

(2008) 05 DEL CK 0254

In the Delhi High Court

Case No : Writ Petition (Criminal) 509 of 1996

Narendra Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-05-2008

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 11, 12(1), 12A, 12A(3), 3
Constitution of India, 1950 — Article 14, 141, 19, 21, 22
Customs Act, 1962 — Section 111, 113, 113, 2, 2(39)
Maintenance of Internal Security Act, 1971 — Section 3(2)
Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 — Section 12A, 12A(1), 19(1), 2, 2(2)

Citation : (2008) 103 DRJ 294

Hon'ble Judges : Vikramajit Sen, J; P.K. Bhasin, J

Bench : Division Bench

Advocate : R.M. Bagai and Sangeeta Bhayana, for the Appellant; Barkha Babbar and Lily K. Nambiar for Respondents 1-2 and Mukesh Anand, for Respondents 3-4, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.

WP(Crl.)509/1996

1. The Prayers in this writ petition are for the quashing of the Detention Order dated 19.12.1974 passed u/s 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short COFEPOSA Act); for quashing of the Order dated 29.5.1978 u/s 19(1) of Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short SAFEMA); and for restraining the respondent from acquiring/dispossessing petitioner's properties, namely, house property municipal No. 1115/X-5, Dhab Khatika, RB Saindas Road, Amritsar and factory premises bearing No. 31, Khasra No. 745, Jawahar Nagar, Batala Road, Amritsar along with some machinery installed

therein and for passing any other appropriate order that may be equitable and just. Notably, the Petitioner has not filed a copy of the impugned Order dated 29.5.1978 allegedly passed u/s 19(1) of SAFEMA.

2. It needs to be clarified at the threshold that Detention Order dated 5.11.1974 u/s 3(2) of Maintenance of Internal Security Act, 1971 (for short "MISA") relates to the father of the Petitioner, namely, Late Roshan Lal Wazirabadi, s/o Kanshi Ram (hereinafter referred to as Roshan Lal). Proclamation of Emergency was declared on 25.6.1975 and was lifted on 21.3.1977. While Late Roshan Lal was under detention, on 19.12.1974 he was ordered to be detained u/s 3(1) of COFEPOSA. This impugned Detention Order was "revoked" by Orders dated 22.3.1977, and Late Roshan Lal appears to have been released on the following day, that is, 23.3.1977. In the interregnum Shri Om Prakash, brother of the present Petitioner (viz. another son of Late Roshan Lal) filed Criminal Writ Petition 138/1975 in the High Court of Punjab & Haryana. In the meanwhile SAFEMA notices dated 30.4.1977 and 11.1.1978 had been served on Roshan Lal and Sheela Wati respectively. Thereafter, Late Roshan Lal and Late Sheela Wati, father and mother of the Petitioner, filed CWP 219/1979 and 220/1979 in the Supreme Court of India, which, along with other petitions on the same point, was disposed of by the Nine-Judge Constitution Bench in an unanimous Judgment reported as Attorney General for India and Others Vs. Amratlal Prajivandas and Others, . These concluding paragraphs are of seminal importance and are extracted for facility of reference:

56. To summarise:

(1) Parliament was perfectly competent to enact both the COFEPOSA and the SAFEMA.

(2) For the reasons given in the body of this judgment, we do not express any opinion on the validity of the 39th and 40th Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. We assume them to be good and valid. No arguments have also been addressed with respect to the validity of 42nd Amendment Act to the Constitution either.

(3) (a) An order of detention made u/s 3 of COFEPOSA, which was governed by Section 12-A thereof is yet an order of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA. Since the President had issued an order under Article 359(1) suspending Articles 14, 21 and 22, it became competent for Parliament, by virtue of Clause (1-A) of Article 359 to enact Section 12-A of COFEPOSA for the duration of and limited to the period for which the Presidential Order was in force. It was meant to achieve the purposes of emergency. Once Section 12-A is held to be a competent piece of legislation, orders of detention made there under (i.e. orders of detention to which the said provision applied) cannot be held to be not amounting to orders of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA, particularly in view of the express language of Section 2(2)(b) [including proviso (iii)]

thereto] - and the protection enjoyed by both the enactments by virtue of their inclusion in the Ninth Schedule to the Constitution.

(b) An order of detention to which Section 12-A is applicable as well as an order of detention to which Section 12-A was not applicable can serve as the foundation, as the basis, for applying SAFEMA to such detenu and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b). If such detenu did not choose to question the said detention (either by himself or through his next friend) before the Court during the period when such order of detention was in force, - or is unsuccessful in his attack thereon - he, or his relatives and associates cannot attack or question its validity when it is made the basis for applying SAFEMA to him or to his relatives or associates. (emphasis supplied)

(4) The definition of "illegally acquired properties" in Clause (c) of Section 3 of SAFEMA is not invalid or ineffective.

