

(2014) 03 DEL CK 0301

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 2060 of 2013

Gautam Jain

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-03-2014

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3 3(1) 3(1)(iii) 3(1)(iv) 3(3)
Constitution of India, 1950 — Article 22(5) 22(6) 226
Foreign Exchange Management Act, 1999 — Section 37
National Security Act, 1980 — Section 7

Citation : (2014) 03 DEL CK 0301

Hon'ble Judges : Sanjiv Khanna, J;G.P. Mittal, J

Bench : Division Bench

Advocate : B. Kumar and Mr. Naveen Malhotra and Mr. Nitendra Kumar, for the Appellant; Pawan Narang, Advocate and Mr. Anish Dhingra and Mr. Vasundhara Chauhan, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—Gautam Jain, detenu, impugns detention order dated 23rd September, 2009 u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act, for short). He has prayed for issue of writ of habeas corpus under Article 226 of the Constitution of India for quashing his detention with a prayer that he should be set forth at liberty. The respondent Union of India, Ministry of Finance have contested the proceedings and have filed counter affidavit and an additional affidavit. The petitioner has filed rejoinder affidavit to the counter affidavit and rejoinder to the additional affidavit.

2. In the writ petition, the petitioner has relied upon judgment dated 13th October, 2013 passed in the Writ Petition (Criminal) 940/2013 titled Anil Kumar Aggarwal vs. Union of India & Anr., wherein the co-detenu Raj Kumar Aggarwal was directed to be released, on the principle of parity. However, during the

course of oral arguments, the said plea or contention was not raised. In the counter affidavit, the respondent has distinguished the two cases i.e. the case of the petitioner and Raj Kumar Aggarwal on various grounds and in preliminary submissions paragraph 4(x) have set out date wise details of efforts made to enforce the detention order but without success. It is stated that the detention order dated 23rd September, 2009 was made subject matter of challenge by the petitioner Gautam Jain in Criminal Writ No. 1/2010 before the Supreme Court, where vide order dated 7th May, 2010, execution of the detention order was stayed. The petitioner had earlier concealed himself. The stay order continued till 1st October, 2013 when the said writ petition was dismissed as withdrawn. The petitioner again concealed himself and prevented/obstructed execution till 18th October, 2013 when he was finally detained. Apart from action u/s 7(1)(b) of the Act resulting in publication in the newspaper on 10th December, 2009, numerous efforts were made by the respondent to execute the detention warrant, have not been specifically controverted or denied at the time of hearing. Rejoinder affidavit does not specifically meet the allegations in the counter affidavit in preliminary submissions 4(x). In Subhash Popatlal Dave Vs. Union of India (UOI) and Another, , elucidating upon the law on the said issue, Chelameswar J. has observed as follows:

39. Whether the test of live nexus developed by this Court in the context of examining the legality of the order of preventive detention can be automatically applied to the question of the legality of the execution of the preventive detention orders where there is a considerable time-gap between the passing of the order of preventive detention and its execution is the real question involved in these matters.

40. To answer the question, we must analyse the probable reason for the delay in executing the preventive detention orders. There could be two reasons which may lead to a situation by which the preventive detention order passed by the competent authorities under the various enactments could remain unexecuted:

- (1) the absconding of the proposed detenu from the process of law,
- (2) the apathy of the authorities responsible for the implementation of the preventive detention orders.

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43. If a preventive detention order is to be quashed or declared illegal merely on the ground that the order remained unexecuted for a long period without examining the reasons for such non-execution, I am afraid that the legislative intention contained in the provisions such as Section 7(1)(b) of the COFEPOSA Act would be rendered wholly nugatory. Parliament declared by such provision that an (recalcitrant) individual against whom an order of preventive detention is issued is under legal obligation to appear before the notified authority once a notification contemplated u/s 7(1)(b) of the COFEPOSA Act is issued. We have already noticed that failure to appear without a reasonable excuse would be an

offence and render the defaulter liable for a punishment of imprisonment. Holding that the preventive detention orders are themselves rendered illegal, on the basis of the live nexus theory (which, in my opinion, is valid only for examining the legality of the order vis-à-vis the date on which the order is passed) would not only exonerate the person from the preventive detention order but also result in granting impunity to such person from the subsequent offence committed by him under the provisions such as Section 7(1)(b) of the COFEPOSA Act.

44. This question fell for consideration of this Court on more than one occasion. In *Bhawarlal Ganeshmalji Vs. State of Tamil Nadu and Another*, , this Court speaking through O. Chinnappa Reddy, J. held: (SCC p. 469, para 6)

6. ... where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the "link" not snapped but strengthened.

