
(1992) 04 CAL CK 0006
In the Calcutta High Court
Case No : F.M.A.T. 914 of 1992

N.K. Bapna

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-04-1992

Acts Referred:

Citation : 96 CWN 730 : (1992) 2 ILR (Cal) 109

Hon'ble Judges : Bhagabati Prasad Banerjee, J; Abani Mohan Sinha, J

Bench : Division Bench

Advocate : Nara Narayan Gooptu, Ashoke Kumar Sen, Kalyan Banerjee and Subrata Talukdar, for the Appellant; Anjan Kumar Mukherjee and Chandra Nath Mukherjee, for the Respondent

Judgement

Bhagabati Prasad Banerjee, J.—This appeal and the application for stay was heard together. This is an appeal against the judgment and order dated March 12, 1992, passed by the learned trial Judge dismissing the writ application filed by the writ Petitioner challenging the validity by an order of detention passed u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (referred to as COFEPOSA Act) at the pre-execution stage on the ground that the case made out by the Appellant/writ Petitioner comes within the scope and ambit of the exceptions laid down by the Supreme Court in the case of the Additional Secretary of the Government of India and Ors. v. Sm. Alka Subhash Gadia and Anr. Criminal Appeal Nos. 440/441 of 1991 (1) S.C.C. 549. In that- judgment the Supreme Court held that is not open to challenge the validity of a (sic)tioa order passed under (sic) order is not passed under the Act (sic) which it is purported to have been passed, (ii) that (sic) to be executed against a wrong person(sic) (iii) that it is passed for a wrong purpose (iv) that it is passed on vague, (sic) and irrelevant (sic) or (v) that the authority which passed it (sic) had no authority to do(sic).

2. In this judgment it was held by the Supreme Court that to the extent reserved by this judgment the decision of the Supreme Court in S.M.D. Kiran Pasha Vs.

Government of Andhra Pradesh and Others, and the decisions of all High Courts which are contrary to and/or inconsistent with the view taken by the Supreme Court in this case, they should be deemed to have been disapproved and overruled.

3. In this case no affidavit-in-opposition was filed by the Respondents controverting any of the averments made in the writ application and Mr. Anjan Kumar Mukherjee, learned Advocate appearing on behalf of the Respondents, at the very outset stated that the Respondents have taken a policy decision for not filing any affidavit in any writ application which is moved challenging the validity of a detention order under the Cofeposa Act and as such the statements and/or allegations made in the petition had not been controverted by filing any affidavit by the Respondents.

4. The facts as evident from the petition is that the writ Petitioner is the Managing Director of M/s. E.A.P. Industries Ltd. The said company was established in the year 1956 and was engaged in producing Plastic Compounds, Plastic Film and Sheets and P(sic)late Plasticizers (Plastic Chemicals) and stated to be a reputed company in the market. In respect of these products it is stated that for production of The said materials the company procures materials both from domestic and foreign markets and two vital raw materials, namely, P.V.C. Resin and 2-Ethyl Hexanon (2-EHA) have to be imported and that the said company had an arrangement with the Customs Authorities by which it is used which is to store the imported raw materials in a private bonded warehouse to store the imported raw materials in a private bonded warehouse which is kept under the lock and key of the Customs Officers and whenever the company wanted to use the raw materials it used to inform the Customs Department and in their presence the said warehouses were opened and upon payment of Customs duty the said company used to get delivery of the required quantities for the purpose of its production. It was stated that this system had been continuing for the past decades and the company had never faced any difficulty nor there was any complaint from any quarter with regard to the storage and removal of those materials.