(5) The application of SAFEMA to the relatives and associates [in clauses (c) and (d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment. The position of "holders" dealt with by Clause (e) of Section 2(2) is different as explained in the body of the judgment.

(6) Section 5-A of COFEPOSA is not invalid or void. It is not vocative of Clause (5) of Article 22.

(7) Petitioners have failed to establish that any of the provisions of SAFEMA are vocative of Articles 14, 19 or 21 - apart from the protection they enjoy by virtue of the inclusion of the Act in the Ninth Schedule to the Constitution.

57. All the writ petitions, transferred cases and appeals are disposed of accordingly. The court and authorities before whom proceedings are pending under SAFEMA shall proceed to dispose them of in accordance with law and in the light of this judgment. It is in the interest of all concerned that the proceedings are concluded with all deliberate speed.

3. This exposition of the legal position can be altered only by a Constitution Bench Constituting of more than Nine Judges, and any decision inconsistent with *Amratlal* would have little legal efficacy. *Union of India (UOI) and Others Vs. Dhanwanti Devi and Others*, explicates a precedent to contain "the principle on the case is decided", which, when isolated, constitutes the *ratio decidendi*. *Dhanwanti Devi* has been followed in *State of Haryana Vs. Ranbir @ Rana*, and in *Girnar Traders Vs. State of Maharashtra and Others*, . In *M/s. A-One Granites Vs. State of U.P. and Others*, the following exposition of the law has been articulated:

11. This question was considered by the Court of Appeal in *Lancaster Motor Co.*

(London) Ltd. v. Bremith Ltd. (1941) 1 KB 675, and it was laid down that when no consideration was given to the question, the decision cannot be said to be binding and precedents sub silentio and without arguments are of no moment. Following the said decision, this Court in the case of Municipal Corporation of Delhi Vs. Gurnam Kaur, observed thus:

In Gerard v. Worth of Paris Ltd. (K) (1936) 2 All ER 905 , the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, Therefore, this very point was argued in a subsequent case before the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. (1941) 1 KB 675, the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents sub silentio and without argument are of no moment. This rule has ever since been followed.

In State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , reiterating the same view, this Court laid down that such a decision cannot be deemed to be a law declared to have binding effect as is contemplated by Article 141 of the Constitution of India and observed thus:

A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141.

In the case of Arnit Das Vs. State of Bihar, , while examining the binding effect of such a decision, this Court observed thus (Para 20):

A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined.

4. In M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., their Lordships sounded a note of caution to the effect that - "Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment "per incuriam". It has to be shown that some part of the decision was based on a reasoning that was demonstrably wrong...." In that case, the analysis was that the principle of per incuriam did not apply. The question that immediately arises is whether a Bench of the High Court can or should decline to apply a judgment of the Supreme Court on the strength of this legal principle.

5. In *Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another*, a Three-Judge Bench has opined that "Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, Therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, Therefore, extend to all observations of points raised and decided by the Court in a given case". In *Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal*, their Lordships declined to follow decisions relied upon which had not declared any principle of law. *Mehboob Dawood Shaikh Vs. State of Maharashtra*, clarifies that a judicial precedent cannot be predicated only on facts; it meets the rigours of stare decisis only if "it decides a question of law". The Constitution Bench has also reiterated the view in *Islamic Academy of Education and Another Vs. State of Karnataka and Others*, that the ratio decidendi of a judgment can be obtained only from a reading of its entirety. This is also the opinion of the Court in *Punjab National Bank Vs. R.L. Vaid and Others*. In *State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others*, the Hon'ble Supreme Court has observed that "any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used". Most recently, in *Tamil Nadu State Transport Corporation Ltd. Vs. S. Rajapriya and Others*, the Court has unequivocally declared that "a decision is not an authority for the proposition which did not fall for its consideration".

6. The following observations in *Escorts Ltd. Vs. Commissioner of Central Excise, Delhi-II*, justify their extraction:

8. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been

stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* 1951 AC 737 at p. 761, Lord MacDermot observed: (All ER p.14 C-D)

The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.

9. In *Home Office v. Dorset Yacht Co.* (1970) 2 All ER 294 Lord Reid said (All ER p.297g-h),

Lord Atkin's speech...is not to be treated as if it was a statutory definition It will require qualification in new circumstances.

Megarry, J in *Shepherd Homes Ltd. v. Sandham* (No.2), (1971) 1 WLR 1062 observed: (All ER p.1274d-e) "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament;" And, in *Herrington v. British Railways Board* (1972) 2 WLR 537 Lord Morris said: (All ER p.761c)

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.

