" shall be substituted. In clause (c) of section 8 to apply the detention under sub-section (1) of Section 9, for the words "the detention of the person concerned" the words "the continued detention of the person concerned" shall be substituted. For the detention after declaration u/s 9(1), the procedure u/s 8 is followed with certain modification as stated above. Thus, we see the detention contemplated u/s 3(1) and that contemplated u/s 9(1) are different and distinct entities and the procedures for reference and the report to be given are distinct from each other and they cannot be considered as one and integrated, but on the other hand, they are two separate procedures.

5. Section 9(1) enables the authority to make a declaration which would have the effect of extending the period of detention to two years from the date of detention by virtue of amendment to section 10. Section 8(f) with modification as per section 9(2)(iii) will read as follows:

"8(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the continued detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the continued detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

6. Section 9 of the COFEPOSA Act visualises the declaration to be made by the authority concerned to detain a person without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding six months from the date of detention. Such detention ought to have been made with, a view to preventing the detenu from smuggling goods or abetting the

smuggling of goods or engaging in transporting or concealing or keeping smuggled goods provided the Central Government or its Officer not below the rank of an Additional Secretary specially empowered for this purpose is satisfied that such person (a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling or (b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling or (c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling and makes a declaration in that behalf within five weeks of the detention of such person. Explanation I to that sub-section defines "area highly vulnerable to smuggling." It is not necessary to set out the definition, but it is sufficient to state that the declaration is not challenged before us on the ground that the, activities of the detenu were not in "area highly vulnerable to smuggling". Sub-section (2) of section 9 effects certain amendments in clauses (b), (c) and (f) of section 8 of the Act. Under clause (b), the appropriate Government has to make a reference to the, Advisory Board within five weeks from the date of detention. Under clause (1) sub section (2) of section 9, the period of five weeks is extended to four months and two weeks. Again, under clause (c) of section 8, the Advisory Board has to opine whether or not there is sufficient cause for the detention of the person concerned and submit its report within eleven weeks from the date of detention. By the amendment brought about by clause (ii) of Section 9(2), the words "the detention of the person concerned" are substituted by, the words "the continued detention of the person concerned" and instead of the period of eleven weeks, the period is extended to five months and three weeks. The effect of this amendment is that the Advisory Board is, in cases where a declaration is made u/s 9(1) of the Act, called upon to decide within a period of five months and three weeks from the date of detention whether or not there is sufficient cause for the continued detention of the person concerned. Similarly, by clause (iii) of section 9(2), in clause (f) of section 8, the words "for the detention" appearing at both the places have to be substituted by the words "for the continued detention" of the person concerned. In other words, the appropriate Government can confirm the detention and continue the detention of the person concerned if the Advisory Board has opined that there is sufficient cause for his continued detention. Once this is done, by virtue of section 10 of the Act, the maximum period of detention gets enlarged to two years from the date of detention. From the above scheme of the Act, it becomes clear that once a declaration is made u/s 9(1) of the Act, it has the effect of (i) extending the period within which a reference must be made to the Advisory Board from five weeks to four months and two weeks; (ii) extending the period of detention without reference to the Advisory Board from three months to six months; (iii) extending the period within which the Advisory Board can report from eleven weeks to five months and three weeks; and (iv) extending the maximum period of detention from one year to two years from the date of detention.

7. The Constitutional framework in regard to personal liberty in the context of

preventive detention is to be found in Articles 21 and 22. These two Articles together constitute an integrated Code, the former prohibits deprivation of personal liberty except according to the procedure established by law whereas the latter outlines the procedure in respect of preventive detention. Clauses (1) and (2) of Article 22 which provide for punitive detention prescribe certain safeguards to ensure that a person who is deprived of his personal liberty is informed of the grounds of his arrest and. Is produced before the nearest Magistrate within twenty four hours of his arrest. By virtue of clause (3) these safeguards are not available to an enemy alien or a person taken in preventive detention. Preventive detention though abhorrent to the concept of personal liberty has received Constitutional recognition with a view to curbing prejudicial activities of anti-social and subversive elements detrimental to national interest. Article 22(4) provides that there shall be no law providing for preventive detention for more than three months. Such, law makes provision for the constitution of an Advisory Board of persons who are, or have been, or are qualified to be appointed as Judges of the High Court and such Board has opined before the expiration of three months that there is sufficient cause for the detention of the detenu. After the Advisory Board has opined that there is sufficient cause for the detention of the concerned individual, the maximum period of detention will have to be determined in each case provided that if the statute enacted under sub-clause (b) of clause (7) prescribes the maximum period, it shall not exceed such maximum limit. The limitation that a person shall not be detained for more than three months is again subject to any law made under sub-clauses (a) and (b) of clause (7). Clause (7) empowers Parliament to prescribe by law (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board, and (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention. Therefore, on a conjoint reading of clauses (4) and (7) of Article 22, it becomes clear that ordinarily no person can be kept in preventive detention for a period exceeding three months unless Parliament has, by law, permitted detention for a longer period, as in the case of section 9(2) of the Act. The Parliament is also authorised by sub-clause (b) of clause (7) of Article 22 to prescribe the maximum period for which any person may be detained, which period is prescribed by section 10 of the Act. Thus, in the case of a detenu in respect of whom a declaration is made u/s 9(1) the maximum period of detention prescribed by section 10 is two years from the date of detention. In the background of this Constitutional framework, and the scheme of the Act which we have outlined hereinabove, we can also usefully refer to some of the decisions cited by Mr. Karmali, the learned counsel appearing for the petitioner in the Special Criminal Application. In the decision in Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others, , the Supreme Court had occasion to consider the question as to whether a detenu can be detained for an extended period after the declaration u/s 9(1) of the COFEPOSA Act. In that decision, the Supreme Court came to the conclusion that in the absence of the

