

(1992) 02 RAJ CK 0032

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1199 of 1992

Kishore Sharan and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 25-02-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 21, 22, 226, 32
Customs Act, 1962 — Section 108, 123, 124

Citation : (1992) WLN 491

Hon'ble Judges : G.S. Singhvi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.S. Singhvi, J.—Both these writ petitions contain more or less similar prayers. They are based on facts which are closely connected with each other. It is, therefore, proper to decide these two writ petitions by common order.

2. Writ Petition No. 1199/92 has been filed by the petitioner with a prayer to issue a writ of mandamus or any other appropriate writ, order or direction restraining the respondents from proceeding further in the matter of detention of the petitioner under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and for restraining the respondents from creating false evidence to implicate the petitioner for detaining him under the COFEPOSA Act, 1974.

3. Briefly stated, the case of the petitioner is that he belongs to a family of Silver Smiths. He runs a shop under the name and style of M/s. Jamnalal Sarraf & Co. in Ramganj Bazar, Jaipur. Presently he is dealing with silver antique ornaments and he is not involved in any smuggling or anti national activities. One Maruti Gypsy bearing No. RNX 1917, was intercepted near Achhrol on Delhi-Jaipur National Highway on 30.5.89 and currency notes to the tune of Rs. 12 lacs were

recovered from the vehicle. The vehicle is registered in the name of the firm of the petitioner. The occupants of the vehicle Sharwan Lal Sharma and driver Badri Narain

made statements that they were employees of the petitioner firm. The customs authorities seized the vehicle and currency notes. The petitioner applied for anticipatory bail which was granted by the District and Sessions Judge, Jaipur City, Jaipur on 5.6.89. The petitioner made a statement before the Customs Authorities u/s 108 of the Customs Act, 1962, wherein he stated that the currency notes were not being sent as sale proceeds of smuggled gold, but, the money belonged to Sanjay Gupta alias Sanju Gupta of Delhi, who sent this amount to Govind Lashkari, younger brother of the petitioner for purchasing a constructed house in Jaipur. Sarwan Lal and Badri Mandal also retracted their earlier statements by sending telegrams to Customs Collector, Jaipur and stated that money belonged to Sanju Gupta of Delhi. Sanju Gupta was also examined u/s 108 of the Customs Act. His house was also searched, but, nothing incriminating was found. Notwithstanding these statements the customs authorities have not dropped the proceedings and with some oblige motive, a notice u/s 124 of the Customs Act has been issued on 24.11.89 to the petitioner, his employees and Sanjay Gupta. Replies have been filed by all the persons but, no further proceedings have been taken for the last more than two years. No criminal prosecution has been launched.

4. One Hari Narain son of Phool Chand, who was formerly an employee of the petitioner firm was found to be in possession of ten pieces of gold weighing 1166.650 Grams. This was seized by the Customs Authorities from him on 2.7.91. In his statement u/s 108 of the Customs Act, he is said to have stated that the gold was smuggled and that his employer, namely, the petitioner was engaged in smuggling gold. The petitioner's house and shop were searched on that very day. Cash amount worth Rs. 80100/- was found in the shop and the petitioner has showed corresponding entries in the Cash Books. No other incriminating material was found. Apprehending his arrest, the petitioner moved for anticipatory bail which was granted by the Sessions Judge, Jaipur City, on 5.7.91.

5. Hari Narain was also released on bail by the Special Judge, Economic Offences, Jaipur, on 3.7.91. Hari Narayan gave a statement in the form of affidavit dated, 4.7.91 in which he was stated that he is no more in the employment of the petitioner firm and that the seized gold was not a smuggled gold.

6. The petitioner has then stated that respondent No. 4 is annoyed with the petitioner firm and he has been pressuring the petitioner to become an informer in order to help unearth the smuggling activities in respect of silver. Since the petitioner refused to oblige him, he has threatened the petitioner with implicating him in a false case and eventually he would manage to book the petitioner under COFEPOSA Act. After July, 1991 the Customs Authorities have done nothing

except issuing a show cause notice u/s 124 of the Customs Act. The allegations contained therein are wholly incorrect. Since the Customs authorities have realised that they will not be able to take any action against the petitioner under the Customs Act, now they have managed passing of a detention order u/s 3 of COFEPOSA Act. This order has not been served upon him. Apparently, this order has been passed by the detaining authority on the basis of half-truth and incomplete facts placed before it by the Customs Authorities. The petitioner is now seriously threatened with the deprivation of his liberty and his right under Article 21 of the Constitution of India is at stake.