10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

7. *Union of India (UOI) and Another Vs. Major Bahadur Singh*, concerned the question of whether the decision of the Apex Court in *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, established a binding precedent. Their Lordships clarified that the Court should abjure expounding the law without any discussion on the subject. The passages extracted above were once again reiterated. In *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, the Court opined that where a decision is rendered merely on the factual matrix of the case it would not constitute a declaration of the law and would Therefore not form a precedent.

8. Mr. Bagai, learned Counsel for the Petitioner, has drawn our attention to *Competent Authority, Ahmedabad Vs. Amritlal Chandmal Jain and Others*, , which, if carefully read, militates against the contentions of the Petitioner. It is palpably apparent that the Three Judge Bench would not have intended to give an exposition of the law that was not in conformity with the Nine Judge Bench of

Amratlal. Their Lordships had specifically noticed that the Petitioner before them had in fact challenged his detention. It was thereafter clarified that a writ of certiorari need not be separately filed, and if this aspect was not gone into by the Court solely because the Detenue had meanwhile been released, further challenge to the SAFEMA proceedings by assailing the validity of the Detention Order would not be barred. The first writ petition was disposed of on 10.7.1985 and the notice u/s 6 of SAFEMA came to be issued thereafter on 10.10.1985 which was challenged in a writ petition. Another notice u/s 8 of SAFEMA was issued on 28.7.1985 and was assailed through another writ petition. These challenges succeeded.

9. According to the learned Counsel for the Petitioner, the writ petition filed in 1975 by his brother challenging the detention of their father Late Roshan Lal, was dismissed as infructuous on 24.2.1978. However, even prior to this event, Late Roshan Lal had received a notice dated 30.4.1977 under Clause (c) of Sub-section (1) of Section 3 of SAFEMA. Late Sheela Wati was subsequently also served with a similar notice, but dated 11.1.1978. As is evident, both of them were fully aware that SAFEMA had been invoked against them and Therefore it was essential for them to challenge the Detention Order in their endeavor to insulate their notified properties against proceeding under this statute. It was Therefore to be expected of Late Roshan Lal and/or his son Shri Om Prakash not to have acquiesced in the dismissal of that writ petition. Alternatively, Late Roshan Lal and/or Late Sheela Wati ought to have immediately filed a writ of certiorari challenging his Detention and the SAFEMA action predicated thereon which action they eventually initiated before the Supreme Court in 1979. This aspect distinguishes the present case from Chandmal Jain. In *Karimaben K. Bagad Vs. State of Gujarat and Ors*, after the Detention was revoked on 4.8.1977 and the writ petition was dismissed on 8.8.1977, a Section 6 SAFEMA notice came subsequently to be issued. So far as *Union of India (UOI) and Others Vs. Mohanlal Likumal Punjabi and Others*, is concerned, the writ petitions were disposed of on 11.1.1995 and SAFEMA proceedings commenced afterwards by virtue of a notice/order dated 31.8.1995. These decisions are of no aid to the Petitioner since the law does not presume that a person should have the foresight to anticipate the action which the opposite party initiates. Once actual knowledge is received, recourse to legal remedy within the parameters drawn by law must be presumed.

10. On the receipt of the SAFEMA notices by Late Roshan Lal on 30.4.1977 and his wife Late Sheela Wati on 11.1.1978, either or both of them could have initiated fresh writ proceedings in the nature of certiorari, but they did not do so. Instead, they unsuccessfully contested the forfeiture proceedings under SAFEMA up to the Appellate Tribunal for Forfeited Property, whose Orders dated 2.2.1979 are Annexure P-6 to the petition. These Orders have not been assailed and thus have attained finality on all persons claiming as legal heirs of Late Roshan Lal. Late Roshan Lal and Late Sheela Wati did not raise the contentions addressed by their son and legal heir in these proceedings and further failed to prove that the

purchase of the subject properties were from legitimately earned funds. The Petitioner, Shri Narendra Kumar, has succeeded to these properties as a legal heir of his parents and has no locus standi to raise contentions and objections which his parents and predecessors-in-interest did not find fit to raise. The Petitioner cannot be better placed than his parents whose properties he endeavors to succeed to, but free from all the encumbrances and disabilities that the properties came to suffer during the lifetime of his parents.