It was a case where the detenu evaded the arrest for a period of more than 3 years but eventually surrendered himself before the Commissioner of Police, Madras and then challenged the order of detention. One of the submissions before this Court was that the detention order must be considered to have lapsed or ceased to be effective in the absence of the fresh application of mind of the detaining authority to the question of continuing necessity for preventive detention. This Court rejected the submission. The said principle was followed in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, .

45. Once again in *Union of India and Others Vs. Arvind Shergill and Another*, , this Court held that: (SCC p. 605, para 6)

6. ...we do not think that it would be appropriate to state that merely by passage of time the nexus between the object for which the husband of the respondent is sought to be detained and the circumstances in which he was ordered to be detained has snapped.

It was a case where the detention order was challenged at the pre-execution stage before the High Court and the High Court had stayed the execution of the order and the matter was pending for some time. After losing the matter in the High Court, the proposed detenu approached this Court without surrendering and advanced the argument that the live nexus snapped in view of the delay in executing the preventive detention order. The submission was rejected.

46. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated u/s 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law-breaker to take advantage of his own conduct which is

contrary to law.

47. Even in those cases where action such as the one contemplated u/s 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal. This Court in *Shafiq Ahmad Vs. District Magistrate, Meerut and Others*, , held so and the principle was followed subsequently in *M. Ahamedkutty Vs. Union of India (UOI) and Another*, , wherein this Court opined that in such cases, the surrounding circumstances must be examined ["14. In *Shafiq Ahmad Vs. District Magistrate, Meerut and Others*, relied on by the appellant, it has been clearly held that what amounts to unreasonable delay depends on facts and circumstances of each case. Where reason for the delay was stated to be abscondence of the detenu, mere failure on the part of the authorities to take action u/s 7 of the National Security Act by itself was not sufficient to vitiate the order in view of the fact that the police force remained extremely busy in tackling the serious law and order problem. However, it was not accepted as a proper explanation for the delay in arresting the detenu. In that case the alleged incidents were on 2-4-1988/3-4-1988/9-4-1988. The detention order was passed on 15-4-1988 and the detenu was arrested on 2-10-1988. The submission was that there was inordinate delay in arresting the petitioner pursuant to the order and that it indicated that the order was not based on a bona fide and genuine belief that the action or conduct of the petitioner were such that the same were prejudicial to the maintenance of public order. Sabyasachi Mukharji, J., as my Lord the Chief Justice then was, observed that whether there was unreasonable delay or not would depend upon the facts and circumstances of a particular situation and if in a situation the person concerned was not available and could not be served, then the mere fact that the action u/s 7 of the Act had not been taken, would not be a ground for holding that the detention order was bad. Failure to take action even if there was no scope for action u/s 7 of the COFEPOSA Act, would not by itself be decisive or determinative of the question whether there was undue delay in serving the order of detention." (M. Ahamedkutty case, p. 10, para 14)]. In both *Shafiq Ahmad Vs. District Magistrate, Meerut and Others*, and *M. Ahamedkutty Vs. Union of India (UOI) and Another*, cases, these questions were examined after the execution of the detention order. Permitting an absconder to raise such questions at the pre-execution stage, I am afraid would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.

3. The main pleas/contention raised by the petitioner before us are as under:

(i) There has been failure to supply relied upon documents i.e. pages 1 to 25 mentioned in the statement of Pooran Chand Sharma recorded on 3rd September, 2009. Reference was made to paragraphs 37 to 41 of the grounds of detention wherein reference to statement of Pooran Chand Sharma dated 3rd September, 2009 is made and it is stated that searches conducted against said Pooran Chand Sharma on 3rd September, 2009 had revealed that the petitioner had continued to remain involved in prejudicial hawala dealings even in August,

2009. Our attention was drawn to paragraph 37 wherein the detaining authority, it is submitted, had invoked Article 22(6) and claimed privilege from communicating the search details.

(ii) The petitioner had made two representations dated 3rd December, 2013 and 6th December, 2013 to Joint Secretary, Government of India and Secretary, Government of India for supplying/furnishing documents seized during the search of Pooran Chand Sharma, relied upon in paragraph 35 to 38 of the grounds of detention, pleading that the failure to supply the relied upon documents would violate Article 22(5) of the Constitution as the petitioner would be deprived of his valuable right to make effective and purposeful representation before the Advisory Board and the Central Government.