Advisory Board's opinion to the effect that there is sufficient cause for the "continued detention" of the detenus, their detention for a period exceeding one year is without legal sanction and as such, such a detention has to be quashed.

8. A Bench of our High Court in Special Criminal Applns. Nos. 691 to 698 and 700 to 704 of 1985 dated 10-2-1986: (reported in Abdula Mamad Mithani and etc. Vs. State of Gujarat and Others, has clearly held as follows:

"Non-supply of the basic material on which the subjective satisfaction for the declaration was reached would deprive the detenu of his right to make an effective representation before the Advisory Board with, a view to persuading it to the view that there did not exist sufficient cause for his continued detention. It is only after the Advisory Board has reported that there is in its opinion sufficient cause for the continued detention of the detenu that the appropriate Government can confirm the detention order u/s 8(f) of the Act. Therefore, the right to be personally heard by the Advisory Board in regard to his, continued detention would be rendered nugatory if the material on the basis whereof the declaration was made is kept back from the detenu. We are, therefore, of the opinion that after the decision of the Supreme Court in Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others, there can be no doubt that the Advisory Board would have to go behind the declaration to consider the question of sufficiency of cause for continued detention. Once it is settled that the Advisory Board can go behind the declaration, it stands to reason to hold that the detenu must have an opportunity to represent against his continued detention by pointing out that the material on the basis whereof the declaration was made was not sufficient for reaching the subjective satisfaction required for making the declaration. In the instant case admittedly the basic material in support of the declaration was not supplied to the detenu nor was the detenu informed that the declaration was founded on this very same material on which the detention order u/s 3(1) of the Act was made by the appropriate authority. We are, therefore of the opinion that the non-supply of basic material for the declaration is fatal and, therefore, the detention of the detenus cannot be upheld."

In another decision by a Bench of our High Court rendered on 1st April, 1986 in Special Criminal Applns. Nos. 75 to 87 of 1986* (Reported in 1986 Cri LR 317 (Guj) 1987 Guj. / V G-22) the Bench did not go into the controversy as to whether once the declaration under section 9(1) is illegal, the detention from the inception itself is illegal or it becomes illegal only beyond the period of one year. In the case before the said Bench, the Advisory Board did not give its opinion in terms of the mandate of section 8(f) of the Act as regards the continued detention. Hence the Bench held that the continued detention of the petitioners after the date of the report of the Advisory Board in each of those cases was illegal. The other decision cited by Mr. Karmali, the learned counsel appearing for the petitioner, is the one rendered on 8-4-1986 by the Bench of our High Court in Special Criminal Applns. Nos. 1130 of 1985 with 1131, 1133, 1134 and 1079 of 1985. In this decision also the Bench had to consider as to whether the material

for declaration u/s 9(1) was furnished to the detenu and if not, what is the effect of such continued detention. Considering this aspect, the Bench held :

"If the material on the basis of which the declaration is made is not supplied to the detenu nor is he informed that the declaration is made relying upon the same material on the basis of which the order of detention was passed, then his right to make an effective representation against the declaration will be prejudicially affected and that would also make his continued detention pursuant to such a declaration illegal."

Mr. Karmali also cited some of the Bench decisions of the Bombay High Court which had occasion to deal with the effect of declaration u/s 9(1) of the Act. In Criminal Writ Petn. No. 170 of 1985 decided on 19-7-1985 : (reported in 1986 Cri LJ 1645), the Bench of the Bombay High Court opined that :

"the amendment of additional word "continued" is not merely of form, but of substance and it cannot be said that even if the Advisory Board has merely reported as to the sufficiency of the cause for the detention of the person, it should be deemed to have given its report as to the sufficiency of cause for the continued detention of the person concerned."