5. On May 2, 1990 the said company imported around 204 metric tons of P.V.C. Resin from France. The said consignment of P.V.C. Resin landed at the Calcutta port. Therefore, the said goods were warehoused in accordance with the provision of Section 60 of the Customs Act, after the assessment u/s 18 of the said Act was made and after the company had executed a bond binding itself in sum equal to twice the amount of duty assessed on such goods. For the purpose of storage the solid materials were kept in a bonded warehouse and for storage of liquid it was kept in a bonded tank. The said goods were cleared for warehousing and was transported through trucks to the company's factory on May 4, 1990 and May 5, 1990 and May 7, 1990, respectively (sic) was an admitted position (sic)t the goods were kept under the lock and key of the Customs Officers in the company's Godowns Nos. 1 and 2. It was also an

admitted position that after the goods were kept in the godowns, the company took delivery of 75 metric tons of P.V.C. Resin on payment of necessary Customs duty. The said clearance took place on September 17 and November 8, 1990, under the supervision of the Customs Officers at the said warehouse who kept the key in their custody. Thereafter the company also placed it under lock in the said warehouse and kept the key in its custody. Again the said company had to deliver 175 metric tons of 2-EHA on payment of appropriate Customs duty and the same were, cleaned on December 19, 1989, December 21, 1989, February 8, 1990, February 18, 1990, February 20, 1990, March 13, 1990 and March 26, 1990 in the presence of Customs Officers. It is stated that the Petitioner was surprised to learn that the Customs Officers who visited the company's factory premises on September 27, 1990, found in Godown No. 1 of the company's warehouse a shortage of around 93.975 metric tons of P.V.C. Resin and they also found that the stock of 2-EHA in the tanks to be unusually short of quantity. The said shortage of 2-EHA was reportedly detected by taking a dip from the dip measurement point of the bonded storage tanks and the approximate shortage of 2-EHA were reportedly found short was around 58.137 M/tons. It is not necessary to go into the details of the case made out in the writ Petitioner inasmuch as immediately thereafter the Customs Officers conducted a thorough search in the factory premises and interrogated various other senior officers of the company and pursuant to a summons issued u/s 108 of the Companies Act the writ Petitioner who is the Managing Director of the company in reply to the question put to him replied that in my initial statement I have taken the moral responsibilities of payment of duty if there is a shortage and accordingly on the basis of figures indicated to me we did prepare the drafts to pay the duty but were unable to do so in absence of my specific order/permission from Customs.

It was further stated that duly interrogation by the writ Petitioner that Immediately after the deduction of shortage by the Customs Authorities the matter was under investigation and the investigation was not yet completed. Thereafter an order of detention u/s 3(1) of the COFEPOSA Act, 1974, was issued against the Petitioner who is the Managing Director of the said company, by Shri Mahendra Prasad, Joint Secretary to the Government of India, specially empowered in this behalf. The said order of detention was passed with a view to prevent him from abetting the smuggling of goods and dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods in future.

A copy of the purported order of detention dated January 1, 1992, bearing No. F.N.O. 673/1/92-CVS VIII was annexed to the writ application.

6. The learned trial Judge by the order and; judgment dated March 12, 1992, have held that the removal of the goods stored in a warehouse amount to "smuggling" relying on the definition of the words "smuggling" u/s 2(e) of the COFEPOSA Act read with Section 2(39) of the Customs Act and as such the case clearly comes under the purview of the provision u/s III(i) of the Customs Act

and consequently the order of detention had been validly passed.

7. Mr. Nara Narayan Gooptu, the learned Advocate-General of the State of West Bengal, followed by Shri Ashoke Kumar Sen, Senior Advocate, submitted that when goods had been kept in the warehouse under the provision of Section 60 of the said Act after executing a bond binding the company a sum equal to twice the amount of duty assessed on such goods after assessment of duties u/s 18 of the said Act the goods had crossed the Customs frontier or barriers and the provision of Section III(i) of the Customs Act could not apply in the facts and circumstances of the case. It was submitted that after the goods were kept in a warehouse after executing such bond in accordance with the provision of Section 50 of the said Act if there was any improper removal of goods from warehouse, in that event (sic) 72 of the Customs Act clearly provides the consequences that would follow in case of such improper removal of goods from warehouse. Section 72 of the Customs Act provides as follows:

Goods improperly removed from warehouse, etc.-

(1) in any of the following cases, that is to say:

(a) Where any warehoused goods are removed from a warehouse in contravention of Section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted u/s 61 to remain in a warehouse;

(c) Where any warehoused goods have been taken u/s 64 as samples without payment of duty ;

(d) Where any goods in respect of which a bond has been executed u/s 59 and which have not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer. The proper officer may demand, and the power of such goods shall forthwith pay the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under Sub-section (1) the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of goods, if any, in the warehouse, as the said officer may select.