(iii) Failure to supply, it was submitted, vitiates the detention on two grounds i.e. (1) the said documents should have been supplied *pari passu* with the execution of the detention order on 18th November, 2013 and (2) that the said documents have not been supplied inspite of specific request. Our attention was drawn to paragraphs 37 to 41 of the detention order which refers to nascent enquiry against Pooran Chand Sharma and therefore, in public interest, documents were not being supplied. It is stated that the nascent enquiry pending in 2009 cannot be a justification for not supplying the documents at the time of execution of the detention order in November, 2013 and on specific written request in December, 2013.

(iv) Another argument raised by the petitioner arises out of the defence propounded by the respondent in the additional affidavit and the counter affidavit to paragraph/ground (j) of the writ petition. In the counter affidavit, in reply/response to ground (j), it is submitted that the representations of the petitioner, i.e. the representations dated 3rd and 6th December, 2013, were considered for supply of withheld documents but rejected because no such material or documents were relied upon and withheld by the detaining authority. A categorical and affirmative plea taken in the additional affidavit asserts that the detaining authority had only considered the statement of Pooran Chand Sharma dated 3rd September, 2009, retraction letter dated 4th September, 2009 of Pooran Chand Sharma and Department's letter dated 9th September, 2009 sent to Pooran Chand Sharma. Other than this, no other material or document was considered. It is also claimed that investigation against Pooran Chand Sharma is still pending and last statement was recorded on 11th February, 2014 when officers of the Investigating Authority had visited the Central Jail, Tihar. The contention of the petitioner is that this shows non-application of mind by the detaining authority as the documents mentioned in the statement of Pooran Chand Sharma and purportedly implicating the petitioner should have been examined and were relevant material documents. Thus, investigation details should have been examined by the detaining authority and failure to examine the said documents/material vitiates the detention order, for non-application and error in decision making process. The recommending authority had no right to

withhold and the entire set of relevant documents which includes purported documents found during the course of search and mentioned in the statement of Pooran Chand Sharma should have been forwarded.

4. We find merit in the said contentions raised by the petitioner. Paragraphs 35 to 38 and 41 of the detention order are reproduced below:

35. Based upon information that one Pooran Chand Sharma @ Ashok @ Rao Ji and his associate, are involved into making and receiving payments upon instructions from abroad, on 03.09.2009 the officers of department took search action against said Shri Pooran Chand Sharma @ Ashok @ Rao Ji. Statement of said Shri Pooran Chand Sharma @ Ashok @ Rao Ji was recorded on 03.09.2009, wherein he inter-alia deposed that payment of Rs. 10 Lacs was made by him to Gautam Jain of 145 Ashok Vihar, New Delhi, upon instructions from abroad.

36. Shri Pooran Chand Sharma @ Ashok @ Rao Ji sent a letter to the department, dated 04.09.2009, levelling allegations against the officers and retracting his statement dated 03.09.2009. This letter/retraction was considered by the department and, under the cover of letter dated 09.09.2009, a reply was sent by the Department to Shri Pooran Chand Sharma @ Ashok @ Rao Ji wherein the allegations/averments made" under this retraction letter were rebutted.

37. Since the investigation of department against said Shri Pooran Chang Sharma @ Ashok @ Rao Ji and his associates is at nascent stage and you have continued association with the persons involved into prejudicial activities of hawala transfers, it is against public interest to supply to you all the seizure details in the case of Shri Pooran Chand Sharma @ Ashok @ Rao Ji and his associates. Therefore, along with these "grounds of detention" you are being supplied the copy of statement dated 03.09.2009 of said Shri Pooran Chand Sharma @ Ashok (c) Rao Ji, his retraction letter dated 04.09.2009 and department"s reply dated 09.09.2009.

38. The Indian Currency/documents seized from your aforesaid residential and business premises and various statements recorded by the department"s officers reveal your regular and continuous prejudicial dealings of receiving and making of illegal Hawala payments from/to various persons upon instructions of persons resident outside India. The transactions appearing in these seized documents itself total upto such hawala payments of over Rs. 30 Crores, besides the huge cash pertaining to prejudicial Hawala payment that was recovered and seized from you. The statements also indicate that, in addition to the above, in 3 month period (as per your statement and the statement of your employee Shri Shankar, as" detailed supra) you received/made illegal Hawala payments to the tune of Rs. 180 Crores and the seized % documents pertaining to a brief period substantiates this amount for the period of 3 months. 6114 searches conducted by the department against said Pooran Chand Sharma, on 03.09.2009, has also revealed that you are still involved into prejudicial hawala dealings. The persons namely S/Sh Raj Kumar Aggarwal @ Munna and Murlidhar (c) Kanhaiya Jain (c)