Hence, the Bench further decided that:

"the confirmation of the detention order by the Government can be made only on the Advisory Board giving its opinion that there is sufficient cause for the continued detention of the person concerned."

In this decision, it is pertinent to note that the Bench observed that :

"the expression "continued detention" in sections 8(c) and 8(f) is of significance and shows the intention of the Legislature to make a distinction between the two classes of detentions viz. the case of normal detention in which declaration u/s 9 not issued and a case where such a declaration is issued."

9. In the decision in Suresh Bhojraj Chelani Vs. State of Maharashtra, , the Supreme Court had an occasion to consider as to whether the order of confirmation passed should mention the period of detention and if it is not mentioned whether such an order of confirmation is vitiated. Considering this aspect of the case, the Supreme Court held :

"Section 10 of the COFEPOSA Act provides that the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of S. 9 do not apply and which has been confirmed under clause (f) of S. 8 shall be one year from the date of detention and the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of S. 9 apply and which has been confirmed under clause (f) of S. 8 read with sub-section (2) of S. 9 shall be two years from the date of detention :

Provided that nothing contained in this section shall affect the power of the appropriate Government in either case to revoke or modify the detention order at

any earlier time.....It has nowhere been mentioned that the period of one year or the period lesser than one year shall have to be mentioned in the order of confirmation.....The maximum period (in this case) is one year. When no period is mentioned in an order, the implication is that the detention is for the maximum period of one year (or two years as the case may be).,"

In the decision in *Jusab Haji Ismail v. State of Gujarat*, reported in 1985 Guj LH 617, a Bench of our High Court, referring to the contention that after the amendment and substitution of section 9 and consequential amendment in section 8 of the COFEPOSA Act, the Advisory Board cannot go into the original detention u/s 3(1) held:

"This is clearly misconceived. The jurisdiction of the Advisory Board to go into the validity of the original detention is not taken away and the jurisdiction to go into the question of continued detention necessarily includes the question of original detention also. Therefore this contention also fails."

We can usefully reproduce the observation of the Supreme Court in the decision in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, as to how the preventive detention has to be resorted to :

"Preventive detention unlike punitive detention which is to punish for the wrong done, is to protect the society by preventing wrong being done. Though such powers must be very cautiously exercised not to undermine the fundamental freedoms guaranteed to our people, the procedural safeguards are to ensure that, yet these must be looked at from a pragmatic and commonsense point of view, The exercise of the power of preventive detention must be strictly within the safeguards provided. We are governed by the Constitution and our Constitution embodies a particular philosophy of Government and a way of life and that necessarily requires understanding between those who exercise powers and the people over whom or in respect of whom such power is exercised. The purpose of exercise of all such powers by the Government must be to promote common well-being and must be to subserve the common good. It is necessary to protect therefore the individual rights in so far as practicable which are not inconsistent with the security and well-being of the society. Grant of power imposes limitation on the use of the power. There are various procedural safeguards and we must construe those in proper light and from pragmatic commonsense point of view. We must remember that observance of written law about the procedural safeguards for the protection of the individual is normally the high duty of public official but in all circumstances not the highest. The law of self-preservation and protection of the country and national security may claim in certain circumstances higher priority."

10. The decisions of both the High Courts and the Supreme Court as narrated in paragraphs supra have held that the lack of the words "continued detention" in the detention order and in the opinion of the Advisory Board will vitiate the continued detention contemplated for the cases coming under the purview of