8. It was further submitted that if the imported goods were stored in the warehouse u/s 49 of the Customs Act and that if there was any removal of any goods improperly pending clearance of the goods, in that event the provision u/s III(j) of the said Act would be clearly attracted and consequently that would be a valid ground for issue of a detention order u/s 3(1) of the Cofeposa Act as it would be a clear case of smuggling as defined in Section 2(39) of the Customs

Act read with Section (2)E of the Cofeposa Act. Section 49 of the Customs Act read as follows:

Storage of imported goods in warehouse pending clearance-

Where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Collector of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods, may, pending clearance, be permitted to be stored in a public warehouse or in a private warehouse if facilities for deposit in a public warehouse are not available; but such goods shall not be deemed to be warehouse goods for the purposes of this Act, and accordingly the provisions of Chapter IX shall not apply to such goods.

9. It is necessary to set out certain other provisions to appreciate the case made out by the parties which are as follows:

Section III(j) of the Customs Act read as follows:

Confiscation of improperly imported goods, etc.-The following goods brought from a place outside India shall be liable to confiscation :

(a)....

(b).....

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission.

"Smuggling" has been defined in Section 2(e) of the COFEPOSA Act which reads as follows:

"Smuggling" has the same meaning as in Clause (39) of Section 2 of the Customs Act, 1962 (52 of 1962) and all its grammatical variations and cognate expressions shall be construed accordingly.

Section 2(39) of the Customs Act reads as follows:

"Smuggling" in relation to any goods, means any act of omission which will render such goods liable to confiscation u/s III or Section 113.

10. It was submitted on behalf of the Appellant/Petitioner that Chap. IX of the Customs Act regarding warehousing of imported goods is an independent Code so far warehousing goods are concerned. u/s 59 the goods can enter into the warehouse only after the goods were assessed u/s 17 or 18 of the Customs Act and the importer execute a bond binding himself in a sum equal to twice the amount of the duty assessed on such goods.

11. Section 60 of the said Act provides that when the provisions of Section 59 of the said Act have been complied with in respect of any goods, the proper officer

may make an order permitting the deposit of the goods in a warehouse without payment of duty. Section 61 of the said Act provides that period for which the goods may be retained in the warehouse. Section 62 of the said Act provides that all warehouse goods shall be subject to the control of the proper officer and no person shall enter a warehouse or remove any goods there from without the permission from the proper officer and that proper officer may cause any warehouse to be locked and no person shall remove or break such lock. Section 63 of the said Act provides that the owner of the said warehoused goods had to pay the rent and charges of the said warehouse. Section 64 of the said Act provides that the owner's right to deal with warehoused goods in which it is provided that the owner with the sanction of the proper officer may inspect the goods and show the goods for sale to the intending buyers and also can take sample of goods without entry for home consumption and if the proper officer so permits without payment of duty on such sample. Section 65 of the said Act provides with the sanction of the Assistant Collector of Customs and subject to such conditions and on payment of such fees as may be prescribed, the owner of any warehoused goods may carry on any manufacturing process or other operations in the warehouse in relation to such goods. Section 71 of the said Act provides that no warehoused goods shall be taken out of a warehouse except on clearance for home consumption or re-exportation or for removal to another warehouse or as otherwise provided by this Act, Section 72 of the said Act provides that where any warehoused goods are removed in contravention u/s 71 of the said Act or where any goods in respect of which a bond has been executed u/s 59 and which had not been cleared for home consumption or exportation are not duly accounted for to the satisfaction of the proper officer, the proper officer may demand and the owner of such goods shall forthwith pay the full amount of duty chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of Such goods Section 72(2) of the said Act provides that if the owner fails to pay any amount demanded under Sub-section (1) the proper officer may, without prejudice to any other remedy, cause to be detained and sold after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods if any, in the warehouse, as the said officer may select.