Rajubhai 6 Murli, who received Hawala payments from you have also been found to be indulging into receiving and making Hawala payments, upon instructions of persons resident outside India. Even the said Pooran Chand Sharma from whom you have received Rs. 10 Lacs, upon instructions from abroad, has also been found to be involved into business of receiving and making of illegal hawala payments. This clearly indicates that you are involved into receiving and making of such Hawala payments in a well organised manner and you have also developed nexus with other parties indulging into such prejudicial activities. Thus it stands established that you have been continuously engaged in receiving and distributing of payments in India to various persons under the instructions from abroad and that you have been arranging foreign exchange outside India, through illegal Hawala channels, in lieu of payments received here in India.

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41. The search action taken by the department against said Shri Pooran Chand Sharma, as narrated above, brings out that even as on August 2009 you were found to be involved into activities prejudicial to the conservation and augmentation foreign exchange.

5. It is not possible to accept the plea and submission of the respondent that documents or seizure details in the case of Pooran Chand Sharma were not relied upon or relevant documents as per the detention order. In paragraph 37, the detention order unequivocally states that it was against public interest to supply the petitioner all seizure details in the case of Pooran Chand Sharma and therefore along with the grounds of detention only copy of statement dated 3rd September, 2009 of Pooran Chand Sharma, his retraction dated 4th September, 2009 and Department's reply dated 9th September, 2009 were being supplied. In plain and simple words in paragraph 37, the detaining authority has mentioned that all seizure details gathered/obtained during the search of Pooran Chand Sharma were not being supplied to the petitioner in public interest. In paragraph 38, it is stated that searches conducted by the department against Pooran Chand Sharma had revealed that the petitioner at that time was still involved in prejudicial hawala dealings. The expression used was "searches conducted" and not "the statement of Pooran Chand Sharma on 3rd September, 2009" etc. The Petitioner was found to be involved in the activities prejudicial to the conservation and augmentation of foreign exchange.

6. In view of the aforesaid categorical and affirmative stand in grounds of detention, it is not possible to accept the stand in the counter affidavit and the additional affidavit that the documents or material found during the search of Pooran Chand Sharma, except his statement dated 3rd September, 2009, retraction dated 4th September, 2009 and department's letter dated 9th September, 2009 were not taken into consideration. The said assertion is contrary to specific words and statement made in paragraphs 37, 38 and 41 of the detention order and should not and cannot be accepted. On being questioned, learned counsel for the respondent submitted that he does not have

a copy of the documents or material found during the course of search in the place of Pooran Chand Sharma on 3rd September, 2009. We were, however, shown copy of statement of Pooran Chand Sharma dated 3rd September, 2009. Pooran Chand Sharma was confronted with a specific document and in response had stated that the entry related to transaction between Pooran Chand Sharma and the petitioner. It is, therefore, clear that the said document i.e. the document seized during the search which was confronted to Pooran Chand Sharma and Pooran Chand Sharma had implicated the petitioner. This was a relied upon document. Even otherwise it would be a relevant document. The said document cannot be treated as a mere narration of facts or casual reference to the factual matrix in the grounds of detention. The document with the entry formed the basis of the assertions made in paragraphs 37, 38 and 41 of the grounds of detention.

7. In view of the aforesaid findings, the contention that the said document was not examined by the detaining authority loses force and relevance as it was a document examined and relied upon. However, as noticed above, the detaining authority had taken a contrary stand in the counter affidavit and the additional affidavit and stated before us on oath that the detaining authority had not examined the seizure details in the case of Pooran Chand Sharma except statement of Pooran Chand Sharma dated 3rd September, 2009, his retraction dated 4th September, 2009 and Department's reply dated 9th September, 2009. The statement of Pooran Chand Sharma dated 3rd September, 2009, connecting and implicating the petitioner with reference to specific transaction, would necessarily require examination of the seized documents. Failure to examine the said documents shows non application of mind as the documents were relevant and material. The petitioner obviously is being prejudiced as he has denied opportunity to offer an explanation with reference to the seized document by stating or offering comments on the document/entry. The petitioner could have explained that the document or entry did not relate to him and/or the statement made by Pooran Chand Sharma on the said document was unreliable and non-trustable for variety of reasons. Failure to furnish the said documents would curtail and deny valuable right of the petitioner and therefore, prejudicially affected him.