Section 9. The argument of Mr. Karmali is that once it is found that the continued detention cannot be sustained, there is no other option for the appropriate Government except to revoke the detention order as a whole as provided u/s 8(f). We are not able to appreciate this argument. Firstly, section 8(f) contemplates revocation of the detention order only when the Advisory Board has reported that there is, in its opinion, no sufficient cause for the continued detention of the person concerned. Assuming for the argument sake that in such a case, the detention order as a whole has to be revoked, section 8(f) makes it obligatory on the part of the Government to revoke the detention order only in case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the continued detention of the person concerned. In a case where the Advisory Board has reported that in its opinion there is sufficient cause for the continued detention of the person concerned, we do not think that the appropriate Government shall have the power to revoke the detention as a whole even if it is found on some technical ground that the continued detention of the person concerned cannot be sustained. The continued detention is thought of in certain circumstances after a valid detention is made. They contemplate separate and distinct circumstances that work independently in different fields. Even if the aggravated form falls, the detention simpliciter cannot fall unless on its own defect the detention simpliciter also falls to the ground. As far as the present case is concerned, the Advisory Board has reported u/s 8(f) of the said Act that there was and there is, in its opinion, no sufficient cause for the continued detention of Shri Chandrakant Ishwarlal Acharya. In view of such a report, the Government of Gujarat, by virtue of the powers conferred u/s 8(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, has confirmed the said detention order and continued detention of Shri Chandrakant Ishwarlal Acharya. Reading the order as suggested by Mr. Karmali to the effect that the Advisory Board has given its opinion only with respect to the continued detention u/s 9(1) of the Act, even then, in our opinion, the detention u/s 3(1) is very well within that phraseology of "continued detention" and as such the detention order u/s 3(1) if it is valid, even if the continued detention is not sustainable, will not fall to the ground. It is also well settled that there is no need that the order of confirmation passed by the Government should mention the period of detention. In the decision in *Suresh Bhojraj Chelani Vs. State of Maharashtra*, , the Supreme Court had occasion to consider as to whether the order of confirmation passed by the Government without mentioning the period of detention is vitiated or not. The Supreme Court, after coming to the conclusion, which we have extracted in paragraph 9 (supra) said that the language of section 8(f) merely states that on receiving the Advisory Board's opinion as regards sufficiency of cause for the detention, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and it does not support the contention of the counsel to the effect that the order of confirmation passed by the Government should mention the period of detention. Thus, when especially no period need be mentioned in the order confirming detention, the order passed

for continued detention must be taken as order passed both for detention and continued detention.

11. The main thrust of the argument of Mr. Karmali is that once the declaration u/s 9(1) is made, section 8 will stand automatically modified. If that be so, the detention order has to be revoked as provided u/s 8(f), if once it is found that the continued detention cannot be sustained. The learned counsel further submitted that the language of section 8(f) is clear to the effect that where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith. Any other reading to save the detention in spite of the clear direction to revoke the detention and release the detenu forthwith in case the Advisory Board opines that there is no sufficient cause for continued detention of the person concerned, will be doing violence to section 8(f) and will be reading something into this section when it is not there. It is further contended by Mr. Karmali that the detention order u/s 3 will not be effective of its own after the declaration u/s 9(1) and that if the said declaration falls to the ground, the whole of detention order has to be revoked. If such a situation is considered to be a lacuna in the said section 8(f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, the same cannot be rectified by the Court, except leaving it to the Legislature to effect necessary amendments.

12. Mr. S.D. Shah, the learned counsel appearing for the Central Government, contended that the initial power to detain a person under the COFEPOSA Act is to be found only u/s 3 of the said Act and that, therefore, an order of detention u/s 3 is an independent and substantive executive order which is enforceable and the direct and immediate effect thereof is the detention of an individual. As far as the declaration u/s 9(1) is concerned, Mr. S.D. Shah contended that it is not an order having any direct and immediate effect on the personal liberty of an individual in the absence of order u/s 3. Hence, according to Mr. S. D. Shah, a mere illegality or invalidity of the declaration u/s 9 cannot vitiate the original exercise of power u/s 3 inasmuch as that power is not in any way dependent upon making of declaration. Mr. S. D. Shah further submitted that detention u/s 3(1) is subject to the Constitutional mandate as per Article 22(4) and it will not depend upon the validity of the declaration u/s 9(1) of the Act. The purpose for enacting section 9 is to prescribe class or classes of cases in which or the circumstances under which a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board. Hence the illegality or invalidity of section 9 declaration cannot and should not affect section 3 order which is the only substantive and independent order that can be passed under the COFEPOSA Act and the same is not in any way dependent upon Section 9 declaration. We do not think it is necessary to spell out in detail the matrix for detaining a person u/s 3(1) or u/s 9(1) for the purpose of the present case except stating that the declaration u/s 9 has the fourfold effect connected with the extension of time schedule prescribed for taking the requisite steps as enumerated in earlier part

of this judgment. Section 3 of the COFEPOSA Act makes it incumbent upon the authority concerned to pass an order of detention under circumstances mentioned therein. Such legislation is made in consonance with the mandatory provision contained in Article 22(4) which reads as follows:

"22. Protection against arrest and detention in certain cases. -

XXX XXX XXX XXX (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a high Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7), or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)."