7. The petitioner has asserted in his petition that there is no material which can legally be construed the basis for detaining him under COFEPOSA Act.

8, In Writ Petition No. 1451/92, the petitioner has stated that his family occupation is drilling of Semi Precious stones. He has also been doing brokerage in semi precious stones. In 1989 he was employee with M/s. Jamna Lal Saraf and Co. Ramganj Bazar, Jaipur and continued with them till March, 1991. Thereafter, he resumed his family trade. The firm deals mainly in silver antique ornaments. He has also stated that his maternal grand father was a moneyed person. He owned agricultural lands near Sanganer. He was a Patwari in Revenue Department. He was also know as a moneylender in the area. He earned lot of money in the business of money-lending. After his death, petitioner's maternal grand mother inherited huge wealth. She was overly attached to the petitioner. Therefore, during her last days, she gifted raw gold to the petitioner. On 2.7.91 he was carrying gold strip to a goldsmith for converting it into different ornaments. The Customs Authorities stopped him and seized gold strips from him. A false seizure memo was prepared and the gold was shown in ten pieces instead of one long strip. Although, the petitioner had disclosed his ownership of the gold, the Customs Authorities recorded a forged statement u/s 108 of the Customs Act alleging that it was a smuggled gold. The petitioner was severely beaten and terrorised to put his signatures on that statement. On 3.7.91, the petitioner was produced before the Special Judge, Economic Offences, who released the petitioner forthwith. On 4.7.91, the petitioner made a statement on oath, which was attested by Notary Public, Jaipur. After some time, the petitioner went to the Custom Collector, Jaipur to submit his statement disclosing correct facts and disowning his earlier statement dated 2.7.91 recorded by the Customs authorities. In the Collectorate he met Shri Chandra Prakash Sharma. When Shri Chandra Prakash Sharma came to know that the petitioner is going to disown the statement dated 2.7.91, he got furious and threatened the petitioner with dire consequences including the threat of booking him under COFEPOSA Act. Badly shaken by this incident, the petitioner came back without submitting his statement. The petitioner was being pressurised to speak against Kishori Sharma Garg and to become an informer and to help the department in unearthing the smuggling activities. The petitioner did not oblige him. The petitioner has stated that except issuing a show cause notice u/s 124 of the Customs Act, no steps have been taken by the Customs Authorities after July 1991. He has never

indulged in any anti national activities or smuggling activities. He has, however, received authentic information that an order has been passed u/s 3 of the COFEPOSA Act for his detention. This order passed in the last week of January, 1992 has not been served upon the petitioner. He apprehends his arrest at any moment. His fundamental right of life and liberty will be put to jeopardy if he is detained under COFEPOSA Act. Prayer made in this writ petition is in the same form in which a prayer has been made in Writ Petition No. 1199/92.

9. In Writ Petition No. 1199/92 separate replies have been filed on behalf of respondent No. 1 and respondents No. 2 to 4. In writ petition No. 1451/92 reply has been filed only by respondents No. 2 to 4. The sum and substance of all these replies are that the Customs authorities seized ten pieces of gold bearing foreign marks in the form of biscuits. These foreign markings were erased. Immediately after seizure of Gold, the statement of Harinarain was recorded u/s 108 of the Customs Act, 1962. In that statement he has stated that he was employee of Kishori Sharan Garg of M/s Jamna Lal Saraf and Co., Jaipur. The subsequent affidavit dated 4.7.91 is absolutely false. The gold seized from Harinarain has been analysed at the Government of India Mint, Bombay. It has been reported that the seized gold is of much higher purity than the gold found in India. The respondents have denied the allegation that only one strip of gold was seized from Hari Narain Bansal. It has then been stated that one gold biscuit bearing foreign marks was also recovered from Ghanshyam Soni. He was also arrested on the same date. It has then been stated that after seizure of the gold, Kishori Sharan Garg of M/s, Jamna Lal Saraf and Co., went underground and did not cooperate in the investigation. His statement could be completed only on 16.8.91. The department sponsored the proposal of passing of detention order by the State Government sponsored the proposal of passing of detention order by the State Government. This requires deliberate consideration/examination of the matter at various levels in the Government. The petitioners are engaged in smuggling activities prejudicial to the national interest. The allegation of malafide leveled against respondent No. 4 have been denied. It has been stated that he is a very junior officer in the department and he has nothing to do with the passing of detention order. The matter is examined by a screening committee of the State Government and, on the recommendations of the screening committee, the State Government takes a decision to pass or not to pass an order of detention. It has also been stated that the recovery of Rs. 80,100/- from the shop of the petitioner, Kishori Sharan Garg, alongwith the statement of Hari Narain, dated 2.7.91, clearly reveals that Kishori Sharan Garg is engaged in clandestine activities of smuggling. The respondents have also raised objection about maintainability of the writ petition at this stage.