8. However, this is not the end of the matter as we have reached the conclusion and accept the contention of the respondent that paragraphs 35 to 37, partly 38 and then paragraph 41 of the grounds of detention constitute a separate or independent ground under Article 22(5) read with Section 5A of the Act. The said ground can be separated, by applying the principle of segregation but the detention order, can be upheld on other grounds. The said grounds do not suffer from the said infirmity and are valid. Article 22(5) and Section 5A were examined and the constitutional validity thereof was upheld by the Supreme Court in Attorney General for India and Others Vs. Amratlal Prajivandas and Others, , in the following words:-

46. Section 5A of COFEPOSA may be reproduced here for ready reference. It reads:

5-A. Grounds of detention severable.--Where a person has been detained in pursuance of an order of detention under sub-section (1) of Section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly-

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are--

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub-section (1) of Section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds.

47. The section is in two parts. The first part says that where an order of detention is made on two or more grounds, "such order of detention shall be deemed to have been made separately on each of such grounds", while the second part says that such order shall not be deemed to be invalid or inoperative merely for the reason that one or some of the grounds are either vague, non-existent, irrelevant or unconnected. That the second part is merely a continuation of and consequential to the first part is evident from the connecting words "and accordingly". The second part goes further and says that the order of detention must be deemed to have been made on being satisfied with the remaining good ground or grounds, as the case may be. Both the parts are joined by the word "and".

48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. In *Debu Mahato Vs. The State of West Bengal*, it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in *Anil Dey Vs. State of West Bengal*, It was a case of theft of railway signal

material. Here too one act was held to be sufficient. Similarly, in *Israil Sk. Vs. The District Magistrate of West Dinajpur and Others*, and *Dharua Kanu Vs. State of West Bengal*, single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In *Mrs Saraswathi Seshagiri Vs. State of Kerala and Another*, , a case arising under COFEPOSA, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.

49. Now, take a case, where three orders of detention are made against the same person under COFEPOSA. Each of the orders is based upon only one ground which is supplied to the detenu. It is found that the ground of detention in support of two of such orders is either vague or irrelevant. But the ground in support of the third order is relevant, definite and proximate. In such a case, while the first two orders would be quashed, the third order would stand. This is precisely what the first part (the main part) of Section 5A seeks to do. Where the order of detention is based on more than one ground, the section creates a legal fiction, viz., it must be deemed that there are as many orders of detention as there are grounds which means that each of such orders is an independent order. The result is the same as the one in the illustration given by us hereinabove. The second part of it is merely clarificatory and explanatory, which is evident from the fact that it begins with the word "accordingly"--apart from the fact that it is joined to the first part by the word "and". In such a situation, we are unable to see how can the section be characterised as inconsistent with Article 22(5). Had

there been no first part, and had the section consisted only of the second part, one can understand the contention that the section is in the teeth of Article 22(5) as interpreted by this Court--this was indeed the situation in *K. Yadigiri Reddy v. Commissioner of Police* [ILR 1972 AP 1025] as we shall presently indicate. It is difficult to conceive any inconsistency or conflict between Article 22(5) and the first--the main--part of Section 5A. Parliament is competent to create a legal fiction and it did so in this case. Article 22(5) does not in terms or otherwise prohibit making of more than one order simultaneously against the same person, on different grounds. No decision saying so has been brought to our notice. Be that as it may, we do not see why Parliament is not competent to say, by creating a legal fiction, that where an order of detention is made on more than one ground, it must be deemed that there are as many orders of detention as there are grounds. If this creation of a legal fiction is competent, then no question of any inconsistency between the section and Article 22(5) can arise.

9. In other words, the contention of the respondent which has appealed to us is that the paragraphs relating to seizure details in the case of Pooran Chand Sharma implicating the petitioner constitute a separate ground and therefore, even when we hold that the detention on the said ground is illegal, the detention order can be upheld on other grounds by applying the doctrine of segregation as the detention order is based on multiple or different grounds. Thus, the detention order can be sustained if there are other grounds mentioned in the detention order.