12. It was contended On behalf of the Appellant that when the Customs Act clearly provides provision for recovery of the arrear of Customs duties with penalties, interest and other impositions levied on the goods improperly removed from the as defined under the Act. It was submitted that the course of importation terminated and had come to an end when the goods had been put in the warehouse and before the goods were put into the warehouse the goods were cleared or in other words It was found that the goods had been validly imported on the basis of the valid incense and that the importation was valid and or legal in the eye of law. Thereafter only requirement that was required to be performed by the company was to pay the full amount of Customs duties and for realization of the Customs duties the same were put in the warehouse on

condition that as soon as payment of Customs duties would be made the goods could be released.

13. It was submitted that under such circumstances it could not be said that improper removal of the goods from the warehouse without due payment of Customs duties amounts to smuggling of the goods. It was at best a case of evasion of the Customs duty in a clandestine manner and evasion of Customs duty cannot be treated to be smuggling of goods into India. It was further submitted that if there was no materials before the detente authority that the Petitioner was involved in smuggling activities, in that event, there was no question of passing an order u/s 3(1) of the COFEPOSA Act. In this case the detention order was passed with a view to preventing the Petitioner from abating the smuggling of goods and dealing with and/or concealing or keeping smuggling goods in future.

14. It is submitted on behalf of the Appellant that as in the facts and circumstances of the case the detaining authority could not exercise the power u/s 3(1) of the COFEPOSA Act as the allegations complained of did not and could not constitute smuggling of goods within the meaning of the Customs Act and as such the purported order of detention is an order which is not passed under the Act under which it is proposed to have been passed.

It was further submitted that the facts of this case clearly established that this case where the order was passed for the wrong purpose and in any event it have been passed on vague, extraneous and irrelevant grounds or in other words it is the submission on behalf of the Appellant that it was submitted the detention order is liable to be struck down on the ground that it falls squarely within three out of five exceptions provided by the Supreme Court in Alka Gadia's case (Supra), viz.

(a) that the impugned order is not passed under the Act under which it is purported to have been passed,

(b) that it is passed for a wrong purpose,

(c) that it is passed on vague, extraneous and irrelevant grounds.

15. In this case reliance was placed to the decision of the Supreme Court in the case of Gora Vs. State of West Bengal, wherein the Supreme Court held that there must be live link between the grounds of criminal activity alleged by the detaining authority and the purpose of detention, namely, inhabitation of prejudicial activity of the species specified in the statute. This credible chain is snapped if there is too long and unexplained an interval between the offending acts and the order of detention.

16. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. It is a subsidiary test evolved by the Court for the purpose of determining the main question whether the past activities of the detenu is such

that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it sub serves that purpose and it cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organized operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in the future.

17. Reference was also made to another decision of the Supreme Court in the case of Smt. Rekhaben Virendra Kapadia Vs. State of Gujarat and Others, wherein the Supreme Court observed that the question is whether in a COFEPOSA case held that the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention." The question is whether the past activities of the detenu are such that the detaining authority can reasonably come to the conclusion that the detenu is likely to continue in his unlawful activities, It was further submitted that relying these decisions the conduct of the detenu has to be considered not merely based on the incident in question but has to be considered not merely based on the incident in question but has to be considered in the light of his past activities so that the detaining authority might have a reasonable apprehension that unless the detenu is detained there is likelihood of repeating such occurrence. Relying upon these two decisions it was also submitted on behalf of the Appellant that in the instant case the alleged shortage and/or removal of the goods is the only solitary incident in the history of the company and that on the basis of salitary incident "the detaining authority could not satisfy that unless the detenu is detained the detenu would be indulging in smuggling activities in future, particularly, in view of the fact that the detenu is a Managing Director of the company and that the allegation of complaint did not and could not amount the smuggling of the goods and as such they said order of detention order was passed u/s 3(1) of the COFEPOSA Act could not have been passed under the Act in question.

