
(1977) 03 MAD CK 0031

In the Madras High Court

Case No : Criminal M.P. No"s. 445, 447 and 449 of 1975 and 3019 of 1976

K.T.M.S. Abdul Cader and Others

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 23-03-1977

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 7(1)
Criminal Procedure Code, 1973 (CrPC) — Section 392, 82(1)
Maintenance of Internal Security (Amendment) Ordinance, 1974 — Section 3, 3(1), 4, 6

Citation : AIR 1977 Mad 386 : (1977) 90 LW 501

Hon'ble Judges : P. Govindan Nair, C.J.;Ramanujam, J;Koshal, J

Bench : Full Bench

Judgement

Ramanujam, J.—In these petitions the validity of certain proclamations issued by the Chief Metropolitan Magistrate, Madras, under S. 82(1)

of the Criminal Procedure Code read with S. 7(1)(c) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974,

on 16-1-1975, is challenged mainly on the ground that the detention orders passed against the petitioners by the State Government under S. 3 of

the latter Act which formed the basis for the said impugned proclamations are invalid. These petitions originally came up for hearing before

Krishnaswamy Reddy, J., who, after hearing the arguments for some time referred them to a Division Bench, as he felt that the petitions involve

constitutional points of considerable public importance. These petitions were then heard by a Division Bench consisting of Paul and Varadarajan,

JJ. On account of a difference of opinion between them, they were posted before Natarajan J. as per S. 392 CrI. P. C. Before him it was urged by

the State for the first time, that the above petitions which indirectly challenge the validity of the detention orders passed against the petitioner cannot

be maintained in view of the decision of the Supreme Court in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, . The learned Judge

felt that the said question deserves consideration by a Full Bench. He, therefore, referred all the petitions to a Full Bench, and accordingly they

have come before us.

2. K.T.M.S. Abdul Khadar, the petitioner in Crl. M. P. 445 of 1975, A.M. Ahmed Yaseen, the petitioner in Crl. M. P. 449 of 1975 and B.S.A.

Rahman the petitioner in Crl. M. P. 449 of 1975, are alleged to have been smuggling or dealing with smuggled goods. This led the State

Government to reasonably apprehend that unless they are detained forthwith, they will continue to indulge in similar activities which may prove a

hazard to the safety and security of the country. Hence detention orders were originally passed against each of the petitioner under S. 3(1)(c) of

the Maintenance of Internal Security (Amendment) Ordinance 1974. As the petitioners in each of these petitions left the country even before the

passing of the detention orders and continued to live abroad, the warrant of arrest against them could not be executed. Therefore, on a report

made by the State Government, the Chief Metropolitan Magistrate, Madras issued proclamations under S. 82(1) Crl. P. C., hereinafter referred to

as the Code, on 2-12-1974. In the meanwhile the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, hereinafter

referred to as the Act, came into force and fresh orders of detention under the said Act were passed against each of the petitioners on 19-12-

1974. As before, the warrants of arrest following the detention orders could not be executed due to the continued absence of the petitioners

abroad, and therefore, at the instance of the State Government, the Chief Metropolitan Magistrate, Madras, had issued fresh proclamation under

S. 7(1)(c) of the Act, read with S. 82(1) of the Code on 16-1-1975.

3. Before the Division Bench, the principal point urged by the petitioners was that as the Act has no extra-territorial application, the State

Government has no power under the Act to pass orders of detention against persons who at the time when the orders were made, were not within

India but were outside its territorial limits, that the orders of detention passed

against them being illegal, the State was not entitled to invoke S. 7(1)

(c) of the Act, and S. 82(1) of the Code for issuing the proclamations in question to compel their attendance in court and, that therefore,, the

impugned proclamations are liable to be quashed. Paul, J. rejected the said contention holding--

There is nothing in the provisions of the Act which would invalidate a detention order passed in respect of a person who is an Indian citizen and

who is a resident of India and owes allegiance to the Indian Government, merely because that person was at the time of the passing of the order,

not within the territorial jurisdiction of India.

Varadarajan, J. took a different view and held that--

On a strict construction of the provisions of the Act it must be held that it has not been made applicable to the citizens of India outside India.

It was on account of this difference of opinion the petitions were posted before a third Judge, Natarajan J. Thus the substantial question for

consideration before us is as to whether the detention order under S. 3 of the Act could be passed in respect of persons outside India. As already

stated, Paul J. has held that detention orders can be passed against any person outside India provided he is an India citizen while Varadarajan J. is

of the view that detention orders can not be made in respect of persons outside. India even if they are Indian citizens. Since one of petitioners

before us is a foreign citizen, we have to necessarily deal with the validity of the detention orders passed against Indian citizens as also foreign

Nationals who were outside India at the time when they were passed.

4. Before dealing with the above main question, we have to consider the preliminary objection raised by the learned Advocate General that these

petitions which indirectly attack the validity of the detention orders cannot be maintained in view of the decision of the Supreme Court in Additional

District Magistrate, Jabalpur Vs. Shivakant Shukla, . In the said decision of the Supreme Court, it has been held by a majority that--

In view of the Presidential Order dated 27th June 1975, no person has any locus standi to move any writ petition under Art. 226 before a High

Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not

under or in compliance with the Act or is illegal or is vitiated by mala fides,

factual or legal or is based on extraneous considerations.

The contention advanced by the learned Advocate General on the basis of the above decision is that it is not open to the petitioners to attack the

orders of detention passed against them in any legal proceedings, that the observations of the Supreme Court extracted above apply not only to the

proceedings under Art. 226 of the Constitution but to all proceedings including the proceedings initiated under the Code and that the decisions of

the Supreme Court in *Sree Mohan Chowdhury Vs. The Chief Commissioner, Union Territory of Tripura*, , *Makhan Singh Vs. State of Punjab*

(and connected appeals), , and *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, , have clearly laid down that the words ""all proceedings

pending in any court"" occurring in Art. 359(1) of the Constitution refer to all legal proceedings pending in any court. He also contends that the

Presidential Order operates as a blanket ban on any and every judicial inquisition into the authority of the detention orders.