10. We would, therefore, at this stage like to refer to the grounds mentioned in the detention order. Detention order in paragraph 1 states that the petitioner has been indulging in making and receiving hawala payments upon instructions received from abroad from his business premises in Chandni Chowk and residence at SFS Flat, Ashok Vihar. In paragraph 2, it is stated that both the premises were searched on 15th October, 2008 and Indian currency of Rs. 2,04,00,000/- along with three mobile phones were seized from business premises and Indian currency of Rs. 64,35,000/- and documents were seized from his residential premises. Statement of Shankar @ Mitha Lal, employee of the petitioner was recorded u/s 37 of the Foreign Exchange Management Act, 1999 (FEMA, for short) wherein, he stated that the main work of the petitioner was receiving and making payments in India on instructions from Sultan Bhai, Maama @ Manu, Mithu Bhai, Hirani and Jabbar Bhai, based in Dubai. Shankar decoded the figures mentioned in the bunch of documents as seized. He had further stated that the petitioner was making and receiving hawala payment to tune of Rs. 2 crores per day on instructions from Dubai and received and made payments to the tune of Rs. 180 crores in the last three months. Detention order also mentions and draws inferences from the statements of Ram Chand Gupta, Amit Jain, Ajay Misra, Pawan Kumar Pandey and Vikesh Kumar recorded u/s 37 of FEMA.

11. The detention order mentions gist of the statement of daughter of the

petitioner i.e., Ms. Karishma Jain again recorded u/s 37 of FEMA regarding Rs. 64.35 lakhs seized from the residence of the petitioner. Statements made by the petitioner on 16th December, 2008 and 22nd December, 2008 u/s 37 of FEMA which gives details of foreign exchange arranged from abroad for different persons in India and de-codifying of various details, have been alluded with significance. Detention order also mentions statements of Rajiv Kumar, Jitender Kumar Verma and Raj Kumar Bindal u/s 37 of FEMA and retractions made by different persons whose statements were recorded u/s 37 of FEMA, etc. Searches in different premises on 17th December, 2009 and the seizure including seizure of cash made in the said searches and the statements of Kapil Jindal, Kanhaiya Lal, Raj Kumar Aggarwal, Kanti Lal Prajapati, Anil Aggarwal etc find elucidation and reliance. Detail of various mobile phones stand recorded. The order refers to searches made by the Department on 24th April, 2009 at the places of Muralidhar resulting in seizure of documents and cash. Statement of Bharat Kumar recorded on different dates. It states that summons were issued to the petitioner for appearance but he did not appear.

12. Faced with the above situation, learned counsel for the petitioner had submitted that the grounds of detention in the present case are composite and not separate. Our attention was drawn to response/reply to ground (R) and (U) in the counter-affidavit. In reply to the said grounds it has been contended in the counter-affidavit that statements of Kapil Jindal as well as others cumulatively indicate that the activities of the petitioner and others with whom the petitioner was associated in hawala dealings and in reply to ground (Q), it is stated that the grounds of detention when read cumulatively indicate activities of the petitioner and other persons with him. The Petitioner was associated in hawala dealings and disclose his high potentiality and propensity to engage himself in prejudicial activity of making and receiving hawala payments in future. Reliance was placed on the decision of the Supreme Court in A. Sowkath Ali Vs. Union of India and Others, , wherein it was held:

26. Learned counsel for the petitioner on the other hand places reliance on Vashisht Narain Karwaria Vs. State of U.P. and another, This Court held: (SCC pp. 633-34, para 11)

11. Mr. Dalveer Bhandari relying on Section 5A of the Act urged that the order of detention should not be deemed to be invalid or inoperative merely on the ground that some extraneous materials were placed before the detaining authority since those alleged extraneous materials have no bearing on the validity of this impugned order which can be sustained on the material set out in the grounds of detention itself. Placing reliance on decision of this Court in Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, wherein it has been observed that the "grounds" under Article 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material submitted that in the present case the factual material set out in the grounds of detention alone led to the passing of the order

with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order. We are unable to see any force in the above submission. What Section 5A provides is that where there are two or more grounds covering various activities of the detenu, each activity is a separate ground by itself and if one of the grounds is vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever, then that will not vitiate the order of detention.

This case considered the aforesaid decisions relied on behalf of the State.

27. Firstly, we find that the question of severability u/s 5A has not been raised by the State in any of the counter-affidavits, but even otherwise it is not applicable on the facts of the present case. Section 5A applies where the detention is based on more than one ground, not where it is based on a single ground. Same is also the decision of this Court in the unreported decision of Prem Prakash v. Union of India [Crl. A. No. 170 of 1996 dated 7-10-1996 (see below at p. 163)] decided on 7-10-1996 relying on K. Satyanarayan Subudhi Vs. Union of India, and others, . Coming back to the present case we find really it is a case of one composite ground. The different numbers of the ground of detention are only paragraphs narrating the facts with the details of the document which is being relied on but factually, the detention order is based on one ground, which is revealed by Ground (1)(xvi) of the grounds of detention which we have already quoted hereinbefore. Thus on the facts of this case Section 5A has no application in the present case.