18. Relience was further made to a Division Bench judgment of the Bombay High Court in the case of Mohiuddin Tayab Sony v. The State of Maharashtra and Anr. 1980 Cri.L.J. 1940. This is a case where the Division Bench of the Bombay High Court granted relief to the detenu at pre-execution stage. It was held in this case that once a prima facie case was the relevant material before the Court, if a prima facie case is made out indicating that the said satisfaction is not founded on any material or order issued and is not-in conformity with the mandatory provisions of the Act then burden cannot be discharged by the detaining authority by merely filing affidavit denying everything. In that particular case it was an admitted position that till that date grounds for detention were neither

formulated nor prepared or signed by the detaining authority. In these circumstances it was the duty of the Detaining Authority to satisfy the Court abo(sic) the existence of the material and that he has not acted in a mechanical or cavalier manner while exercising the power. The Detaining Authority owes a duty to the detenu as well as to the Court. An obligation of the Detaining, Authority to the Court is to satisfy the Court that he has acted in accordance with law. Therefore, even if the law permits that the detaining authority need not communicate the grounds of detention to the detenu unless he is detained the Detaining Authority is not wholly absolve of its responsibility and obligation to the Court when a prima facie case is made out by the Petitioner and rule nisi is issued by the Court. In such a case the counter-affidavit by the detaining authority at least must broadly indicate the nature of the prejudicial activities or the material before him from which an inference could be drawn in favor of the detaining authority that there was some material before him on the basis of which subjective satisfaction could be arrived at. It is well-settled that judicial scrutiny cannot be shut out merely on the strength of ipse dixit of the detaining authority.

19. On behalf of the Respondents Mr. Anjan Kumar Mukherjee, learned Advocate, submitted that the Union of India in the instant case on instructions from the Government of India no affidavit-in-opposition was filed as a matter of the affidavit-in-opposition in the writ application challenging the validity of the detention order as pre-execution stage and in this connection relied on the observation made in the Supreme Court in the case of Alka Gadia's case (Supra) wherein the Supreme Court observed that, in other words, the provisions of the Constitution permit the Legislature to make a law under which a person may be arrested and detained without first communicating to him the ground of his arrest.

20. The provisions of Section 3(3) of the present Act which are made for the purpose of Article 22(5) of the Constitution of India provide that ordinarily the grounds of arrest shall be communicated within the maximum period of 5 days, and in exceptional circumstances and for reasons to be recorded in writing they shall be communicated within a period of 15 days from the date of the detention. These provisions of the Act have not been faulted on any account. In the face, therefore, of the clear provisions of the Constitution and of, the valid Act, it was not open to contend that the provisions of Articles 14, 19 and 21 of the Constitution prevent a person being deprived of his liberty without first apprising him of the grounds of his arrest. For this very reason, it is also not open to contend that since the State has all the facts in its possession which require the arrest and detention of the person, it must first disclose the facts before depriving him of his liberty and our attention was also drawn that the observation made by Supreme Court in Alka Gadia's case (Supra) that the powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the Courts have over the years evolved certain

self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the Courts. To accept Shri Jain's present contention would mean that the Courts should disregard all these time honored and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the Appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period.

21. It is submitted by Mr. Mukherjee that the Petitioner have been able to procure a copy of the order of detention only though under a wrong number but admits that the said detention order has been passed on January 1, 1992, but the grounds of detention on the basis of which the detention order u/s 3(1) of the COFEPOSA Act have been passed and/or based are not before this Court and as such this Court cannot decide the validity of an order without looking into the grounds of detention. Mr. Mukherjee further submitted that in view of the above observation of the Supreme Court in Alka Gadia's case (Supra) the Respondents cannot disclose the grounds of detention to this Court. It was further submitted by Mr. Mukherjee that in the facts and circumstances of this case the improper removal of goods from warehouse is clearly covered by Section III(j) of the Customs Act and as such it amounts to a smuggling. According to Mr. Mukherjee that the importation has not come to an end and has not been terminated by merely putting the goods after assessment under Sections 17 or 18 of the Customs Act in a bonded warehouse and that in removal from bonded warehouse amounts to smuggling of goods in contravention of the provision of law and as such the detaining authority had acted bona fide and on relevant materials and the order of detention was validly passed. Mr. Mukherjee further submitted that a Customs area is defined u/s 2(II) of the said Act which means the Customs station and includes any area in which the imported goods or export goods are ordinarily kept before clearance by the Customs Authorities and according to Mr. Mukherjee such clearance means the clearance on payment of Customs duties