To state that if the declaration u/s 9(1) is held to be invalid, the -detention order will stand revoked forthwith will be going against the constitutional mandate provided under Article 22(4). The detention order passed u/s 3 cannot be wiped out on the ground that the declaration u/s 9(1) has failed. In the present case, both the detention order and the declaration u/s 9(1) have been referred to the Advisory Board within the prescribed time. The Advisory Board has reported on this reference that there was and there is, in its opinion, sufficient cause for the continued detention of the detenu concerned. On the strength of this opinion, the State Government, in exercise of the powers conferred by sub-section (f) of section 8 of the COFEPOSA Act confirmed the said detention order and continued the detention of Shri Chandrakant Ishwarlal Acharya. It has now transpired that the continued detention as per the declaration u/s 9(1) cannot be sustained. Nevertheless, the order of detention u/s 3(1) cannot be superseded nor made ineffective simply on the ground that section 9(1) declaration is invalid. Independent of the declaration u/s 9(1), the order of detention u/s 3(1) which is the only section under which the order of detention can be made, will stand irrespective of the invalidity of the declaration u/s 9(1). Detention u/s 3(1) of the COFEPOSA Act is strictly as per the constitutional mandate under Article 22(4). Section 9 wherein the declaration is made for an extended period is in keeping with the constitutional mandate u/s 22(7) which reads as follows:

"22. Protection against arrest and detention in certain cases XXX XXX XXX

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law

providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)." This declaration for detention for a period longer than three months without obtaining the opinion of the Advisory Board is made in the given circumstances enumerated in the said section. Hence the detention u/s 3(1) of the Act and the declaration u/s 9(1) are independent and distinct. The reading of these sections clearly envisages a detention order u/s 3(1) which is a necessary foundation for declaration u/s 9(1) which contemplates detaining a person for a period longer than three months without obtaining the opinion of the Advisory Board in a given circumstance. If there is no detention as such u/s 3(1), there is no question of any declaration u/s 9(1). Hence the detention u/s 3(1) is inbuilt in any order or declaration and simply because the declaration u/s 9(1) proves to be invalid, it will not, ipso facto, make the detention u/s 3(1) invalid.

13. The argument of Mr. Karmali is that once the Section 9(1) declaration is made, section 8 stands amended as per section 9(2) and as such the consequences mentioned in section 8(f) must automatically follow. In other words, Mr. Karmali states that once a declaration u/s 9(1) is made, the original section 8(1) without amendment as per section 9(2) will become an ancient history.

14. No doubt section 8(f) states that if the Advisory Board has reported that there is, in its opinion, no sufficient cause for the continued detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith. According to Mr. Karmali, once the continued detention becomes illegal, the appropriate Government has no other option except to revoke the detention order and release the person concerned forthwith. This may look anomalous in view of the definite constitutional mandate to pass an order of detention u/s 30). Mr. Karmali states that this has to be read only in the way he suggests owing to the clear provision in section 8(f). If this prima facie view is accepted, it will result in grave injustice due to the fact that the detention order u/s 3(1) which is as per the constitutional mandate of Article 22(4) will become nugatory. But, a combined reading of sections 3, 8 and 9 will not lead to such a result and make the detention u/s 3(1) also invalid in given circumstances.

15. In this connection we can usefully refer to the decision rendered by a Bench of the Bombay High Court in writ Petn. No. 170 of 1985 dated 19-7-1985: (reported in 1986 Cri LJ 1645) wherein the Bench held that the legislative intent is to make a distinction between two classes of detention, viz. the case of normal detention in which declaration u/s 9 is not issued and a case where such a declaration is issued. Apart from this decision, our High Court in the decision in

Jusab Haji Ismail v. State of Gujarat reported in 1985 Guj LH 617 has clearly held that jurisdiction to go into the question of continued detention necessarily includes the question of original detention also. We have elaborately referred to these decisions in paragraphs supra. In the first place, the question of revoking the detention and causing the person to be released forthwith will arise only in case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the continued detention of the person concerned. If the Advisory Board has upheld the detention and continued the detention, there is no question of revoking the definition simply because the Court will ultimately on a given circumstance will revoke the continued detention. Section 8(f) even after modification due to section 9(2)(iii) visualises revoking the detention only in case where the Advisory Board has given the opinion that there is no sufficient cause for detention. If the Advisory Board has not given such an opinion, the detention order cannot be revoked nor the person can be released forthwith. The power to detain a person is found u/s 3 only. Order u/s 3 is an independent and substantive executive order while the declaration u/s 9 is not a substantive or independent order. Section 9 declaration, in our opinion, cannot even be an enforceable order. The order u/s 3(1) operates since the declaration u/s 9(1) is only a continuation of that order and as such any order passed for the continued detention impliedly confirms the detention u/s 3(1). To close our eyes to this inevitable situation will result in doing violence to the statutory provision u/s 3(1) of the COFEPOSA Act.