5. On a due consideration of the views expressed by their Lordships of the Supreme Court in *Shukla's* case, we are inclined to take the view that,

if the legality of the detention order is challenged on the ground of violation of fundamental rights during the subsistence of the Presidential Order

under Art. 359(1) suspending the enforcement of Fundamental Rights, such a challenge cannot be entertained by any court in any proceeding. In

Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, , the Supreme Court held that the bar created by Art. 359(1) applies to petitions for

the enforcement of fundamental rights mentioned in the Presidential Order either by way of an application under Art. 32 or by way of any

application under Art. 226, as is clear from the following observations:--

A person can enforce fundamental rights in this court under Art. 32, as well as in the High Courts under Art. 226. It is idle to suggest that the

object of Art. 359(1) is that the right to move this court only is barred and not the right to move any High Court. Art. 226 does not provide a

guaranteed fundamental right like Art. 32. This guaranteed fundamental right under Art. 32 itself may be suspended by a Presidential Order under

Art. 359(1).

We are not in a position to agree with Mr. Govind Swaminathan appearing for the petitioners that the ratio in *Shukla's* case would apply only to

proceedings under Art. 32 or 226 and not the proceedings under the Code. The ban under Art. 359(1) will have to apply to all proceedings in any court as otherwise the purpose and object of the Presidential Order will be nullified by parties having resort to any legal proceedings other than the writ proceedings under Art. 32 or under Art. 226. If the contention of Mr. Govind Swaminathan that Art. 359 will apply only to writ proceedings under Art. 32 and 226 of the Constitution is accepted, it will lead to a curious and absurd result, in that courts other than the High Courts and the Supreme Court, will be able to enforce fundamental rights in any legal proceedings while the higher courts like the High Courts and the Supreme Court will be powerless to enforce fundamental rights either directly or by way of appeal or revision from the lower courts. Further, the expression "all proceedings pending in any court" occurring in Art. 359 may not allow any other interpretation than the one given above. Therefore, we have to proceed on the basis that it is not open to the petitioners to seek to enforce their personal freedom by challenging the validity of the detention orders on the ground that they violate their fundamental rights.

6. This leads to the next contention of the State that the Presidential Order operates as a blanket ban on courts going into the validity of detention orders. In these cases, the petitioners do not seek to enforce their personal freedom by questioning the detention orders passed against them. They only seek to quash the proclamation orders issued under S. 7(1) of the Act read with S. 82(1) of the Code, on the ground that the detention orders being illegal, there is no basis for the issuance of the proclamations in question. Mr. Govind Swaminathan contends that so long as the petitioners do not seek to enforce their personal liberty, they can attack the validity of the proclamations issued by the Chief Metropolitan Magistrate under S. 82(1) of the Code on the basis of the detention orders and that such a challenge is not barred by the Presidential Order. The stand taken by the State is that even though the relief claimed by the petitioners related to the proclamations issued under S. 82(1) affecting their rights to property, that relief cannot be granted by the court unless the detention orders are declared invalid, that for the purpose of granting the relief to the petitioners the court has to necessarily go into the question as to the validity of the detention orders, and that, therefore, the petitioners

who are prohibited from canvassing the validity of the detention order in a petition for the enforcement of their fundamental right of personal freedom cannot indirectly or collaterally attack the detention order in these proceedings. It is said that what the court is prohibited from doing directly cannot be done indirectly or collaterally. According to the learned Advocate General, on a proper interpretation of Art. 359(1) and the Presidential Order issued there under and the decision in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, , even an indirect or collateral attack on the detention order is not possible in any court of law. We are not in a position to accept the above submission of the learned Advocate General. Art. 359(1) which is the basis of the Presidential Order is as follows--

Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

A close reading of the said Article indicates that any Presidential Order there under can suspend the enforcement of the rights conferred by Part III of the Constitution while a Proclamation of Emergency is in operation and that after such a Presidential Order no person can move any court for the enforcement of such of the rights conferred by Part III as are mentioned in that order. Therefore, when a proceeding is filed to enforce certain rights as against the Government while a Proclamation of Emergency is in operation, the first and foremost thing is to see whether the right claimed is one referred to in the Presidential Order and whether it is the kind of right conferred by Part III. The Presidential Order dated 16-11-1974 with which we are now concerned, refers to the rights conferred by Arts. 14 and 21 of the Constitution. Art. 21 confers rights to life and personal liberty. Therefore the said Presidential Order will extend to the suspension of the right to move any court for the enforcement of right to life and personal liberty. The petitioners, therefore, cannot approach any court seeking to enforce their fundamental right under Art. 21 to personal liberty

by questioning the detention order. In these case, the relief claimed by the petitioners does not relate to their personal liberty under Art. 21, but

relates to their rights to property which is sought to be proceeded against as a result of the proclamations issued by the Chief Metropolitan

Magistrate under S. 82(1) of the Code. It is true, the reliefs claimed by the petitioners are based on the alleged invalidity of the detention order,

and it cannot be granted unless the detention orders are found invalid. But so long as the petitioners do not seek to enforce their right to personal

liberty which alone is prohibited by the Presidential Order, they are entitled to sustain these petitions. AS has been pointed out by the Supreme

Court in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, , in determining the question as to whether a particular proceeding falls

within the mischief of the Presidential Order or not, what is to be examined is not so much the form which the proceedings have taken or the words

in which the relief is claimed as the substance of the matter.

7. In these cases the question is whether the petitioners' properties could be proceeded against in pursuance of the proclamation issued under S.