also and that if any goods had been validly imported the importation would become invalid if the goods were removed without payment of Customs duties at a subsequent stage and as such it would be a case of smuggling of goods into the territory of India. It was further submitted that Section 49 of the Customs Act do not contemplate keeping of any goods in warehouse inasmuch as the provision of warehouse is provided only in Chap. IX of the Act and as such the word "warehouse" has been defined and according to Mr. Mukherjee removal of goods from warehouse where the goods were kept for realization of the Customs duties would clearly amounts to a smuggling of the goods. It was further submitted that in the, instant case no confiscation proceeding had been started u/s III of the Customs Act and no prosecution contemplated under the Customs Act had also been started but that cannot create any bar to the issue any order of detention under the provisions of the COFEPOSA Act.

22. It was contended by Mr. Mukherjee that the grounds of challenging as pointed out by the Supreme Court "that the impugned order is not passed under the Act under which it is purported to have been passed" means that the order of detention has been passed under a different Act altogether and as the order of detention have been passed under the COFEPOSA Act, whether good or bad must be held to have been passed under the said Act. This submission of Mr. Mukherjee is not correct inasmuch as where the provision of the particular Act have not been complied with or the Tribunal has" not acted in conformity with the fundamental principles of judicial procedure, the same cannot be said to be an order under the particular Act.

23. The Supreme Court in the case of Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, while considering the scope of Section 17, M.B. Sales Tax Act, 1950, wherein it was provided that save as is provided in Section 17, no assessment made or order passed under this Act.. shall be called in question in any Court... held that if the order was passed without compliance of the provisions of the said Act or the Authority has not acted in conformity with the fundamental, principles of judicial procedure, Civil Court's jurisdiction is not excluded or in other words the said order cannot be said to have been passed under the said Act to attract the finality clause. The poser of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is -reasonably probable he would " do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from Prof. Patanjali Sastri CJ. who pointed out in State of Madras v. V.G. Rao AIR 1952 S.C. 597 that preventive detention was "largely precautionary and based on suspicion" and to these observations may be added the following words uttered by the Chief Justice in that case with reference to the observations of Lord Finalay in Rex. v. Halliday 1917 A.C. 260 namely, that the Court was the least appropriate Tribunal to investigate into circumstances of suspicion on which such

anticipatory action must be largely based. This being the nature of the proceedings, the Court is not competent to decide the validity of an order of detention of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct Judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in Sub-section (1) of Section 3 and if so, whether it is necessary to detain him with a view to prevent him from so acting"s.

24. It is also a well-settled principle of legal policy that a person should not be penalized except under clear law, the Court when considering the relation to the facts of the case which of the opposing construction of the enactment would give effect to the legislative intent should presume that the Legislature observe this principle but should therefore the Court should strive to avoid adopting a construction which penalize a person where the legislative intention is so doubtful or penalizes him in a way, it is not made clear. It is also a well-settled principle of interpretation that the Court seeks to avoid a construction to secure a mischief in the enactment was designed to remedy only at the cost of the setting up a disproportionate counter-mischief since this is unlikely to have intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction, for example, where it appears that Parliament really intended it or the literal meaning is too strong. Applying this well-settled rules of interpretation it cannot be said that after the goods have been cleared under Sections 17 and 18 of the Customs Act and had been kept in a private bonded warehouse in accordance with the provision of Chap. IX of the Customs Act on execution of a bond binding the company in a sum equal to twice the amount of duty assessed of such goods the improper removal of the goods from warehouse would amount to a case of smuggling as defined in Section 2(39) of the Customs Act. In order to constitute "smuggling" as defined under the Customs Act, it must be established clearly that act of omission which will render such goods liable to confiscation u/s III of the Customs Act, Section 49 of the Customs Act throws some light on this question, wherein it is provided that where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Collector of Customs is satisfied on the application of the importer that the goods cannot be cleared within the reasonable time, the goods may, pending clearance, be permitted to be stored in a public warehouse or a private warehouse, the facilities for deposit in a public warehouse are not available, but such goods shall not be deemed to be warehoused for the purposes of this Act and, accordingly, the provisions of Chap. IX shall not apply to such goods. Section 49 read with the provision of Sections 17 and 18 and other provisions of this Act, it is clear to us that when the goods have been warehoused after execution of a bond as required u/s 59 of the Customs Act and when it is expressly provide u/s 72 of the Act that any goods which have been warehoused and which have been improperly removed, then the proper officer may demand and the owner of such goods shall forthwith pay the full amount of duty

chargeable on account of such goods together with all penalties, rent, interest and other charges payable in respect of such goods and the authority have also power to sell the goods for the purpose of realization of the dues.