13. In the said decision, it has been observed that there was one composite ground on which detention order had been passed and different numbers of grounds of detention were only paragraphs narrating the facts in detail relied upon. The detention order was passed upon one ground alone. It was not a case of multiple grounds. In paragraph 26 of the said decision, earlier decision of the Supreme Court in Vashisht Narain Karwaria Vs. State of U.P. and another, had been quoted. Article 22(5) of the Constitution and Section 5A of the Act were referred to and it has been held that where there were two or more grounds covering various activities of the detenu, each activity was a separate ground itself and if one of the grounds was vague, non-existent or not relevant and it was not connected or not proximately connected with the other reasons or ground, it would not vitiate the order of detention. In the present case, we can easily separate and isolate the invalid grounds i.e., search material and statement of Puran Chand Sharma and other grounds. These are independent and separate grounds.

14. It would be appropriate to refer to an earlier decision of the Supreme Court in Prabhu Dayal Deorah Vs. The District Magistrate, Kamrup and Others, . In the majority judgment, it was elucidated and explained:-

The detenu has a right under Article 22(5) of the Constitution to be afforded the earliest opportunity of making a representation against the order of detention.

That constitutional right includes within its compass the right to be furnished with adequate particulars of the grounds of the detention order.

15. Referring to the decision in Prabhu Dayal's case (supra), Supreme Court in Hansmukh Vs. State of Gujarat and Others, , had observed:-

From these decisions it is clear that while the expression "grounds" in Article 22(5), and for that matter, in Section 3(3) of the COFEPOSA, includes not only conclusions of fact but also all the "basic facts" on which those conclusions are founded, they are different from subsidiary facts or further particulars of these basic facts. The distinction between "basic facts" which are essential factual constituents of the "grounds" and their further particulars or subsidiary details is important. While the "basic facts" being integral part of the "grounds" must, according to Section 3(3) of COFEPOSA "be communicated to the detenu, as soon as may be, after the detention, ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days from the date of detention", further particulars of those grounds, in compliance with the second constitutional imperative spelled out from Article 22(5) in Khudiram Das Vs. The State of West Bengal and Others, , are required to be communicated to the detenu, as soon as may be practicable, with reasonable expedition. It follows, that if in a case the so-called "grounds of detention" communicated to the detenu lack the basic or primary facts on which the conclusions of fact stated therein are founded, and this deficiency is not made good and communicated to the detenu within the period specified in Section 3(3), the omission will be fatal to the validity of the detention. If, however, the grounds communicated are elaborate and contain all the "basic facts" but are not comprehensive enough to cover all the details or particulars of the "basic facts", such particulars, also, must be supplied to the detenu, if asked for by him, with reasonable expedition, within a reasonable time. What is "reasonable time conforming with reasonable expedition", required for the supply of such details or further particulars, is a question of fact depending upon the facts and circumstances of the particular case. In the circumstances of a given case, if the time taken for supply of such additional particulars, exceeds marginally, the maximum fixed by the statute for communication of the grounds it may still be regarded "reasonable", while in the facts of another case, even a delay which does not exceed 15 days, may be unjustified, and amount to an infraction of the second constitutional imperative pointed out in Khudiram Das Vs. The State of West Bengal and Others, .

16. The aforesaid decisions clarify that when detention order is based upon basic facts on which conclusions are founded and these are different from subsidiary facts and particulars of the basic facts. Thus, distinction must be drawn between basic facts which are essentially factual constituents of the grounds and further particulars or subsidiary details. The basic facts constitute grounds of detention.

17. We have already quoted decision of the Constitution Bench of the Supreme Court in Attorney General for India (supra) wherein it has been observed that

any detention order can be issued and sustained even in case of one or sole prejudicial act, provided the detaining authority has considered the gravity and nature of the act and other circumstances and inference was drawn by the detaining authority that the person concerned could continue to indulge in similar activity. Thus, in a given case, a single act might be sufficient to sustain an order of detention and it cannot be held that one single act could never constitute basis for a detention order. It was observed that multiplicity of ground for making or sustaining a detention order was not necessary. It would be appropriate to now reproduce observations of three Judges Bench of the Supreme Court in *Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others*, wherein the term "ground" with reference to Article 22(5) of the Constitution and Section 5A of the Act was examined and it was observed:

71. Section 5A stipulates that when the detention order has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly that if one irrelevant or one inadmissible ground had been taken into consideration that would not make the detention order bad.