82(1) of the Code. According to the petitioners, the detention orders being extra-territorial in operation, they are bad and as such the

proclamations under S. 82(1) of the Code which are based on such detention orders are also invalid. Though in dealing with the question as to the

validity of the proclamation orders, the Courts has to necessarily go into the question whether the detention orders are invalid because of their

extra-territorial operation, the court in doing so is not enforcing the petitioners' right to personal liberty which alone is prohibited by the Presidential

Order. The decision of the Supreme Court in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, , considers specifically such a situation

and holds that the court's power to deal with the other claims put forward by the detenus apart from the claim for personal liberty is not taken

away by the Presidential Order. In paragraphs 551 and 552 of the Judgment the Supreme Court has pointed out--

Paragraph 551: Art. 359 clause (1) and the Presidential Order issued under it do not have the effect of making unlawful actions of the executive

lawful. There can be no doubt that the executive is bound to act in accordance with law and cannot flout the command of law. The executive

cannot also act to the detriment of a person without authority of law or except in accordance with law. If the executive takes any action which is not supported by law or is contrary to law, its action would be unlawful. This unlawful characteristic of the action is not obliterated by the Presidential Order issued under Art. 359 clause (1). Art. 359 clause (1) and the Presidential Order issued under it do not give any power to the executive to alter or suspend or flout the law nor do they enlarge the power of the executive so as to permit it to go beyond what is sanctioned by law. They merely suspend the right of a person to move any court for redress against the unlawful action of the executive, if his claim involves enforcement of any of the fundamental rights specified in the Presidential Order.....

Paragraph 552: It will be clear from what is stated above that whilst a Presidential Order issued under Art. 359 clause (1) is in operation, the rule of law is not obliterated and it continues to operate in all its vigour. The executive is bound to observe and obey the law and it cannot ignore or disregard it. If the executive commits a breach of the law, its action would be unlawful, but merely the remedy would be temporarily barred where it involved enforcement of any of the fundamental rights specified in the Presidential Order. This would be obvious if we consider what would be the position under the criminal law. If the executive detains a person contrary to law or shoots him dead without justifying circumstances, it would clearly be an offence of wrongful confinement in one case and murder in the other, punishable under the relevant provisions of the Indian Penal Code, unless the case falls within the protective mantle of S. 76 or 79 and the officer who is responsible for the offence would be liable to be prosecuted if there is no procedural bar built by the Cr.P.C., against the initiation of such prosecution. The Presidential Order suspending the enforcement of Art. 21 would not bar such a prosecution and the remedy under the I.P.C., would be very much available. The offence of wrongful confinement or murder is an offence against the society and any one can set the criminal law in motion for punishment of the offender. When a person takes proceedings under the Cr.P.C., in connection with the offence of wrongful confinement or murder or launches a prosecution for such offence, he cannot be said to be enforcing the fundamental right of the detenu or the murdered man under Art. 21 so as to attract the inhibition of

the Presidential Order.

It will be clear from the passages extracted above that if any legal right conferred on a person by legislation other than the fundamental right is

sought to be enforced in a court of law, it would not be within the inhibition of a Presidential Order issued under Art. 359(1). As already stated,

the petitioners seek to enforce their right to property challenging the action taken by the authorities under S. 82(1) of the Code and that cannot be

held to be barred by the Presidential Order. Hence the preliminary objection raised by the learned Advocate General that the above petitions are

not maintainable cannot be accepted.

8. Then we proceed to consider on merits the petitioners' contentions as regards the validity of the proclamations issued by the Chief Metropolitan

Magistrate. Mr. Govind Swaminathan, learned counsel for the petitioners, submits (1) the orders of proclamation issued under S. 82(1) of the

Code are based on the detention orders and that as detention orders themselves are bad in view of their extraterritorial operation, the

proclamations have also to be taken to be invalid and inoperative, (2) even if the detention orders are taken to be valid notwithstanding their extra-

territorial operation, the petitioners cannot be said to have absconded or concealed themselves so as to bring into operation S. 82(1) of the Code

and (3) there are no materials from which a reasonable belief could be entertained that the petitioners are avoiding arrest under the detention

orders.

9. As regards the first contention, the learned counsel for the petitioners refers to the various provisions of the Act and submits that none of the

provisions of the Act would enable the issue of a detention order to be operative in respect of a person residing abroad. He refers to S. 1(2) of the

Act and states that the Act can have operation only within India. He also refers to Ss. 3 and 4 and says that the Act being applicable only to the

territory of India any detention order passed under S. 3 and the execution of the same under S. 4 can only be in respect of a person residing within

its territory. Though S. 6 makes the detention orders valid and operative even if the person sought to be detained or place of his detention is

outside the territorial jurisdiction of the Government or the officer who issues the order of detention, the learned counsel would submit that the said

section is intended to cover orders of detention passed by the State Government or other officers in respect of persons outside their territorial

jurisdiction and that the section does not contemplate an order of detention being passed by any authority under the provisions of the Act to be

operative in respect of a person residing abroad. According to the learned counsel S. 6 came to be introduced in the Act only with a view to get

over certain earlier decisions in *Ram Nagina Rai Vs. District Magistrate, , In Re: S.V. Ghate, and Mohan Kumaramangalam In re*, 1951 1 MLJ

174 : 52 Cri LJ 294, wherein certain authorities functioning under S. 3 of the Preventive Detention Act, 1950, were held incompetent to issue

detention orders in respect of persons residing outside the limits of their jurisdiction and, therefore, the said sections cannot be taken to confer the

power on any of the detaining authorities to pass a detention order in respect of a person residing abroad. The question therefore is whether S. 6

which clearly says that detention order cannot be invalidated or made inoperative merely because a person sought to be detained or the place of

detention of such person is outside the limits of the territorial jurisdiction of the authority issuing the detention order can be construed in the manner

suggested by Mr. Govind Swaminathan and its operation curtailed with reference to the decisions set out above.