25. In our view, the course of import of goods comes to an end as soon as the goods are put into the warehouse. When it is not meant for re-export, if the contention on behalf of the Respondents is accepted, in that event any sale of goods from the bonded warehouse after clearance under Sections 17 and 18 to a foreign buyer would constitute sale in course of import within the meaning of Article 286(1)(b) of the Constitution. The Division Bench of Madras High Court in the case of Deputy Commissioner of Commercial Taxes, Madras Vs. Caltex (India) Ltd., Madras, have held that where importers after the Customs duty have been levied upon their goods, stocked their goods in the Customs warehouse and from there sold goods to the ocean-going vessels, it was held that the course of import of goods have come to an end and the sales to the ocean-going vessels could not be said to be still in course of such import. Such, sales were not exempt under Article 286(1)(b) of the Constitution from Sales Tax.

26. The provisions of Section III(j) could not be construed in a manner which would introduce an anomalous and unworkable result and that if Parliament intended that any removal of goods from a bonded warehouse would amount to a case of confiscation as provided u/s III of the Customs Act, in that event, it has to be held that the provision of Section 72 becomes completely nugatory. If the contention of the Union of India is accepted in this case, in that event we have to hold that the provision u/s 72 is nugatory and that such submission cannot be accepted Inasmuch as it is not the scheme and/or object of the Act, goods could be confiscated and at the same time the parallel proceeding would continue for the purpose of realization of the duties, rent, interest and other charges payable in respect of such goods u/s 72 of the Customs Act. There could not be any levy of Customs duty on the goods which are liable to be confiscated. The provision of Customs Act and the provision of the COFEPOSA Act could " not be construed in a manner beyond what was intended by the Parliament and when the Legislature had clearly provided that in case of improper removal of goods without payment of Customs duties the authorities shall only realize the arrear Customs duty, rent, charges, interest etc. from the importer, it cannot be duties from the importer the proceedings for confiscation of the goods could be made. In case the goods are liable to be confiscated under the provision of this Act, the Customs Authorities loses its power altogether to realize any Customs duty u/s 72 of the said Act. Two things are inconsistent and cannot go together. In order to establish that the action complained of clearly comes within the preview of Section III of the Act and unless it comes within the preview of Section III of the said Act it does not amounts to smuggling and" it is needless to point out that unless there is smuggling of goods the question of application of the COFEPOSA Act does not and cannot arise at all. On the basis of the materials on record and on perusal of" the provision of Customs Act and the COFEPOSA Act we are of the view that in the instant case there was no scope for passing an order of

detention u/s 3(1) of the COFEPOSA Act and consequently we are of the view that the submission of the Appellant that the case made out prima facie comes within the first, third and fourth exceptions as provided in Alka Gadia's case (Supra). The writ Court's power in respect of the validity of the order of detention at pre-execution stage is concerned has been laid down by the Supreme Court in Alka Gadia's case and that in the instant case the grounds of detention are not before this Court. The Respondents have chosen not to file any affidavit. This Court also cannot compel the Respondents Union of India and the detaining authority to file any affidavit, inasmuch as it has been held by the Supreme Court in the case of State of Punjab and Another Vs. V.P. Duggal and Others, in a writ application, where allegations were made against the Minister and the High Court directed to implead the Minister a party in order to give him opportunity to controvert the allegations. Supreme Court held that no direction could be given compelling the Minister to file affidavit. It is for him to consider whether the affidavit should be filed or not. True in the instant case, no affidavit has been filed by the Respondents and as such it could be held relying upon the principle laid down by the Supreme Court in the case of Madhya Pradesh Industries Ltd. Vs. The Income Tax Officer, Nagpur, that when a writ petition had been filed challenging the jurisdiction of the income tax Act on the ground that the Officer had no reason to belief assertion, when assertion not controverted, non-filing of affidavit or production of relevant materials, the proceedings are liable to be quashed as being without jurisdiction. This Court also could not direct the Respondents to produce the records of this case inasmuch as it has been held by the Supreme Court in the case of Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, wherein the Supreme Court observed that disclosure of records to the Court alone and not to the detenu will introduce something unknown to the judicial procedure. This will bring in an element of arbitrariness and preclude both the parties from representing their respective cases.