11. We are fully mindful of the fact that this petition has been remanded to us since the Supreme Court was of the view that the principle of *res judicata* did not apply in the manner in which the Division Bench presided over by Chief Justice M.J. Rao (as his Lordship then was) was persuaded to hold. In letter dated 5.6.1997 from the Deputy Commissioner, Amritsar to the Competent Authority, SAFEMA it stands recorded that the Revenue Authorities have taken possession of property measuring 0.4 marlas out of total areas 0-17 marlas of khasra No.2871/745-727 of the subject property. After the dismissal of the Appeal of the late parents of the Petitioner they filed CWP 219/1979 and 220/1979 in the Supreme Court of India which, as we have already mentioned, were dismissed along with several others on 12.5.1994. The Petitioner, Therefore, has no locus standi to raise any further objections, especially in view of the unsuccessful attack thereto by his parents (see *supra* paragraph 56 (3) (b) of *Amratlal*) which we have already highlighted. The writ petition is dismissed since in our opinion the Petitioner has no locus standi to agitate prayers pertaining to his parents, which attack had been finally laid to rest in May 1994. If the Petitioner has any title to the properties which stands forfeited under SAFEMA, it is by virtue of his being the Legal Heir of Late Roshan Lal and Late Sheela Wati. He cannot have a better title than his parents merely through inheritance. The writ petition is replete with statements to the effect that the subject properties belonged to the Petitioner's late parents, and that they were lawfully acquired by them. The Petitioner does not assert that he has a title to the properties independent and distinct to that of his late parents.

12. Assuming that the Petitioner has locus standi to challenge the Detention of his father which the Detenue father himself had not raised in his life time, the contention of Mr. Bagai is that the provisions of SAFEMA are not attracted by virtue of Section 2 (2)(b)(iii) of that statute. In our paraphrasing, this provision stipulates that SAFEMA shall apply to every person in respect of whom an order of detention has been made under COFEPOSA provided it has not been revoked in terms of Sub-section (3) of Section 12A thereof. The last mentioned Sub-section enjoins that the question whether the detention of any person continues to be necessary for effectively dealing with the Emergency shall be reconsidered by the appropriate government within four months from the date of such declaration, which constitutes the first Review; and thereafter the necessity of detention will be considered at intervals not exceeding four months. Mr. Bagai's argument that the detention of Late Roshan Lal, father of the Petitioner, was revoked as envisaged by this provision, is devoid of merit. As we have already

seen that Late Roshan Lal was initially detained under MISA in terms of the Order dated 5.11.1974. Proclamation of Emergency occurred on 25.6.1975. On 19.12.1974 Late Roshan Lal was ordered to be detained under COFEPOSA which by virtue of Section 12A(1) was for the period of operation of the Proclamation of Emergency or a period of twenty four months from 25.6.1975 whichever period was shorter. The so-called revocation of the Detention of Late Roshan Lal was in terms of the order dated 22.3.1977 which coincided with or was contemporaneous to the lifting of the Emergency. In other words, the Detention had run right through the duration or continuance of the Emergency. For Section 2(2) (b)(iii) of SAFEMA to apply, the revocation should have been effected before the expiry of the Emergency or on the first Review as contemplated in Section 12A(3) of COFEPOSA, which is not what happened in the present case. The provision is, Therefore, of no assistance to the Petitioner. Mr. Bagai has tried to confuse the issue by arguing that the Detention of Late Roshan Lal was revoked one day prior to the lifting of the Emergency. This is not only contrary to the factual matrix, but is in sharp variance to the pleading in the SLP itself, Ground I whereof contains the statement - "The petitioner's detention was revoked suo moto by the Detaining Authority on the lifting of the Emergency by issuing revocation Order dated 22.3.1977." It needs to be highlighted that it is the Petitioner's father's detention which is referred to, (the petitioner was not detained at all), and here again efforts to confuse the issue have been made. This argument is also rejected.

13. Mr. Bagai has lastly contended that the impugned proceedings under SAFEMA are not maintainable by virtue of Section 2 (2)(b)(iv) for the reason that the impugned Order of Detention of Late Roshan Lal is liable to be set aside by this Court, being the court of competent jurisdiction. We must immediately record the Preliminary Objection strenuously agitated by learned Counsel for the Respondents viz. that the entire cause of action had arisen in Punjab where the property is also situated. It is submitted that the other son of Late Roshan Lal had challenged the detention of his father in the High Court of Punjab & Haryana. Therefore, it is palpably evident that this Court ought not to exercise jurisdiction over the dispute because of the absence of territoriality. However, the present Petition has been pending in this Court for over a decade and we would be loathe to dismiss it at this late stage, only on the ground that the Petitioner should have approached the High Court of Punjab & Haryana. It would not be in the interest of justice to traverse this avenue even though it would have been appropriate to do so in the initial hearings of the present writ petition. Rejection of the writ petition at the inception would have been most expedient and just.