10. The petitioner, in writ petition No. 1199/92, has filed rejoinder wherein, it has been stated that in India as also in Jaipur, there are many people who retain old Moharas of gold. The purity of this gold is not less than 99.95%. More-over, Goldsmiths of Jaipur are capable of refining gold having purity of 99.95% and even above. The affidavit of Nawal Kishore Soni has been filed in support of this

assertion. It has also been stated that in India, many a time the Customs Authorities have come across seals bearing the foreign imprints as also high percentage purity. Therefore, merely on the basis of percentage of purity it cannot be interred that the gold seized is of foreign origin.

11. Shri C.K. Garg, learned Additional Advocate General has raised a preliminary objection to the maintainability of the writ petition. He has argued that the orders passed against the petitioners u/s 3 of the COFEPOSA Act have not been served upon them. Till the orders are served upon them, the Court cannot pass any order restraining the authorities from detaining the petitioners. His submission is that at per-detention stage the Court cannot issue a writ In favour of the petitioners. Shri Garg argued that if any order is passed by the High Court restraining the execution of the detention order, the whole object of taking proceedings under COFEPOSA Act will be frustrated and that will be against the interest of public. By placing reliance on the decision of the Supreme Court in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, , Shri Garg submitted that all the pervious decisions rendered by the various High Courts and also by the Supreme Court in S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, , which laid down the law that the High Court can issue pre-emptory writ, are no longer good law. On the basis of the judgment of the Supreme Court in Alka Subhash Gadia's case (supra), Shri Garg submitted that the writ petition must be thrown out without any further consideration. Shri R.S. Bajwa, learned Counsel for the petitioners, opposed the submission of Shri Garg by asserting that the judgment of the Supreme Court in Alka Gadia's case cannot be read as laying down proposition that High Court's jurisdiction to issue a pre-emptory writ for restraining the authorities from detaining a person has been ousted. He argued that while exercising writ jurisdiction under Article 226 of the Constitution, the High Court possesses ample power to issue writ in any matter and at any stage. The jurisdiction of the High Court to issue prerogative writs or orders or directions in the nature of the writs cannot be curtailed except by a constitutional amendment and no decision of any Court including that of the apex Court can be read as imposing any restriction on the exercise of this Jurisdiction by the High Court, Shri Bajwa argued that neither the provisions of the Customs Act nor that of COFEPOSA Act contain any provision which could be read as imposing a fetter on the exercise of jurisdiction by the High Court. In fact any such restriction on the jurisdiction of the High Court will be clearly unconstitutional, argued Shri Bajwa.

12. Having carefully gone through the judgment of the Supreme Court in Smt. Alka Subhash Gadia's case (supra), I am clearly of the view that that decision cannot be read as laying down a proposition of law that High Court cannot entertain a writ petition or issue an order or direction in the nature of the prerogative writs directing that a person may not be detained under a particular Act. The decision of the Supreme Court itself specifically recognises the fact that the High Court has Jurisdiction to entertain a writ petition and issue appropriate

writ, order or direction having regard to the facts of that case. In Para 30 of that judgment, the Supreme Court observed that, there is a difference between the existence of power and its exercise. Neither the Constitution Including the provisions of Article 226 thereof, nor the Act in question placed any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 of the Constitution are wide and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. The Supreme Court has in unmistakable terms recognised that the Courts have power to entertain grievance against any detention order even prior to its execution. It is altogether a different matter as to in what circumstances the Court will actually exercise its jurisdiction to interfere with an order of detention prior to its execution or may restrain the competent authority from passing an order of detention. The question of exercise of power in the given facts and circumstances of a particular case or the facts situation obtaining in a particular case, cannot be construed as containing any limitation or restriction on the availability of the jurisdiction with the High Court under Article 226 of the Constitution of India. It has loosely been observed in several decisions that the availability of a remedy under a particular law creates a bar or operates as a bar to the maintainability of the writ petition. The employment of such language however, does not lead to an inference that the Court has at any time, held that the Jurisdiction or the power of the High Court under Article 226 of the Constitution of India, has been abridged, curtailed or restricted. What is sought to be conveyed by such later observations is that the High Court will not exercise jurisdiction when a remedy is available to a party for getting relief for which the writ petition is filed. It must very emphatically be made clear that except by way of constitutional provisions on amendments, no fetter or restriction can be imposed on the jurisdiction of the High Court to issue an appropriate writ, order or direction. The wide amplitude of the writ jurisdiction of the High Court noticed by the Apex Court in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, cannot be restricted or curtailed by any decision of the Court. The High Court can give relief to any person in the matters which come for judicial review : before it in exercise of writ jurisdiction. However, while exercising its jurisdiction, the High Court always keeps in mind the self-imposed restraints. Such self imposed restraints are to be kept in mind in all types of cases. They are not confined to the review of orders passed under detention law. Thus, I do not find any merit in the preliminary objection raised by the learned Additional Advocate General.