10. Mr. Govind Swaminathan does not dispute the proposition that in view of Art. 245(2) of the Constitution, the Indian Parliament has the power

to make a law having extra-territorial operation. Even apart from the said concession of the learned counsel, it is well established that the power of

the Parliament to make a law in relation to the topic entrusted to it is plenary, that a law passed by the Parliament under Art. 245 cannot be

invalidated merely on the ground it has extra-territorial operation and that such a law cannot be questioned on the ground that it may not be found

capable of enforcement outside its territories. So long as the Parliament is supreme and plenary, inadequacy of enforcement machinery cannot

hamper its legislative freedom. Even if the law as made by the Parliament is ineffective in respect of persons and things outside India, it has to be

enforced by the courts in India as if it is fully effective within its territory. To what extent, if at all, it will receive recognition in courts or Tribunals of

foreign countries have to depend upon different considerations. That circumstance is not one in which the courts or tribunals in India are interested

or concerned. As pointed out by Lord Simon in *British Columbia Ele. Rly. Co. v. King*, AIR 1946 PC 180, the question whether Legislative

power is so used as to extend beyond what will prove to be effective is different from the legislative competence. A Legislature which passes a law

having extra-territorial operation may find what it had enacted cannot be directly enforced. But the Act is not invalid on that account and the courts

of the country must enforce the law with the machinery available to them so long as the law is found to have been validly enacted even though such

laws have an extra-territorial operation.

11. The words "extra-territorial operation" are used normally in two different senses as connoting firstly laws in respect of acts and events which

take place inside the State but have operation outside and secondly laws with reference to the Nationals of a State in respect of their acts outside.

In its former sense the laws are strictly speaking intra-territorial though loosely termed as extraterritorial under Art. 245(1) which are clearly within

the competence of the Parliament. Therefore, merely because the law enacted by the Parliament has extra-territorial consequences. It cannot be

invalidated as has been set out in Article 245(2) of the Constitution. Oppenheim in his *Treatise of International Law*, 8th Edn. Vol. I, at p. 331.

para 147 says--

Many States claim jurisdiction with regard to certain acts committed by a foreigner in foreign countries. States which claim jurisdiction of this kind

threaten punishment for certain acts either against the State itself, such as high treason, forging banknotes and the like, or against its citizens, such as

murder and arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned

remains outside their territory. But if, after the commission of such an act, he enters their territory and comes thereby under their territorial

supremacy, they have an opportunity of inflicting punishment.

As pointed out by Greig in his *treatise on International Law*, at page 164, the jurisdictional competence of a State under international law is in many

respects ill-defined and the task of determining and the explaining of the scope of international law in this field is complicated by the fact that the

word "jurisdiction" is itself used to denote at least two similar, though nevertheless distinct notions firstly the competence of a court of law to try a

particular dispute and secondly the right of a State to control or interfere with a particular person or object, and there is considerable uncertainty as to how far a State can legislate with respect to and its courts decide issues arising out of events taking place entirely abroad. It cannot be doubted that there should be some link between either the offence or the offender and the State claiming jurisdiction and how close that link must be to satisfy the requirement of international law may be difficult to state with accuracy. The State's sovereign powers including the power to make its laws cannot be limited unless it is prohibited by any international law or by agreement, it has agreed to curtail its jurisdiction. At page 167 the circumstances under which the State may exercise extra-territorial jurisdiction are set out. It is true the territory and population being two of the essential characteristics of a Statehood and therefore it is natural that territorial supremacy and the bond of nationality should form the basis of the State's jurisdictional competence. But at the same time, there may be other circumstances which can confer the jurisdictional competence on a State such as (1) territorial jurisdiction based on the theory of incidents occurring in, or persons residing within the territory of the State are subject to its laws; (2) personal jurisdiction based on the fact that a State has the right to extend the application of its laws to its nationals, even with respect to events occurring entirely abroad, (3) universal jurisdiction based on the principle that any State may exercise jurisdiction over a crime committed such as piracy whatever the nationality of the perpetrators, (4) protective jurisdiction-war crimes etc., under which the States are allowed to punish a foreign national by a State, the safety or public order of which has been jeopardised by acts committed by persons outside its territory and (5) jurisdiction based on passive personality principle which enables a State to exercise jurisdiction over a foreigner in respect of an incident taking place abroad resulting in an injury to one of its own nationals.

12. Manual of Public International Law by Max Sorensen at page 355 paragraphs, 6, 23 also recognises the power of a State to lawfully exercise jurisdiction on other bases than territory and though within its own territory or in areas not forming part of the territory of any other State it can take action to exercise its authority or sovereignty, it cannot exercise its power in any form in the territory of another State except by virtue of a

permissive rule derived from international custom or from a convention. Reference has been made therein to the decision in the Lotus case, (PCIJ

Sex A. No. 10 at pp 18-19) where the Permanent Court of International Justice, has observed--

the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary--it may

not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State

outside its territory except by virtue of a permissive rule derived from international custom or from a convention. This discretion left to States by

international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other

States.