14. We shall now proceed to consider whether there is any substance in the Petitioner's assault on the Detention Order of his father, Late Roshan Lal, without prejudice to all the above contentions, especially our finding that the Petitioner does not possess locus standi in this regard. Article 22(5) of the Constitution of India does not lay down any parameters within which an Order of Preventive Detention can be struck down; it speaks only of the communication of the

grounds on which the Order has been made and the essentiality of affording the Detenue the earliest opportunity of making a representation against the Order. Section 3 of COFEPOSA enumerated the grounds on which detention orders can be made. Section 5A of COFEPOSA speaks of severability of two or more grounds on which the Detention Order is predicated, it obliquely or indirectly prescribes that the grounds for detention should not be vague, or non-existent, or not relevant or not connected with such person or invalid ejusdem generis for any other reason whatsoever. As soon as Article 22 ceases to be applicable, i.e. where the restraint to liberty is removed, the Detention would have to be tested on the anvil of Sections 3 and 5A of COFEPOSA. Courts have zealously protected the Fundamental Rights of personal liberty enshrined in Article 21 of the Constitution by imposing stringent time factors and constraints on the State, violation of which would justify the quashing of the Detention Order. It is our thesis and analysis that when the personal liberty of a citizen is not in jeopardy, the Detention Order would be impervious to attack based solely on time factors. In other words, when the Court judicially reviews detention orders in the context of forfeiture of properties under SAFEMA, the validity of such detention orders must be considered on substantive grounds, reflective upon the merits of the case. Since deprivation of personal liberty is no longer in issue, the mandates and protection of Article 22 of the Constitution cease to be contextual or critical and the enquiry should be restricted to conjoint operation of Section 3 and 5A of the COFEPOSA.

15. The legislative intendment behind COFEPOSA, as per its Preamble, is avowedly to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities, which were seen to have increased manifold, thereby having a deleterious effect on the national economy as well as security of the State. Two years thereafter, in 1976, SAFEMA was found to be necessary in order to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators with a view to deprive persons engaged in such activities and manipulation of their ill-gotten gains, as mentioned in the Preamble of that Act itself. It seems to us that whereas the accent is on personal liberty so far as COFEPOSA is concerned, the emphasis is on ill-gotten gains invested in properties so far as SAFEMA is concerned. The grounds on which the detention orders can be challenged in the context of SAFEMA proceedings are to be found fundamentally in Section 3 of COFEPOSA, namely that the Central or State Governments may with a view to prevent any person from acting in any manner prejudicial to the conservation or augmentation of foreign exchange, or with a view to prevent any person from smuggling goods, or abetting the smuggling of goods, or engaging in transporting or concealing or keeping smuggled goods, or dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, make an order directing that such person be detained. It is in this backdrop that the arguments of Mr.

Bagai and Ms. Bhayana have to be cogitated upon. Mr. Bagai has reiterated the argument contained in the writ petition to the effect that the Detaining Authority did not formulate the grounds of detention himself, since it is his subjective satisfaction alone on which such orders are predicated. Our attention has been drawn to the observations contained in Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others, wherein their Lordships have observed that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation, constitutional and administrative, to apply his mind to pertinent and proximate matters only. Annexure P-1(Colly) is the Order and grounds of detention of Late Roshan Lal under MISA. The impugned Order dated 19.12.1974, passed u/s 3(1) of COFEPOSA, is accompanied by the grounds of detention. A perusal thereof will dispel any doubt that the decision to detain Late Roshan Lal was neither arbitrary nor an automatism. The Writ Court must be ever vigilant against substituting its own views and assessment for that of the appropriate authority. As has been opined in Union of India and Others Vs. Arvind Shergill and Another, , "Section 3 clearly indicates that the responsibility for making detention order rests upon the detaining authority who alone is entrusted with the duty in that regard and it will be a serious derogation from the responsibility if the court substitutes its judgment to the satisfaction of that authority on an investigation undertaking regarding sufficiency of the materials on which such satisfaction was grounded". We find no merit whatsoever in this attempt to assail the detention orders in the context of the SAFEMA proceedings.

16. Mr. Bagai has made an effort, but in vain, to garner support from Ramesh Vs. State of Gujarat and Others, . The factual matrix in that case is dissimilar to the present one. In Ramesh a Detention Order had been quashed but thereafter yet another Detention Order was passed without keeping this fact in mind. In the present case, as has already been clarified, Late Roshan Lal was first detained under MISA and within a few months thereof was detained under COFEPOSA. The Order under MISA was not quashed. It has not been shown to us that the justification for passing a detention order under COFEPOSA was mechanical or arbitrary or an automatism, or in ignorance of a previous order having been quashed. It has also not been contended, and with sound reason, that detention order under COFEPOSA ought not to have been passed because of the previous one under MISA. Once it is accepted that both statutes could have been invoked, the argument of Mr. Bagai that the Detention Orders were predicated on the same materials, is of no significance.