13. On merits of the case, Shri S.R. Bajwa has argued that mere seizure of gold from Hari Narain on 2.7.91 cannot be a ground for passing an order of detention of the petitioners u/s 3 of the COFEPOSA Act. He argued that the statement of Hari Narain, which was recorded by the Customs Authorities on 2.7.91 cannot be made use of against Kishori Sharan Garg, particularly when Hari Narain has retracted from that statement immediately after he was released on bail on 3.7.91. That statement could not have in fact, been recorded u/s 108, because

no notice as envisaged by Section 124 of the Customs Act was issued. Such notice was issued only on 20.12.91 and, therefore, before 20.12.91 there was no stage of recording statement of Hari Narain, Shri Bajwa has, in support of this submission placed reliance on the decision of Gujarat High Court in *Union of India v. Abdul Ghani* 1985 Cri.L.J. 324 and *Jagdish Soni v. A.K. Derasi* 1989 Cri.L.J. (Raj.) 49. He then argued that the even if the statement of Hari Narain could be treated as one recorded u/s 108 of the Customs Act, the same cannot be used against the petitioner, Kishori Sharan Garg. It is a very weak type of evidence and cannot furnish a ground for passing an order of detention under COFEPOSA Act. Shri Bajwa placed reliance on the decision of Bombay High Court in *Modi Chand Sarrrpat Raj Sah v. Daya Shankar and Ors.* 1987(3) Crimes 724 and submitted that on the basis of such statement, even prosecution could not be initiated. Shri Bajwa further argued that mere recovery of gold bearing foreign marks cannot constitute a ground for reasonably believing that it is a smuggled gold. The gold strip recovered from Hari Narain belongs to him and Kishori Sharan cannot, in any manner be connected with the said gold strip. Section 123 of the Customs Act cannot be invoked qua-Kishori Sharan, argued learned Counsel.

14. Shri Bajwa lastly argued that so called seizure goods took place on 2.7.91 and, therefore, no tangible action has been taken by the respondents for issue of detention order. There has been a delay of almost 8 months in passing of the order of detention. No explanation has been offered by the respondents about this gross delay. The delay itself shows that the respondents were never serious in preventing so called activities of the two petitioners in the matter of smuggling of gold. Both the petitioners were freely allowed to carry on their business without any interference. The delay is an indicator of the absence of any causal relationship between the seizure of the gold and the allegation of involvement of the petitioners in smuggling activities. Shri Bajwa urged that the provisions of preventive detention laws must be construed very strictly, because, they have far reaching consequences on the liberty of an individual. The ordinary law relating to prosecution of a person against whom allegations of involvement in criminal activities are made, cannot be displaced by having resort to the laws relating to preventive detention. These laws cannot be used as a substitute for ordinary law relating to crimes. The complete failure on the part of the respondents to submit any cogent explanation for this long delay is by itself sufficient for restraining the respondents from executing the orders of detention. Shri Bajwa argued that the specious plea of consideration at different levels cannot be a ground for refusing an order of restraint against the detention of the petitioners. He drew the attention of the Court to the contents of the reply and urged that the respondents have completely failed in giving a cognate explanation of the long delay of 8 months. In support of this submission Shri Bajwa has placed reliance on the decisions of *Dinabandhu Mondal v. Union of India and Ors.* 1988(1) Crimes 767, *Rajgopal Chettiar v. Union of India and Anr.* 1988 (2) Crimes 632, *Barikad Abdul Rahiman v. Union of India and Ors.* 1988 (2) Crimes 626, *Verdi*

Chand Shankarlal Oswal v. L. Hmingliana and Ors. 1990 (1) Crimes 394 , 1990 (2) PLJR 77 (SC) . Shri Bajwa also submitted that so far as Hari Narain was concerned, the gold strip was given to him by his maternal grandmother, out of sheer love and affection and, there is every reason to believe that gold belonged to her. That recovery of gold from Hari Narain by itself is not a ground for detention under COFEPOSA Act.