16. The matter can be looked into from a different angle also. Section 8 of the COFEPOSA Act will stand suitably modified only in cases where a valid declaration u/s 9(1) is issued and it would cover the concerned detention order issued u/s 3(1) of the COFEPOSA Act. The effect of issuance of such notification is limited one. It only extends time schedule prescribed by the Act for the four purposes as seen earlier. If there is a valid notification u/s 9(1), it extends the concerned detention order resulting into extension of time granted by the Act for complying with the aforesaid steps. It is only a valid notification u/s 9(1) that can extend the time in the aforesaid four contingencies. If such protection is not available to the concerned detention order, this extended time schedule or the concession regarding extension of time limit in the aforesaid four contingencies will not be available for the concerned detention order. In other words, the detention order will have to stand or fall on its own and will have to be subjected to unextended time schedule as provided by the Act dehors section 9(1) and (2) respectively. In case of null and void declaration u/s 9(1), therefore, there would arise no occasion for invocation of sub-section (2) of section 9. It is pertinent, in this connection, to note the opening words of sub-section (2) of section 9 which run as follows:

"In the case of any person detained under a detention order to which the provisions of sub-section (1) apply, Section 8 shall have effect subject to, the following modifications"

A mere look at the aforesaid provision shows that if there is no valid declaration u/s 9 covering the detention order issued u/s 3(1), the consequence contemplated by sub-section (2) of section 3 will not get attached to such order and such order dehors the protection u/s 9(1) will have to be processed and tested on the touchstone of the time schedule as provided by the Act independent of section 9(2). The modified form can apply only when there is a valid notification u/s 9(1) covering the concerned detention order. Similarly, extended period of detention from one year to two years as provided by section 10 also will not be available for such detention order. Thus, a conjoint reading of sections 3, 8, 9 and 10 shows that once declaration u/s 9(1) is found to be inoperative and invalid for any reason, no question of resorting to section 9(2) would ever survive and section 8 will have to be read as unamended and unmodified qua such detention. Thus, section 8 as originally framed and section 8 as modified operate in different fields. Section 9 does not repeal section 8. In case where section 9(1) notification ceases to cover a given detention order at any stage, section 8 in its original form would again start operating qua the detention order at that stage.

17. In case section 9(1) declaration is in order and the opinion of the Advisory Board is given, the amended section 8(f) comes into play. Section 8(f) if amended as contemplated u/s 9(2)(iii) will read as we have extracted in paragraph supra. Section 8(f) without modification, will read as we have extracted in paragraph supra.

18. Now the stage is reached for considering the correct connotation of the phrase "continued detention" as employed by the Legislature while modifying section 8(f) in the contingencies covered by section 9(1) declaration. It must be kept in view the constitutional mandate in Article 22(4) to the effect that no law providing for preventive detention shall authorise detention of a person for a longer period than three months unless the Advisory Board, consisting of members having qualifications as laid down in sub-clause (a) of clause (f) of Article 22, has reported before the expiry of the said period that there is, in its opinion, sufficient cause for such detention. It is true that as per the proviso to sub-clause (a) of clause (4) of Article 22, detention of any person beyond the maximum period of three months can be prescribed by any law made by the Parliament under sub-clause (b) of clause (7) of Article 22. Section 9(1) read with section 9(2) obviously is such a statutory enactment. However, despite such enactment as per sub clause (b) of clause (7) of Article 22, the constitutional mandate that the Advisory Board duly constituted has to opine about sufficiency of cause for preventive detention of the concerned person has to be complied with in every case of preventive detention. Hence, when the Advisory Board has to consider the sufficiency of cause for detention of the concerned person u/s 8(f) of the Act in its unmodified form, the Advisory Board has to decide whether the detention order u/s 3(1) was backed by sufficient cause and whether that cause continued till the date of the report of the Advisory Board. These two aspects of the matter are well covered by the phrase "sufficient cause for

detention of a person" as employed in section 8(f) in its unmodified form when the declaration u/s 9(1) does not cover the given detention order. The scope and ambit of the obligations of the Advisory Board functioning under the preventive detention laws have been clearly demarcated by the Constitution Bench of the Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, : A.K. Roy and Others Vs. Union of India (UOI) and Others, . In paragraph 106 of the report Chandrachud C.J. (as he then was), speaking for majority of the Court, interpreting section 11(2) of the National Security Act, 1980 which is in pari materia, with section 8(f) of the COFEPOSA Act in its unamended form, made the following pertinent observations :