The learned author also says that a State may very well exercise civil or criminal jurisdiction over its nationals even with respect to their conduct

outside its territory. Therefore, it is clear from the above authorities that though a State's jurisdiction is mainly territorial, its jurisdiction can extend

in respect of things or acts done by its nationals even outside its territories. It has also jurisdiction which may properly be called protective

jurisdiction to deal with a foreign national whose acts have jeopardised or are about to jeopardise its safety or public order. The protective

principle on the basis of which a State exercises its jurisdiction over foreigners for its own preservation is recognised by the international law. If

such a protective jurisdiction is not given to a sovereign State, its stability and existence itself can be shaken by acts or things done by foreigners

outside its territory and the State will be powerless to do anything against them. Therefore, it should be taken to be the basic right of any State to

protect itself from such prejudicial acts done by foreigners outside the State by dealing with them in any manner they like. It may be that any action

taken by the State against a foreigner sometimes is ineffective so long as the foreigner is outside its territory. But merely on that ground, the action

taken cannot be said to be invalid as the jurisdiction of the State to take action against of the State to take action against a foreigner mainly

depends upon its competency and not upon its effective execution. The jurisdiction to pass an order is different from the power to executive or

effectuate that order. The fact that the foreigner cannot be proceeded against by a State so long as he is outside its limits is not a ground to deny

the State its power to exercise jurisdiction over foreigners invoking the protective principles.

13. The Supreme Court in *Giani Bakshish Singh Vs. Government of India and Others*, has recognised this protective jurisdiction of a State in the

following observations--

The first duty of a State is to survive. To do so it has got to deal with enemies both overt and covert whether they be inside the country or outside.

The fact that the appellant if released would go to England and from there continue to indulge in activities prejudicial to the security and integrity of

this country, is a relevant factor in determining whether he could be detained in this country when he is found in this country.

The difference between power to pass a detention order and its effective enforcement has also been touched upon in the above decision in the

following passage--

We are aware that there is no law in this country providing for extradition of person against whom this country would consider it necessary to pass

an order of consider it necessary to pass an order of preventive detention. It is not to be assumed that this country will indulge in such a useless and

pointless exercise. But that is quite different from saying that there cannot be a law in this country providing for such detention. But if such a person

happens to come to this country, we presume he can be detained. We do not accept the argument that a person like the appellant could be

detained only if it is apprehended that if not detained he would indulge in prejudicial activities in this country and not if his activities are outside this

country ever though they may have a prejudicial effect on this country. Take the case of a person acting prejudicially to the security of a State in

this country while residing in another State. We have no doubt that he can be detained by the former State. The same analogy applies to this case.

International law does not seem to deal with the case of nationals of one country acting in that country to the prejudice of the security and integrity

of another country and whether anything could be done about them.

14. Though as pointed out in the above passage, International Law does not directly deal with the case of nationals of one country acting in that

country to the prejudice of the security and integrity of another country, it definitely recognises the protective jurisdiction of one State to deal with

foreign nationals acting in their country against its security and integrity.

15. From the above discussion, it is clear that the Parliament has got the undoubted power to pass a law to deal with its nationals as well as

foreigners in respect of acts or things done by them abroad which are prejudicial to the security and integrity of India. There cannot be any dispute

that the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 is an Act directed against persons who are engaged in

violating foreign exchange regulations and smuggling activities which have an increasingly deleterious effect on the national economy and thereby a

serious adverse effect on the security of the country. As a matter of fact this Act takes the place of the Maintenance of Internal Security Act 1971.

Then the question is whether the provisions of the Act empower detention orders being passed against persons residing outside India, whether they

are its nationals or not in respect of acts done by them outside the country which have adverse effect on the security and integrity of India.

16. As already stated, the submission of Mr. Govind Swaminathan is that though the Parliament might have the power to make an extra-territorial

law, the Act in question does not contemplate detention orders being passed against persons residing outside the State on the date when the

detention orders are passed. However, we are of the view that by virtue of S. 6, such detention orders could be passed under S. 3 of the Act. We

cannot restrict the operation of S. 6 in the manner suggested by Mr. Govind Swaminathan. Section 1(2) which says that the Act extends to the

whole of India cannot be taken to curtail the operation of S. 6. S. 1(2) is intended to make it clear that the Act is not restricted to any part of India

in its application. That section cannot control the operation of S. 6 which clearly contemplates an order being passed against a person who is

outside Indian territory and the place of detention being also outside. Section 3 contemplates an order of detention being passed with respect to

any person including a foreigner and S. 6 makes the position beyond doubt by saying that an order of detention cannot be invalidated or made

inoperative merely because the person sought to be detained or the place of detention of such person is outside the territorial limits. The learned

counsel refers to S. 1(3) of the Foreign Exchange Regulation Act 1973, and says that if the Legislature, while enacting the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act intended to apply the provisions to persons outside India, it would have made the position clear by enacting a provision similar to S. 1(3) of the Foreign Exchange Regulation Act which makes the provisions of that Act applicable to all India citizens outside India. We are not all impressed by this submission. We have to construe the provisions of the Act in question in the light of the language used and not with reference to any other Act. Therefore, notwithstanding the fact that the Legislature in enacting the Act in question has not specifically stated that the Act is applicable to all Indian citizens outside India as it has stated in S. 1(3) of the Foreign Exchange Regulation Act, we have to consider the question of applicability of the Act to the citizens or foreign nationals outside India with reference to the object of the legislation which is to preserve the national economy and the security of the country. It has already been pointed out that S. 1(2) extending the Act to the whole of India cannot throw light on the question of the operation of the provisions of the Act on persons outside India. That question has to be decided only with reference to S. 3. S. 3 is clearly applicable to any person including a foreigner who is acting in any manner prejudicial to the conservation or augmentation of foreign exchange, by his smuggling activities. S. 4, which has been relied on by Mr. Govind Swaminathan as indicating that the Act is applicable only to a person in India cannot, in our view, control or restrict the operation of S. 3. section 4 merely provides the mode of execution of an order of detention passed under S. 3. It says that detention orders can be executed anywhere in India in the manner prescribed for the execution of warrants of arrest under the Code. It may be that if S. 6 were not there S. 4 dealing with execution of detention orders may be called in aid for determining the scope of S. 3 dealing with the power to pass a detention order. However S. 6 which specifically says that detention orders are not invalid or inoperative merely by reason of the persons to be detained or the place of detention being outside the territorial jurisdiction of the authority passing the detention order definitely throws light on the scope of S. 3. This provision clearly shows that the authority passing the order of detention under S. 3 can pass a detention order in respect of a person outside its limits and the place of detention can

also be outside such limits.