72. Article 22(5) of the Constitution has two elements: (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention. Communication of the grounds pre-supposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say, to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism.

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75. In the instant case, the ground of detention is the satisfaction of the detaining authority that with a view to preventing the detenu from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing the detenu from, inter alia, dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping the smuggled goods, or engaging in transporting or concealing or keeping smuggled goods the detention of the detenu is necessary. This satisfaction was arrived at as inferences from several factors. These have been separately mentioned. One of them is the contention but this ground was taken into consideration without taking note of the retraction made thereafter. But the inference of the satisfaction was drawn from several factors which have been enumerated before. We have to examine whether even if the facts stated in the confession are completely ignored, then too the inferences can still be drawn from other independent and objective facts mentioned in this case, namely, the fact of seizure after search of 60 gold biscuits from the suitcase of the daughter in the presence of the father which indubitably belonged to the father and admitted by him to belong to him for which no explanation has been given and secondly the

seizure of the papers connected with other groups and organisations. Pratap Sait and others to whom gold has been sold by the father are relevant grounds from which an inference can reasonably be drawn for the satisfaction of the detaining authority for detaining the detenus for the purpose of Section 3(1)(iii) and 3(1)(iv). We are of the opinion that the impugned order cannot be challenged merely by the rejection of the inference drawn from confession. The same argument was presented in a little different shade, namely, the fact of retraction should have been considered by the detaining authority and the Court does not know that had that been taken into consideration, what conclusion the detaining authority would have arrived at. This contention cannot be accepted. We are not concerned with the sufficiency of the grounds. We are concerned whether there are relevant materials on which a reasonable belief or conviction could have been entertained by the detaining authority on the grounds mentioned in Section 3(1) of the said Act. Whether other grounds should have been taken into consideration or not is not relevant at the stage of the passing of the detention order. This contention, therefore, cannot be accepted. If that is the position then in view of Section 5A of the Act there was sufficient material to sustain this ground of detention.

76. In the case of State of Gujarat Vs. Chamanlal Manjibhai Soni, this Court maintained the order of the High Court quashing the detention. This Court observed that detention u/s 3 of the Act was only for the purpose of preventing smuggling and all the grounds, whether there are one or more, would be relatable only to various activities of smuggling and no other separate ground which could deal with matters other than smuggling could be conceived of because the act of smuggling covered several activities each forming a separate ground of detention and the Act dealt with no other act except smuggling. Whenever allegations of smuggling were made against a person who was sought to be detained for preventing further smuggling there is bound to be one act or several acts with the common object of smuggling goods which was sought to be prevented by the Act. It would, therefore, not be correct to say that the object of the Act constituted the ground for detention. This view is respectfully reiterated but in the instant case, the authorities concerned came to the conclusion that the detenus were engaged in smuggling, in support of the same they relied on several factors, namely:

- (1) The search and seizure at room No. 316 at Dwaraka Hotel and recovery of 60 gold biscuits.
- (2) The fact that the importation of the 60 gold biscuits could not be explained by the detenu Venilal.
- (3) The secretive manner in which the said gold biscuits were kept.
- (4) The connection with the various dealers as mentioned hereinbefore and the statements of the employees of the dealers that the father and the sons used to come with gold bars.

18. In light of the aforesaid position, we feel that the principle of segregation of

grounds is clearly applicable and paragraphs 37, 38, 41, etc. of the detention order relating to Pooran Chand Sharma can be segregated and treated as separate ground of detention and it is not the case of one composite ground but rather a case of multiplicity of grounds. Therefore, inspite of our observations in respect of the grounds relating to Pooran Chand Sharma, the detention order can be sustained with reference to other grounds.

19. In the written submissions and during the course of hearing, it was submitted that the Central Government had erred in relying upon and referring to the comments of the Joint Secretary, the detaining authority. The said contention does not merit acceptance. The Central Government had independently applied their mind and representation has been rejected by the Secretary. The Joint Secretary, the detaining authority, might have given their comments but this would not affect or invalidate the consideration and application of mind by the Secretary on behalf of the Central Government, who is superior and a higher officer. In view of the aforesaid reasoning, we do not find any merit in the present writ petition inspite of our observations on material/ evidence found during the search of Pooran Chand Sharma. The writ petition is accordingly dismissed. There will be no order as to costs.