"Section 11(2) of the Act provides specifically that the report of the Advisory Board shall specify its opinion "as to whether or not there is sufficient cause for the detention of the person concerned". This implies that the question to which the Advisory Board has to apply its mind is whether on the date of its report there is sufficient cause for the detention of the person. That inquiry necessarily involves the consideration of the question as to whether there was sufficient cause for the detention of the person when the order of detention was passed

It is, therefore, obvious that u/s 8(b) read with Section 8(f) when the Advisory Board has to report on the sufficiency of the cause for detention of a person directed to be detained as per the order u/s 3(1) of the Act, the Advisory Board had to opine whether there was sufficient cause (a) for detaining that person at the time of the order and (b) whether there is sufficient cause for detaining such person at the time of the report of the Advisory Board. These two obligations are already covered by the phrase "sufficient cause for detention of the person" as employed by the Legislature in section 8(f) of the Act in its unmodified form. We have now to see as to what additional obligation is imported for the Advisory Board when the Legislature modified section 8(f) by adding the word, continued to the words "sufficient cause for detention of the person". It is axiomatic to say that if the aforesaid two obligations were already enjoined upon the Advisory Board and they flew from the employment of the words "sufficient cause for detention of the person" the additional words "continued detention" must imply additional obligation for the Advisory Board to give its opinion on the further aspect whether detention of such person in a continued manner was also justified and there was sufficient cause for such continued detention or not. We, therefore, proceed to consider the exact connotation of the word "continued" as added by the Legislature to the provision of section 8(f) in view of section 9(2) (iii) of the Act. In the context of the notification u/s 9(1) which entitles the appropriate Government to continue detention of the detenu for a maximum period of two years as compared to the normal period of one year as laid down by section 10 of the Act. it must be held that the opinion of the Advisory Board about the continued detention would include opinion about the Sufficiency of cause for (i) detention of lie detenu on the date of detention: (ii) determination of the detenu on the date of the report: and (iii) extended detention of the

detenu for a period of more than one year and up to the maximum period of two years. The first two obligations flow from the employment of the word detention as found in the unmodified form of section 8(f) while the last obligation flows from the employment of the additional word "continued" on account of the modification projected in section 8(f) via sections 9(1) and 9(2) of the Act. Consequently, whenever the Advisory Board submits its report containing opinion on the sufficiency of the cause for continued detention of the concerned detenu, the opinion encompasses in its sweep all the aforesaid three requirements of the opinion. In short, such an opinion is a comprehensive and combined opinion covering all the aforesaid three aspects. It is not possible to agree with the contention of Mr. Karmali for the petitioner that whenever the Advisory Board sends report about its opinion regarding sufficiency of cause for continued detention of the detenu as enjoined by section 8(f) read with section 9(2), it would be an opinion only confined to the question regarding continued detention for more than one year and would not include in its sweep its opinion for detention of the detenu on the date of its report. Even otherwise, this question is no longer res integra as the Supreme Court in case of Satar Habib Hamdani Vs. K.S. Dilipsinhji and Others, , has in terms held in paragraph 7 of the report while interpreting the words "continued detention" as employed in section 8(f) in its modified form in the light of section 9(1) declaration that sufficient cause for continued detention would mean that the Advisory Board has to state in its opinion not merely whether detention is necessary, but whether continued detention is necessary. In view of this settled legal position, therefore, it must be held that any opinion given by the Advisory Board in cases where detention orders are covered by section 9(1) notification, about continued detention of the detenu, would contain opinion not only about sufficiency of cause for detaining the detenu on the date of the report and which would in its turn include sufficient cause for detention even at the time of the order of detention, but also would include opinion about extended detention of the detenu beyond one year up to maximum period of two years. Implicit in the opinion about sufficiency of continued detention would be an opinion about sufficiency of cause for the detention of the detenu.

18A. It is the argument of Mr. Karmali that in cases where the Advisory Board's opinion about continued detention is a nullity or its opinion is that there is no case for continued detention, the appropriate Government shall revoke the detention order and release the person forthwith. It is not possible to agree with the aforesaid contention of Mr. Karmali for more than one reason. In the first place, it must be kept in view that when the Advisory Board returns its opinion about sufficiency of cause for continued detention of the detenu, it may either report that, in its opinion, there is sufficient cause for continued detention of the person concerned or, in its opinion, there is no sufficient cause for continued detention of the person concerned. In the first contingency, when the report is that there is sufficient cause for continued detention of the person concerned, the appropriate Government may confirm the detention order as per first part of