17. The submission of Mr. Govind Swaminathan, however, is that S. 6 applies only detention orders passed by the State Government or other

officers duly empowered under S. 3 either by the State Government or by the Central Government, that it does not deal with detention orders

passed by the Central Government, and that in any event the object of S. 3 is not to confer on the authority passing the detention order a power to

deal with persons abroad but to confer a power to pass an order of detention outside their limits of jurisdiction with the country. The learned

counsel also submits that S. 6 has been introduced in the Act only with a view to get over certain earlier decisions rendered under the Preventive

Detention Act, 1950, holding that the officers passing the orders of detention under that Act cannot pass orders of detention in respect of persons

outside their respective jurisdictions and that S. 6 has therefore to be read in the light of those decisions.

18. In *Ram Nagina Rai Vs. District Magistrate*, , a person was detained under the U. P. Maintenance of Public Order(Temporary) Act 1947, by

an order issued by the District Magistrate while the person sought to be detained was not within his jurisdiction. It was held by the court that the

order was illegal. In *Re: S.V. Ghate*, , the Commissioner of Police, Bombay, passed an order of detention in respect of a person who was outside

the State of Bombay. The detention order was challenged as being outside the competence of the Commissioner of Police. The Bombay High

Court held that because of S. 5 of the Preventive Detention Act 1950, a limitation has necessarily to be imposed upon the power of the

Commissioner of Police and that, therefore, he cannot exercise the power of detention in respect of persons beyond his jurisdiction. In *Mohan*

Kumaramangalam in re 1951 1 MLJ 174 : 52 Cri LJ 294, a Division Bench of this court cited with approval the above decision of the Bombay

High Court and held that the State of Bombay cannot, for the purpose of Preventive Detention Act 1950 pass orders detaining persons found

within its territory for their activities in Madras State which is outside the Bombay State. All the above decisions limiting the powers of the detaining

authority to pass orders against persons within its jurisdiction is based on the provisions of S. 5 of that Act which is as follows--

5. Detention order not to be invalid by reason of place of detention: No detention order made by an officer mentioned in sub-s. (2) of S. 3 shall

be deemed to be invalid merely by reason that the place of detention specified in the order is situate outside the limits of the territorial jurisdiction of such officer.

The above provision indicates that any order passed by an Officer empowered under S. 3(2) of the Act cannot be invalidated merely by reason of

the fact that the place of detention is outside limits of the territorial jurisdiction of the officer. It is because of the peculiar language occurring in the

said S. 3 the courts in the above three decisions proceeded to hold that, saving of orders being only in relation to the place of detention and not in

relation to the residence of the persons sought to be detained, the officers empowered under S. 3 cannot pass orders of detention in respect of

persons residing outside their territorial jurisdiction. To get over the above three decisions S. 5 has been amended in 1951 as follows--

5. Detention order not to be invalid or inoperative on certain grounds:

No detention order shall be invalid or inoperative merely by reason--(a) that the person to be detained thereunder is outside the limits of the

territorial jurisdiction of the Government or officer making the order, or (b) that the place of detention of such person is outside the said limits.

Dealing with the scope and validity of the said amended section it has been held in *Prahlad Keshav v. Commr. of Police, Bombay*, ILR (1956)

Bom 715, that the amended section confers a power on the detaining authorities referred to in S. 3 to detain a person outside the limits of its

territorial jurisdiction and that the amended S. 5 is not ultra vires Art. 162 defining the extent of the executive power of the State inasmuch as Art.

245(1) of the Constitution read with Entry III in the Concurrent List empowers the Parliament to enact a law conferring powers upon its own

officers or any officer of the State or the State Government to make an order of detention in respect of a person outside the limits of their territorial

jurisdiction. We are here concerned with S. 6 of the Act, which is in pari materia with S. 5 of the Preventive Detention Act of 1950, as amended.

Therefore, the decision in *Prahlad Keshav v. Commr. of Police, Bombay*, ILR (1956) Bom 715, will be quite relevant for this case and not the

earlier decisions referred to above which dealt with the scope of the unamended

S. 5 of the Preventive Detention Act which was very much limited in its operation.

19. We are not inclined to agree with Mr. Govind Swaminathan, that S. 6 is intended to confer jurisdiction on the State Government and the

officers empowered by the Central Government or the State Government to pass orders of detention to be operative outside their limits of

jurisdiction but it does not confer on them the power to detain a person who is outside the territorial limits of India. But a close look at S. 6

convinces us that the section is intended to confer on all the detaining authorities referred to in S. 3, the power to pass orders of detention in

relation to person outside the country. Section 6 uses the expression "outside the limits of the territorial jurisdiction of the Government or Officer

making the order of detention." The word "Government" is defined under the General Clauses Act in S. 2(23) as meaning both the Central

Government and State Government. Therefore the word "Government" in S. 6 has to mean both Central as well as State Government. Apart from

this, the other provisions of the Act clearly indicate that wherever the Legislature wanted to distinguish the Central Government from the State

Government it uses the words Central Government and State Government. This is clear from the definition of "appropriate Government" in S. 2(a)

and in S. 3 which separately refers to the Central Government as well as State Government. Having regard to the use of the word "Government" in

S. 6, the Central Government should also be taken to have the power to pass a detention order in respect of a person beyond its territorial limits.