15. Shri C.K. Garg, learned Additional Advocate General and Shri Praveen Balwada, Advocate, on the other hand submitted that both the petitioners are persons against whom the authorities have a reasonable belief that they are involved in the activities which are detrimental to the public interest. The old bars were seized from Hari Narain. He made a candid statement on 2.7.91 itself. Thereafter, further investigation was carried out. Kishori Sharan Garg was issued notice on 12.7.91 calling upon him to give a statement. Despite service of notice he did not give his statement. Another notice dated 17.7.91 sent to him was refused. A third notice dated, 31.7.91 was given to him and then his statement was recorded on 1.8.91 and 2.8.91. His statement remained incomplete. It could be completed on 16.8.91. The matter has, thereafter, been investigated from different sources. After careful investigation the Collector, Custom, forwarded the papers to the Government of Rajasthan. The matter was thereafter, placed before the Screening Committee. The Screening Committee considered the papers and after careful consideration the entire material the Government took a decision. Shri Garg submitted that an order of preventive detention has definitely serious adverse consequence on the liberty of an individual and, therefore, in passing such order great care has to be observed. The respondents could not have passed the order of detention in casual fashion and in hot haste. The matter is scrutinised at different levels and then only a decision is taken by a very high authority in the Government. The fact that the decision regarding detention is finally taken by a very high ranking officer of the Government after through security of the matter is by itself, is a safeguard against the arbitrary exercise of power of detention. Both Shri Garg and Balwada submitted that for recording a statement u/s 108 of the Customs Act, 1962, notice u/s 124 of the Act is not a condition precedent. Section 108 and 124 fall under different chapters. The objects of inquiry under these two provisions are altogether different and, therefore, the statement of Shri Hari Narain recorded on 2.7.91, can certainly constitute a relevant material for taking a decision. They placed reliance on the judgment dated 29th August 1990; in S.B. Criminal Revision Petition No. 19/89, Shyam Lal Gupta v. State of Rajasthan and Anr. Shri Balwada referred to the provisions of Section 3 of the COFEPOSA Act and argued that once the authority is fully satisfied about the existence of circumstances warranting exercise of powers u/s 3, appropriate order can be passed. The delay in passing of an order cannot by itself be a ground for passing a restraint order against the execution of the order of detention. They placed reliance on the decisions of Supreme Court in Odut Ali Miah v. State of West Bengal (1974) (2) SCC 129 , Olia Mallick alias Oliruddin Mallick Vs. The State of West Bengal, , Gora

v. State of West Bengal 1975 (2) SCC 996 , Vijay Narain Singh Vs. State of Bihar and Others, , Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, , Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, , M. Ahamedkutty Vs. Union of India (UOI) and Another, , Abdul Salam alias Thiyyan Vs. Union of India and others, and Prabhakar B. Pujari v. State of Karanataka 1990 Suppl. SCC 146.

16. Shri Garg and Shri Balwada further submitted that the impugned action of the respondents is not founded on any irrelevant or extraneous considerations or grounds. The decision to pass detention orders have been taken only after a thorough scrutiny of the material and after the authorities have felt satisfied with the necessity of passing of the order of detention. Again relying on Alka Gadia's case (supra), learned Counsel submitted that the process initiated by the respondents under COFEPOSA Act must not be put to grinding halt by issuance of the writ in favour of the petitioners.

17. Learned Additional Advocate General has also placed before the Court the record for perusal of the Court.

18. Detention of an individual without Mal for any length of time, howsoever short it may be, is totally inconsistent with the basis ideas of democratic Government. The gravity of evil to the community resulting from antisocial activities, cannot furnish sufficient reason for encroachment on the personal liberty of the individual except in accordance with the procedure established by law. For this reason, the Courts have innovated certain procedural safeguards in the cases of preventive detention. When the life and liberty of a citizen is involved it is expected that the Government will ensure that the Constitutional safeguards embodied in Article 22(5) are strictly observed. When a person is detained on the basis of an order made under any law of the preventive detention, the authority must communicate grounds of detention and afford an opportunity for making representation against the order of detention. These are the minimum safeguards which are required to be observed before an executive authority can be permitted to preventively detain a person and thereby put his right of personal liberty to peril in the name of public good and social security.