17. Mr. Bagai's next contention is that the detention of Late Roshan Lal stood vitiated because his Representation dated 17.1.1975 was not considered/decided and furthermore, the documents demanded in that Representation were not supplied. In the Counter Affidavit, however, it has been averred that the State Government had rejected the Representation vide Order dated 11.2.1975. It is significant that in the Counter Affidavit filed on behalf of Respondents 3 and 4 it has been asseverated by the State Government that the subject Representation

which was considered and rejected vide order dated 11.2.1975 was conveyed to the Detenue by Telex dated 5.2.1975. It is indeed regrettable that neither of these documents have been filed by the Punjab Government. However, we have already expressed the view that whereas delay in furnishing copies of relied upon documents or delay in deciding the Representation against his detention filed by a Detenue would be critical whilst the detention continues, it would not be of significance for the purposes of SAFEMA. We have perused the original records and have found the communications dated 5.2.1975 and 11.2.1975 therein. We do not propose to delve further into these questions at this belated stage in view of the fact that the predecessor-in-title of the Petitioner was unable to obtain a favorable finding on this point. We reiterate that Section 2 (2) (b) (iv) of SAFEMA speaks of the setting aside of an order of detention by a Court of competent jurisdiction, the grounds or reasons on which such orders can be quashed or set aside are to be found in Section 3(1) of COFEPOSA after the incarceration of the Detenue has ended. None of these grounds have been made good before us.

18. The final argument to be considered pertains to Section 3(2) of COFEPOSA which mandates that if the order of detention is made by the State Government it should forward a report in respect of the order to the Central Government. Mr. Bagai presses in his favor the decision of a Division Bench of this Court in the case of Harish Khera Vs. Administrator, Union Territory of Delhi, Delhi Administration, Delhi and others, , which, in turn, relies upon Sher Mohammad alias Seru Vs. The State of West Bengal, . A reading of both these cases will show that the assault was founded on Article 22 of the Constitution against the detention of the Petitioner, and not in respect of forfeiture of property under SAFEMA. In Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others, and Rama Dhondur Borade Vs. V.K. Saraf, Commissioner of Police and Others, the Supreme Court set the Petitioner at liberty because of a delay in disposing of his Representation. The decision is not of relevance to SAFEMA proceedings. In the Counter Affidavit of the State of Punjab the averments to the effect that a Report pertaining to the detention order was not forwarded to the Central Government has been denied for want of knowledge. This point was not raised in the writ petition filed by Om Prakash in 1975, nor was any favorable finding received by the parents of the Petitioner in their own lifetime. The contention has been raised in the third salvo of proceedings, that too after two decades. Ms. Babbar, with her usual perseverance, has produced a letter dated 16.4.2008 from the Ministry of Finance which informs that "the concerned file of the Ministry in which the Report submitted by the State Government of Punjab regarding issue of Detention Order in respect of Shri Roshan Lal, son of Shri Kanshi Lal Khatri on 19.12.1974 under COFEPOSA was dealt with, has been weeded out, since the Detention Order was revoked by the Government of Punjab on 22.3.1977." At this late stage, we cannot fault the concerned governments for not being in a position to give a categorical response on the aspect raised, namely, that a Report was not made to Central Government within ten days. Furthermore, it is our opinion that this statutory requirement requires mandatory compliance so far

as the detention or deprivation of the personal liberty of any person is concerned. It is not relevant to proceedings for forfeiture of property where the person concerned can disclose that they were purchased and acquired through legitimate funds.

19. Even on merits, Therefore, the writ petition is devoid of substance. The parents of the Petitioner have laid siege to the detention firstly through their other son (brother of the Petitioner) and then directly themselves, without any success. The parents have availed of the opportunity to prove before the Competent Authority as well as the Appellate Tribunal under SAFEMA that the detailed properties were not procured through ill gotten funds, but also without success.