As already stated, the learned counsel for the petitioners concedes that S. 6 will enable the State Govt. as well as the officers empowered by the

State Government or the Central Government to pass an order of detention in respect of persons outside their jurisdictional limits. If S. 6 had such

an operation in relation to the State Government as well as the officers empowered to pass the detention orders under S. 3, we do not see how the

Central Government alone should be deprived of the power to pass detention orders in relation to persons outside its territorial limits. Therefore, in

this view, if S. 6 is taken to confer on the Central Government, the power to pass order of detention in relation to persons outside its territorial

jurisdiction, the scope of the section cannot be limited in relation to the other

persons who are empowered to pass detention orders under S. 3.

There is, therefore, no escape from the conclusion that S. 6 confers powers on all the detaining authorities referred to in S. 3 to pass orders of

detention in relation to all persons outside the territorial limits of India.

20. In these cases, the orders of detention under S. 3 have been passed by the State Government and by virtue of S. 6 they cannot be invalidated

or made inoperative merely because the persons sought to be detained are outside India, whether they are nationals or foreigners. S. 3 specifically

refers to a foreigner also as coming within the scope of the provisions of the Act, and S. 3 read with S. 6 will definitely confer on the detaining

authority the power to pass a detention order in respect of foreigners also. Therefore, the detention orders passed in these cases are valid.

21. As regards the second contention that the petitioners are not persons who have absconded or concealed themselves with a view to avoid the

detention orders passed under S. 3 and therefore the orders of proclamation cannot be sustained, it is urged by the learned counsel for the

petitioners that the petitioners in these cases went abroad along before the detention orders were passed and, therefore, an intention to avoid or

evade the detention orders cannot be disputed (imputed?) to them. In these cases the detention orders have been passed more than two years

back and it is not the case of the petitioners that they had no contact with their families in India during these two years. All the three petitioners

admittedly have their families in India and it can easily be expected that the petitioners would have been informed about the passing of the detention

orders against them by the members of their family. Besides, in these cases the petitioners should be taken to have been aware of the orders of

detention as they themselves have approached the court challenging the orders of detention. The petitioners have not stated in their petitions as to

when they became aware of the orders of detention. Therefore, it can be presumed that they became aware of the passing of the detention orders

against them within a reasonable time. The question is whether the petitioners can be taken to have absconded or concealed themselves to that the

warrants of arrest could not be executed as contemplated by S. 82 of the Code, to enable the Criminal Court to issue a proclamation.

22. The words "absconding debtor" with reference to Bankruptcy Laws,

according to Stroud's Judicial Dictionary of words and phrases, 3rd Edn., means one who departs for distant countries before the necessary proceedings can be taken to make him bankrupt or being outside the country continues to remain there with intent to defeat or delay his creditors. The primary meaning of the word "abscond" is to hide and when a person is hiding from his place of residence, he is said to abscond. A person may hide even in his place of residence or away from it and in either case he would be absconding when he hides himself. In Wharton's Law Lexicon, 14th Edn., "abscond" has been taken to mean to fly the country in order to escape arrest for crime. Therefore, persons who get scent of the action to be taken by the detaining authorities and leave the country in order to escape the arm of the law can be said to abscond. Similarly persons who have already left the country without the knowledge of any action to be taken against them under the Act, but who continue to remain outside the country with a view to avoid any detention order that may be passed under S. 3 can also be taken to be absconding. It cannot be disputed that a person committing an offence in a particular country would ordinarily be liable to be tried according to the law of that country. It cannot be disputed that a person committing an offence in a particular country would ordinarily be liable to be tried according to the law of that country. If he leaves the country with a view to avoid or escape the arm of the law, he can be said to abscond so far as that country and its laws are concerned. In Chambers's Twentieth Century Dictionary, the word "abscond" has been defined as to hid or to quite the country in order to escape a legal process. Therefore, if a person, before the legal process could be issued somehow or other comes to know of the issue of such a process or anticipates the issue of the process and quits the country he can be said to have absconded.

23. In these cases, two of the petitioners are admittedly citizens of India and the other even though a non-citizen, is having residence in India as his family continues to have residence in India. As already stated, it is impossible to believe that the petitioners have no knowledge of the detention orders passed against them and are remaining abroad for bona fide purposes and not with a view to avoid or evade the detention orders. Even though the petitioners have left India before the passing of the detention orders,

if they continue to remain outside India with a view to defeat or delay the execution of the detention orders, they have to be taken to be absconding persons. It has been held in Jagdev Khan LJ Emperor, AIR 1948 LJ 151 : 48 Cri LJ 624, that the onus of proving that the accused did not abscond for the purpose of avoiding execution of warrant of arrest and that he had no notice of the proclamation issued under S. 87 of the old Cr.P.C., lies on the accused. In these cases we are of the view that the petitioners have not discharged their onus. Even assuming that they did not leave the country in anticipation of the detention orders being passed against them, they should have become aware of the detention orders through their family members who admittedly reside here. There is, therefore, no substance in the contention advanced on behalf of the petitioners that they cannot be taken to be persons absconding or concealing themselves with a view to evade the warrant of arrest.

24. Mr. Govind Swaminathan then submits that the expression "reason to believe" occurring in S. 82 of the Code contemplates the objective satisfaction of the court that the petitioners have in fact absconded, or concealed themselves with a view to avert or evade the enforcement of the order of detention. He refers to the decision of the Supreme Court in The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, . In that case the Supreme Court had expressed the view that the words "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not leading itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was based on all relevant facts or within the limits of the relevant statute as an alternative safeguard to rules of natural justice where the function is administrative, and that if it is shown that the circumstances do not exist or that they were such that it is impossible for any one to believe or to form an opinion therefrom suggestive of the thing set out in the statute the opinion is challengeable on the ground of non-applications of the mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute. The expression "reason to believe" occurring in S. 7 of the Act and in S. 82 seems to suggest, in our view, that the appropriate Government acting under S. 7 of the Act and the