19. In Narendra Purshotam Umrao Vs. B.B. Gujral and Others, the Supreme Court observed that, when the liberty of the subject is involved, it is the bounden duty of the Court to satisfy itself that all safe-guards provided by the law have been scrupulously observed and that the subject is not deprived of his personal liberty, otherwise than in accordance with law. Nevertheless, the community has a vital interest in proper enforcement of its laws, particularly, in areas such as, Conservation of Foreign Exchange and Prevention of Smuggling Activities, in dealing with effectively with persons engaged in foreign exchange and racketeering and persons engaged in anti-social and anti-national activities which threatens the very integrity of Union or that persons engaged in anti-social activities seeking the public order in the worsening law and order situation. By ordering their preventive detention, but, at the same time, ensuring that the law

is not used arbitrarily to suppress the citizen of his right to life and liberty. The scope of the powers of interference by the High Court and the Supreme Court in the matters relating to preventive detention has been examined by the Apex Court and by various High Courts time and again. This question has been examined in great details in Alka Gadia's case (supra) in the context of invoking jurisdiction of the High Court before execution of the order of preventive detention. In para 11 of the judgment the Supreme Court has observed:

The provisions of Articles 21 and 22 read together, therefore, make it dear that a person can be deprived of his life or personal liberty according to procedure established by law and, if the law made for the purpose is valid, the person who is deprived of his life or liberty has to challenge his arrest or detention, as the case may be, according to the provisions of the law under which he is arrested or detained. This proposition is valid both for punitive and preventive detention. The difference between them is made by the limitations placed by Sub-clauses (1) and (2) on the one hand Sub-clauses (14) to (7) on the other of Article 22, to which we have already referred above. What is necessary to remember for our purpose is that the Constitution permits both punitive and preventive detention provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it, are valid.

20. The Court preceded to further observe:

This is not to say that the Jurisdiction of the High Court and the Supreme Court under Article 226 and 32 respectively has no role to play once the detention-punitive or preventive-in shown to have been made under the law so made for the purpose. This is to point out the limitations which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restrictions on these powers, the Judicial decisions have involved them over a period of years taking into consideration the nature of the right infringed or threatened to be infringed, the scope and object of the legislation or of the order or decision complained of, need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the Jurisdiction is invoked, the nature of relief sought etc.

21. After Indicating some of the self imposed limitations on the exercise of jurisdiction, the court observed that these limitations are not only equally observed by the High Court and the Supreme Court while exercising their writ jurisdiction in preventive detention matters, but in view of the object for which the detention law is enacted. The Courts are more circumspect in observing them while exercising their said extraordinary, equitable and discretionary power in these cases.

22. In para-27 of the said judgment, the Court observed:

The preventive detention law by its very nature has always posed a challenge before the Courts in a democratic society such as ours to reconcile the liberty of the individual with the allegedly threatened interests of the society and the security of the State particularly during times of peace. It is as much a deprivation of liberty of an individual as the punitive detention. Worst still, unlike the latter, it is resorted to pervert the possible misconduct in future, though the prognosis of the conduct is based on the past record of the individual. The prognosis further is the result of the subjective satisfaction of the detaining authority which is not Justiciable. The risk to the liberty of the individual under our detention law as it exists is all the more aggravated because the authority entrusted with the power to detain is not directly accountable to the legislature and the people.

23. It then proceeded to say:

However repugnant the notion of preventive detention may be to the champions of individual liberty, it has also to be remembered that the power to make such a law even during peace time has been incorporated in the Constitution by the framers of the Constitution many of whom had tasted the bitter fruits of such detention law during the struggle for freedom. Whatever may, therefore, be one's own notions about the dimensions of individual liberty, one must accept the provisions of the Constitution as enacted by the mature vision and seasoned experience of the Constitution-makers.

24. While reiterating that the Court has power to Interfere at the pre-execution stage, the Apex Court pointed out that the scope of such Interference Is very limited, i.e. (i) that the Impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the Courts to use their extraordinary powers of judicial review to Interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law In question.

25. The Supreme Court answered In negative the question as to whether the detenu is entitled to the order of detention prior to its execution at-least to verify whether it can be challenged at its pre-execution state on the limited grounds available. After setting out the reasons for taking this view the Court observed that there is no doubt that the Courts have; power to interfere with the detention order even at the pre-execution stage, but, they are not obliged to do so nor it will be proper for them to. do so save in exceptional cases, and the detenu cannot claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well-settle principles.