20. In the course of final hearings we have learnt that even though interim/stay orders in respect of dispossession of the Petitioner from the notified properties are not in existence, the Respondents have taken no steps in completing the process postulated by SAFEMA. This petition was dismissed in limine by the Judgment of the Chief Justice of this Court, M.J. Rao (as his Lordship then was). The Remand Order of the Supreme Court, dated 24.2.2004, is conspicuous by the absence of any directions preserving the status quo in respect of the possession of the notified properties. Therefore, we are astounded by the fact that since February 2004 the Respondents have failed to bring the SAFEMA proceedings to its logical culmination by taking possession of the concerned properties. We, Therefore, thought it necessary to direct the Competent Authority to appear before us and clarify the position through Affidavits. The stand of the Competent Authority is legally unfathomable, to say the least. In the Affidavit of the Competent Authority it has been posited that although the stay orders were vacated when the constitutional validity of SAFEMA was upheld by the Supreme Court vide its Judgment dated 12.5.1994, because of the pendency of the present proceedings, it was thought appropriate and proper not to take any further coercive steps. Interestingly, the Affidavit refers to Mohanlal Likumal Punjabi which has been understood by the Competent Authority to hold that where the detention order passed under COFEPOSA is revoked by the Central Government u/s 11 and the revocation is not based on the Report of the Advisory Board operation of SAFEMA is not excluded. Such proceedings are valid and can continue. The Competent Authority has stated in the Affidavit - "Had the properties been taken over and disposed off it would have resulted in "irreparable loss" to the petitioner in case the Hon'ble High Court had decided in favor of the petitioner. However the property which had been forfeited as mentioned in letter dated 05.06.1997 still continues to be with the respondent". Thereafter, the Competent Authority has spoken generally of interim orders being passed during the pendency of writ petitions. The argument is that it would be futile to take coercive steps for possession of the notified property during the pendency of writ petitions, regardless of whether stay orders have or have not been passed by the writ Court. It is alarming that such a senior officer, as the Competent Authority, possesses this warped understanding of law and jural

proceedings. This would lead to the conclusion that the Respondents invariably, as a rule, stay their hands from taking any action no sooner a writ petition is filed in the Court. This is factually untrue. It obviates and renders superfluous the need for the Petitioner to file a stay application and obtain favorable orders thereon. Any officer with even a modicum of experience should know that this is an incorrect assessment of the law and jural process. We restrain ourselves from saying any more.

21. The Writ Petition [WP(Crl.)509] of 1996 is dismissed with costs of Rs. 50,000/- to be deposited by the Petitioner within two months with the Prime Minister's Relief Fund.

WP(Crl.) 990/2003 & WP(Crl.) 997/2003 & WP(Crl.) 1359/2003

22. All three petitions are interconnected and shall be disposed of by this common order. Tejwant Singh and Manpreet Oberoi were detained in terms of Orders of Ms. Nisha Malhotra, Joint Secretary to the Government of India dated 23.8.2002. The grounds on which detention orders were passed, all of even date, are verbatim of each other, and are in minute detail. So far as Shri Tejwant Singh and Shri Sanjeev Sharma are concerned, they are alleged to have exported goods worth Rs. 44.61 crores involving wrongful DEPB credit of approximately Rs. 5.80 crores. After detailed investigation the impugned Detention Orders were passed. In the case of Sanjeev Sharma the Detention Order is dated 23.8.2002 and in the case of Tejwant Singh is dated 14.8.2002; and the grounds on which they are predicated, are substantially similar to those pertaining to Shri Manpreet Singh Oberoi. Succinctly stated, the case of the Respondents is that the Petitioners had exported the cheap quality automotive parts and readymade garments to the United States of America by carrying out heavy over-invoicing. The over-invoicing was with a view to illegally reap the benefit of the Duty Entitlement Pass Book Scheme - Cum- Export Promotion Capital Goods Scheme, DEPB -Cum- Drawback Scheme and Duty Free Replenishment Certificate -Cum - Draw Back Scheme. So far as Manpreet Singh Oberoi is concerned exported goods worth approximately Rs. 33.71 crores were shown as a consequence of wrongful DEPB credit of approximately 4.15 crores and DFRC credit of approximately Rs. 2.74 crores had been claimed and the Detention Order was passed against Shri Manpreet Singh Oberoi on 23.8.2002.

23. Ms. Sangeeta Bhayana, learned Counsel for the Petitioner, has assailed the Detention Orders on a number of grounds. Firstly, she contends that on a perusal of the Customs Act, 1962 (for short Customs Act) it will become immediately evident that the Petitioners have not violated any of its provisions. The power to make orders detaining any person including a firm are to be found in Section 3 of COFEPOSA. Broadly stated, such orders can be passed (i) with a view to preventing such persons from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or (ii) with a view to preventing such person from smuggling goods or abetting or engaging in transportation or concealing or keeping or dealing or harbouring persons