Metropolitan Magistrates acting under S. 82 of the Code must be subjectively satisfied that the person against whom a detention order has been passed has absconded or has concealed himself on the materials before them as the above statutory provisions do not set out any criteria on the basis of which the conclusion that the person sought to be detained has absconded or concealed himself should be arrived at. As has been pointed out in AIR 1944 54 (Privy Council) "reason to believe" that one has absconded does not mean "factually absconded". Therefore, to invoke the power under S. 7(1)(a) of the Act the appropriate Government can, on the basis of the materials before it, form an opinion that the person sought to be detained has absconded or concealed himself and it is not necessary that it must actually be shown that the person has in fact absconded before invoking the power thereunder. Similarly the Magistrate acting under S. 82 of the Code has to form an opinion on the materials before him that the person sought to be detained has absconded or concealed himself without necessarily finding that the person has in fact absconded. We are not in a position to say that the materials on the basis of which the appropriate Government under S. 7(1) and the Magistrate under S. 82 of the Code, had reason to believe that the petitioners have absconded or concealed themselves are in any way inadequate or insufficient. As already stated, the detention orders have been passed more than two years before and the petitioners have consciously kept away from the arm of law with the knowledge of the order of detention. The fact that they have come before the court in these proceedings seeking relief for quashing the proceedings initiated under S. 82 of the Code clearly shows that they are aware of the detention orders. The fact that notwithstanding the knowledge of the detention orders the petitioners continued to remain abroad is sufficient to form the basis for the reason to believe that they continue to live abroad with a view to defeat or delay the enforcement of the order of detention. In a recent decision in Narayan Govind Gavate and Others Vs. State of Maharashtra and Others, , their Lordships of the Supreme Court while construing the scope of S. 5-A of the Land Acquisition Act have observed with regard to situations in which administrative authorities have to form certain opinions before taking action they are empowered to take--

They are expected to know better the difference between a right or wrong opinion than courts could ordinarily on such matters. Nevertheless, that opinion has to be based upon some relevant materials in order to pass the test which courts do impose. That test basically is: Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play? Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some materials, however meagre, on which it could reasonably base its opinion, the courts should not and will not interfere. There might, however, be cases in which the power is exercised in such an obviously arbitrary or perverse fashion, without regard to the actual and undeniable facts, or, in other words, so unreasonably as to leave no doubt whatsoever in the mind of a court that there has been an excess power. There may also be cases where the mind of the authority concerned has not been applied at all, due to misunderstanding of the law or some other reason, to what was legally imperative for it to consider.

We cannot say that the State Government which passed the order of detention had no material to form an opinion that the petitioners have absconded or concealed themselves, that they acted so unreasonably as to leave no doubt whatsoever in the mind of the court that there has been an excess exercise of power, or that there has been an arbitrary or perverse exercise of power.

25. The learned counsel for the petitioners then submits that even though the State Government had reason to believe that the petitioners have absconded or concealed themselves before invoking S. 7(1) (a), when the court acts under S. 82 it has to act judicially and form an independent opinion as to whether the person sought to be detained has absconded or concealed himself. According to the learned counsel S. 7(1)(a) of the Act merely treats the order of detention as a warrant issued by the Magistrate, and, therefore, the procedure contemplated by S. 82 has to be followed and that unless the Court has reason to believe that the person sought to be detained has absconded or concealed himself no proclamation could be issued under S. 82 of the Code. The learned counsel also refers to the order of proclamation issued by the court under S.

82 to show that it has not formed an independent opinion after an enquiry as to whether the persons sought to be detained have absconded or concealed themselves, and that it has merely referred to the satisfaction of the State Government. With reference to this contention that the Magistrate has to form an independent opinion before issuing the proclamation, the learned Advocate General points out that once the State Government sends a report as contemplated in S. 7(1)(a) that it had reason to believe that the person sought to be detained has absconded or concealed himself, the court has to proceed to issue a proclamation under S. 82 in view of the fact that the Act being an emergency legislation it will be defeating the very purpose of the legislation if S. 7(1)(a) is interpreted as requiring a second opinion being formed by the court. According to the learned Advocate General the legislation for preserving national economy and the security of the State by preventing smuggling activities and violation of Foreign Exchange Regulations must be placed in the same category as emergency legislation made during the time of war or external aggression, and the court should, as far as possible, adopt that interpretation which will promote and further the object and policy of the legislation and suppress the mischief the statute was enacted to prevent. Crawford on Statutory Constructions at page 375 points out--

It is the duty of the Court to give effect to the intent of the Legislature. Primarily this intent is to be ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislature as a whole, we must examine the matter further. We may then look to the reason of the enactment and give effect in accordance with its design and purpose sacrificing if necessary, the literal meaning in order that the purpose may not fail.

We however feel that it is not necessary in these cases to deal with the contention that the Act is an emergency legislation and therefore, the provisions of the Act have to be construed as far as possible in furtherance of the policy and object of the Act, and that wherever the statutory provisions are ambiguous, a construction which is favorable to the State should be adopted, as we find from a perusal of the order of proclamation issued by the Magistrate that he had also entertained a reasonable belief that the petitioners have absconded or concealed themselves. Besides,

these petitions having been filed invoking the revisional jurisdiction of this court under S. 397 of the Cr.P.C., which is a discretionary one, we are not bound to entertain the revisions merely on the ground that the court acting under S. 82 has proceeded on the basis of the satisfaction of the State Government under S. 7(1) without an independent enquiry. We have already held that there are materials from which one could entertain a reasonable belief that the petitioners have absconded or concealed themselves with a view to avoid or evade the orders of detention. Therefore, notwithstanding the fact that the Court below acting under S. 82 did not conduct an independent enquiry before entertaining a reasonable belief, the orders of proclamation challenged in these revisions need not be interfered with.

26. The result is the petitions are dismissed.

27. Petitions dismissed.