section 8(f), but it may also not confirm the detention order and may revoke it, but such revocation would be in the exercise of the powers of the appropriate Government u/s 8(f) read with sections 10 and 11 of the Act which entitle the appropriate Government to revoke the detention order at any time even after it has been confirmed and even though the Advisory Board has reported that there is sufficient cause for continued detention of the detenu. We also cannot agree with the contention of Mr. Karmali that appropriate Government in its subjective satisfaction can go behind the positive opinion of the Advisory Board that there is sufficient cause for continued detention of the person and can read the opinion just to the contrary and hold that there is no sufficient cause for continued detention and then get obliged to revoke the detention order and to cause the person to be released forthwith as contemplated by the last part of section 8(f) as modified. If such a construction is countenanced, it would clothe the appropriate Government with plenary powers of sitting in appeal over the Advisory Board's opinion and to go behind their express opinion. In our view, such contention cannot be countenanced on the express language of the provisions. It must, therefore, be held that when the Advisory Board opines that there is sufficient cause for continued detention of the detenu, no obligation for the appropriate Government to forthwith revoke the detention order and to cause the person to be released forthwith would ever arise. The last part of section 8(f) in modified form, therefore, will not apply to the facts of such a case.

19. This aspect can be viewed from a different angle. Once the Advisory Board opines that there is sufficient cause for continued detention, such opinion would mean that there is sufficient cause for detention at the time of the report and also sufficient cause for extended detention from one year to two years, as we have seen earlier. In such an eventuality, there would arise no occasion for the Government to revoke the detention order and to cause the person to be released forthwith, but on the contrary, appropriate Government will have to confirm the detention order u/s 8(f), first part, unless it chooses to exercise its power of revocation of the detention order dehors its report.

20. We may now take a converse case. If the opinion of the Advisory Board is that there is no sufficient cause for continued detention, it would mean that there is no sufficient cause for (a) detention even at the time of the report and no sufficient cause for extended detention or (b) it may also mean that there is sufficient cause for detention at the time of the report, but no sufficient cause for its continuance beyond one year, meaning thereby, it would be a report against extended detention but justifying detention at the time of the report, all the same. Report in category (a) would be involving negative report on both the relevant aspects and would be a doubly negative report while the report in category (b) will be a positive report recommending detention at the time of the report but contra-indicating such detention beyond the normal period of one year. If the report falls in category (a), it is obvious that last part of section 8(f) will apply and appropriate Government in the light of such report will have to revoke the detention order and to cause the person to be released forthwith. But

so far as reports in category (b) are concerned, as they do not involve negative report on both these aspects, applicability of last part of section 8(f) will be ruled out. In case of such type of reports, as the Advisory Board opines that there is no sufficient cause for continued detention beyond one year, but as that report within itself contains a positive report about sufficiency of cause for detaining the detenu at the time of the report, need to read section 8(f) as modified by section 9(2) would not survive any further and for such category (b) type of reports, appropriate Government can validly act under the first part of the unamended section 8(f) and acting under the said part, can confirm the detention order or in its wisdom and in exercise of its independent powers, may revoke the detention, as though fit. In short, only when the opinion of the Advisory board contains a negative report on both the aspects viz. (1) about sufficiency of cause for detention at the time of report and (2) about sufficiency of cause for detention for extended period beyond one year, that the, last part of section 8(f) can never be applied. It is, therefore, not possible to agree with the contention of Mr. Karmali that once the Advisory Board has opined that there is no sufficient cause for continued detention meaning thereby that there is no sufficient cause for extending detention beyond one year, even though the report itself may contain opinion that there was sufficient cause for detaining the detenu at the time of the report, even then, the mandatory duty would arise for the appropriate Government to act under the last part of section 8(f). As already discussed earlier, such an eventuality will never arise in the light of such a report. It must, therefore, be held that the detention order u/s 3(1) when supported by report of the Advisory Board to the effect that there is sufficient cause for detaining the detenu at the time of the report, but there is no sufficient cause for continued detention beyond one year, can validly be confirmed u/s 8(f) first part in its unamended form.

The present reference is only for a limited purpose of giving an opinion as to whether when a declaration u/s 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is found to be bad on any ground, the original detention u/s 3(1) unaided by such declaration also falls to the ground and the detenu is required to be released, even though the detenu has not undergone detention for a period of one year which he would be required to undergo in the absence of the declaration u/s 9(1) of the Act. The discussion we have made above clearly establishes that even if it is found that the declaration under S. 9(1) of the COFEPOSA Act is found to be bad on any ground, the original detention under S. 3(1) unaided by such declaration will not fall to the ground and if the detenu has not undergone detention for a period of one year, he will be required to undergo the remaining period of his detention as per the provisions of the Act even in the absence of the declaration under S. 9(1) of the Act. Reference is answered accordingly. The papers of the case will now be placed before the appropriate Division Bench for proceeding further in accordance with law.

21. Order accordingly.