engaged in smuggling goods or in abetting the smuggling of goods. Section 2(39) of the Customs Act defines smuggling in relation to any goods to mean any act or omission which will render such goods liable to confiscation u/s 111 or 113. Inasmuch as Section 111 deals with the confiscation of improperly imported goods, it has no relevance to the present dispute. It is Section 113 which contemplates confiscation of goods attempted to be improperly exported on which counsel have heavily concentrated their contentions. Secondly, Ms. Bhayana has raised several grounds including non supply of documents, delay in passing the detention order, supply of illegible documents etc. which issues have received the attention of the Supreme Court on several occasions. We have already discussed these contentions above and we reiterate that they are relevant only where the personal liberty of a person is violated or is in jeopardy on the application of Article 22(5) of the Constitution, or of Section 3(3) COFEPOSA. Where a person has been preventively detailed the provisions of Article 22 of the Constitution as well as the sundry provisions of COFEPOSA are required to be meticulously and stringently complied with by the Authorities. The Supreme Court has struck down delay of even a couple of days in supply of documents despite Section 3(3) of COFEPOSA which prescribes a period of five days and in exceptional circumstances, for reasons to be recorded in writing, not more than fifteen days from the date of detention by complying the rationale and spirit behind Article 21 of the Constitution. It appears plain to us that these considerations have no role to play where the detention order is challenged because of the initiation or pendency of forfeiture of property proceedings under SAFEMA.

24. COFEPOSA and SAFEMA are interconnected inter alias since Section 2 of the latter enactment contemplates conviction of a person under the Customs Act or the Foreign Exchange Regulation Act (FERA) or by virtue of Section 2(2)(b) and the passing of order of detention under COFEPOSA. Therefore, the springboard for passing an order under SAFEMA is either conviction under the Customs Act or FERA, or the passing of a Detention Order. The fourth proviso to Section 2(2)(b) of SAFEMA speaks of the setting aside of an order of detention, in which case proceedings under SAFEMA would cease to have jurisdiction. It is our analysis that when the Court of competent jurisdiction considers the quashing of a detention order in the context of Section 2 of SAFEMA they would perforce have to revert to Section 3 of COFEPOSA since it is that provision which spells out the powers and circumstance attending the passing of detention order. On the question of delay in furnishing copies and/or delay in passing impugned detention order we find no need to travel beyond mentioning the cases relied upon by the learned Counsel for the Petitioners. These are Sheetal Manoj Gore Vs. State of Maharashtra and Others, [10 months delay] and Dalbir Singh v. Union of India 1995 1 AD (DL) 1169. It seems to us that while emphasising upon smuggling, learned Counsel for the Petitioners have lost sight of the preceding words which refer to action prejudicial to the conservation or augmentation of foreign exchange.

25. Ms. Bhayana has relied on the decision of a Single Judge of the Punjab & Haryana High Court in *S.P. Goyal v. Union of India* 2003 1 RCR 83. Dealing with the question of over-invoicing the learned Single Judge had concluded that no smuggling activity is carried out and hence a detention order on this ground alone would have to be set aside. We cannot appreciate Ms. Bhayana's reference to the decision of a Single Judge of a High Court when the matter stands covered against the Petitioners by the pronouncement of the Supreme Court in *Om Prakash Bhatia Vs. Commissioner of Customs, Delhi*, . The Courts were concerned with the very same argument, namely, that even where over-invoicing has been resorted to, smuggling cannot be made out. Their Lordships, however, referred to the provisions u/s 3 of COFEPOSA which contemplate the passing of detention orders with a view to preventing any person from acting in any manner prejudicial to the conservation or augmentation of foreign exchange. Their Lordships opined that "in cases where the export value is not correctly stated, but there is an intentional over invoicing for some other purpose, that is to say, not mentioning the true sale consideration of the goods, then it would amount to violation of the conditions for import/export of the goods. The purpose may be money-laundering or some other purpose, but it would certainly amount to illegal/unauthorised money transaction. In any case, over- invoicing of the export goods would result in illegal/irregular transactions in foreign currency." Reference was made to the earlier decision in *Toolsidass Jewraj Vs. Additional Collector of Customs and others*, which was a case of under-invoicing which nevertheless was found to be a violation of Section 12(1) of FERA. We say with humility that over-invoicing invariably leads and results in prejudice to the conservation or augmentation of foreign exchange and, Therefore, independent of smuggling activity, would be a valid ground for invoking the powers u/s 3 of COFEPOSA to pass a detention order. Accordingly we find no merit in the writ petitions.

26. Ms. Barkha Babbar, learned Counsel appearing on behalf of Respondents, had referred to Section 113(i) of the Customs Act. This is a classic case of an anachronism since the impugned transaction took place in 2001 whereas this provision was introduced into Customs Act with effect from 14.5.2003. The amendment/introduction to the Customs Act brought about by Parliament was obviously clarificatory in nature to fill the lacunae which were perceived to exist in the Act. However, in view of the exposition of the law in *Bhatia*, even without resorting to the newly added Section 113(i) of the Customs Act, the detention order passed u/s 3 of COFEPOSA is impervious to challenge.

27. Records requisitioned from the Supreme Court be returned forthwith.

28. There is no merit in the writ petitions and the same are accordingly dismissed.