26. In the light of the principles which have been referred to hereinabove, the

facts and the contentions advanced on behalf of the petitioners deserve a close scrutiny. Hari Narain was arrested by the Customs authorities on 2.7.91 and ten gold pieces weighing 1166.650 Grams were recovered from him. He made a statement on 2.7.91 asserting that he was an employee of Jamna Lal Saraf and Company, belong to the petitioner Kishorl Sharan Garg. The petitioner, Kishori Sharan Garg applied for anticipatory bail which was granted to him. Hari Narain was also released by the Court on 3.7.91. He gave an affidavit on 4.7.91 in favour of the petitioner, Kishorl Sharan Garg, which perhaps helped him in anticipatory bail. The gold seized from Hari Narain was sent to the Government mint for testing. The report of the mint has been received. In the meanwhile, the Customs Authorities recorded the statements of several persons including the petitioner, Kishorl Sharan Garg and his brother Devaki Nandan. The record produced before the Court shows that gold seizure has been made from some other person as well. So far as the petitioner Kishorl Sharan is concerned, he did not respond to the notice of the Customs Authorities issued to him on 12.7.91 and 17.7.91 and ultimately gave his statement in the month of August, 1991. After receipt of the report from the Government Mint the Customs authorities forwarded the matter to the Government of Rajasthan where the Screening Committee considered the matter and, thereafter, the competent authority took a decision that an order u/s 3 of the COFEPOSA Act be passed. The statement of Hari Narain that he had gone to the Collectorate of Customs to make a statement exonerating the petitioner Kishorl Sharan Garg, but, could not make the same because of the alleged threat given by the respondent No. 4, does not inspire confidence. If he could make an affidavit on 4.7.91, there is absolutely no reason for him to have felt scared by the so-called threat given by respondent No. 4. More-over, the statement made by Hari Narain on 2.7.91 cannot be held as irrelevant on the basis of the plea of the learned Counsel for the petitioner that a notice u/s 124 was not given. I do not propose to express any final opinion on that aspect of the matter, but, in the light of the decision of this Court in Shyam Lal Gupta's case (supra), where M.B. Sharma J. has held that statements u/s 108 can be recorded by the officer who is making inquiry in connection with the smuggling of goods, prima-facie, the statement of Hari Narain could furnish a relevant material to the authorities for the purpose of their satisfaction. Hari Narain's plea that the gold seized from him was given to him by his maternal grand-mother also does not inspire confidence. Therefore, it cannot be said that no material was available with the authorities for taking its decision in the matter of detention of the petitioners u/s 3 of COFEPOSA Act. It is true that the preventive detention law must be construed strictly, but, the Court cannot ignore that the community has vital interest in the proper enforcement of the laws in relation to foreign exchange and prevention of smuggling activities in dealing effectively with the persons engaged in such smuggling activities. A person who is detained in custody under various enactments, can move the Court by way of Habeas Corpus petition and unless there are extraordinary circumstances, interference at pre-detention stage is not warranted. Having taken note of the facts which have come on record and the contentions of the learned Counsel for

the petitioners, I am not satisfied that an exceptional case is made out by the petitioners for interference at the pre-detention stage.

27. The argument of Shri S.R. Bajwa that the delay in passing of the order of detention is by itself fatal to the order of detention, cannot be accepted in its abstract form. Delay in detention matters is of three types. The first type of delay is in passing of detention orders and the second type of delay is in execution of the detention orders; the third one is in consideration of the representation submitted by the detenu. I am concerned with the first type of delay. This question has been examined by the Supreme Court in various decisions to which reference has been made herein above.

28. In *Olia Mallick v. State of West Bengal* (supra) while rejecting the plea for quashing an order of detention on the ground of delay, the court observed that, mere delay in making the order is not sufficient to hold that the District Magistrate must not have been satisfied about the necessity of the detention order.

29. In *Golam Hussain alias Gama Vs. The Commissioner of Police Calcutta and Others*, , the Supreme Court dealt with this aspect at some length and then observed:

It is true that there must be a live link between the grounds of criminal activity alleged by the detaining authority and the purpose of detention, namely inhibition of prejudicial activity of the species specified in the statute. This credible chain is snapped if there is too long and unexplained an interval between the offending acts and the order of detention. No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the interval is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. The Court has to investigate whether the causal connection has been broken in the circumstances of each case.

30. In *Odut Ali Miah v. State of West Bengal* (supra), the same view was expressed.

31. In *Rajendra Kumar Natwar Lal Sah v. State of Gujarat* (supra), A.P. Sen J. spoke for the court in the following words:

A distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the COFEPOSA Act and the delay in complying with the procedural safe-guards of Article 22(5). The rule as to unexplained delay in taking action is not inflexible. In case of mere delay in making of an order of detention under a law like the COFEPOSA Act

enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence, have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and the impugned order of detention.

32. In *M. Ahmed Kutti v. Union of India* (supra), the Court observed:

Where the seemingly long time taken for passing the detention order after the prejudicial act is the result of full and detailed investigation and consideration of the facts of the case, the ground cannot be held to be remote and the detention cannot be held to be bad on that ground. In the present case it was submitted for the State that as a thorough investigation of the case was required on the part of the customs authorities both for the proceedings under the Customs Act and for prosecution in the criminal court, the proposal could not have been hurried through. These facts have not been shown to be untrue. Considering the given explanation of the period in between the interception on January 30, 1988 and the order of detention on June 25, 1988, the nexus was not snapped and the ground was not rendered stale and the order of detention was not rendered invalid thereby.

33. In *Abdul Salam v. Union of India* (supra), the delay was of a period of more than one year and the Court held that if the detaining authority is satisfied on the available material then on mere delay as long as it is not highly unreasonable and undue the court should not normally strike down the detention on that ground.

34. The same view has been expressed In *Prabhakar B. Pujari v. State of Karnataka* (supra).

35. I will now refer to the decisions on which reliance has been placed by Shri Bajwa. In *Dinabandhu Mondal v. Union of India* (supra), the learned Judge came to the conclusion that the approach of the detaining authority was causal and the explanation of delay disclosed in the counter affidavit was not convincing and that there was a complete disregard of urgency. On that premises, the learned Judge quashed the order of detention. The learned Single Judge observed that in the counter affidavit, the time consumed for taking various statements should have been explained and, in the absence of such explanation he concluded that there was no proximity between the prejudicial activities and the detention order. The Court was influenced by the fact that there was a delay of four months in execution of order of detention.

36. In Barikad Abdul Rahiman's case (supra), the Court felt that the long delay in passing of the order of detention and execution thereof was unexplained. In that in passing of the order of detention and execution thereof was unexplained. In that case, the incident took place on 11th April, 1986 and the detention order was passed on 30th January, 1987 and the same was executed on 20th August, 1987. The learned Judge of the High Court observed that the explanation for the delay was wholly unsatisfactory. In that case also, the Court was influenced by the delay of 8 months in execution of order of detention.

37. In Rqjgopal. Chettiar v. Union of India (supra), the learned Judges of Madras High Court found that the explanation of delay of 7 months in passing the order of detention and 39 days' delay in execution of the order has not been satisfactorily explained.

38. In Verdichand Shankar Lal Oswal (supra), a Division Bench of the Bombay High Court observed that, there was a total absence of execution of over four months between 12.10.88 and 22.2.88 and that it was a glaring case where causal link between prejudicial activities and the order of detention was snapped. On that basis the Court struck down the order of detention.

39. In Issac Babu v. Union of India and Anr. (supra), the Supreme Court observed that search was made on 30.11.86 and the statement of detenu was recorded u/s 108 of the Customs Act on that very day. The detention order was passed on 7.10.87 and was executed on May 23, 1988 and the delay was totally unexplained.

40. The various decisions referred to hereinabove, show that each case has been decided on its own facts. It is true that some observations have been made in these cases that there should be explanation of almost each day's delay. To that extent, the views expressed by the High Court are contrary to the law laid down by the Supreme Court in Gulam Hussain v. Commissioner of Police (supra), Rqjendra Kumar Natwar Lal Sah, M. Ahmed Kutti (supra) and these observations cannot be treated as laying down correct principles of law. In the present case, the explanation which has been offered by the respondents cannot be construed as an unsatisfactory explanation. As already observed by me, the order of detention has serious adverse impact on the right of an individual and, therefore, great care and caution has to be taken before an order of detention is made. The competent authority must consider the material carefully and then on the basis of consideration of objective factors take a decision to pass or not to pass the detention order. Various steps have to be taken in this process. The material which was placed before the authorities in the present case, was in my opinion, sufficient for a subjective satisfaction for passing of an order of detention and the delay by itself cannot be ground for declaring that the action taken against the petitioners is unconstitutional.

41. In the result, I do not find any justification for restraining the respondents from passing/executing the order of detention. The writ petitions are dismissed.