27. We are, faced with the difficulty that if this Court directs the Respondents to produce records in that event, in view of the principle laid down in A.D.M. Jabalpur case (Supra) the Appellant would get an opportunity to come to know the grounds of detention and that the same would be contrary to the view expressed by the Supreme Court in Alka Gadia's case (Supra) wherein it inter alia observed that the detenu had no right to reasons or grounds at pre-execution stage. If the right to reasons of detention is not there at the pre-execution stage and Supreme Court in Alka Gadia's case has clearly held that there was no such right to grounds and accordingly we cannot do anything which would confer upon the detenu the right to reasons or grounds at the pre-execution stage. In view of the principles laid down by Supreme Court in Alka Gadia's case (Supra) we are unable to follow the decision of the Division Bench of the Bombay High Court mentioned above.

28. In Alka Gadia's case the Supreme Court also observed that in the rare case where the detenu, before being served that he learns of the detention order and the grounds on which it is made and satisfies the Court of their existence by

proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the very limited ground stated above. The Appellant have annexed a copy of the purported order of detention, but the grounds on which it is made is not before us.

29. In a Habeas Corpus petition the Court cannot have any difficulty inasmuch as the order of detention and the grounds would be before the Court and all the grounds available for challenging the validity of the order of detention would, be available to the detenu and the Court may decide the case, but at the pre-execution stage the writ Court's powers are very much limited as laid down in Alka Gadia's case (supra). The validity of the order of detention has to be judged on the basis of the grounds on which it was passed and without looking into the grounds it would not be proper on our part to go into the validity or otherwise of the order of detention. In our view, without looking into the grounds it would not be proper to make any pronouncement that the impugned order has not been passed under the Act under which it has been proposed to have been passed or that it was passed with wrong purpose and/or passed on vague, extraneous and irrelevant grounds.

30. Of course, the Supreme Court observed in the case of Governing Body of Dayanand Anglo Vedic College Vs. Padmanabha Padhy and Others, and held that a document which may be helpful in doing justice must be produced before the Court by the party in possession of the same more so when the party is Government or instrumentality of the State. But in view of the law laid down by the Supreme Court in Alka Gadia's case (Supra) the writ Court's powers in pre-execution stage is very much limited and the writ Court can only grant relief if a party can make out a case bringing their cases within the exceptions and principles laid down in Alka Gadia's case.

31. In order to obtain relief in the writ jurisdiction at pre-execution stage the detenu before service of the detention order must learn the detention order and the ground on which it was made and as to satisfy the Court by proper affirmation that the case is an exceptional case and specifically comes within the five exceptions provided by the Supreme Court in Alka Gadia's case, but in the instant case in the absence of the grounds of detention in the peculiar facts and circumstances of the case we are unable to hold that the exercise of power by the detaining authority u/s 3(1) of COFEPOSA Act comes squarely within one or more exceptions provided in Alka Gadia's case. From the principles laid down in Alka Gadia's case it appears to us that at the pre-execution stage the onus upon the Appellant to satisfy that the grounds of detention fails with the exception provided therein after he has "learnt" the detention order and the ground thereof. The word "learn", according to Black's Law Dictionary (5th Ed.), "To gain knowledge or information of, to ascertain by inquiry, study or investigation". So the detenu has to show on enquiry or investigation what were the grounds on which the order of detention was passed. So in order to get relief he has to satisfy this Court. Of course, the learned trial Judge as well as this Court has to

decide the matter only on the basis of an ex parte allegation made by the Appellant which has not been controverted by the Respondents, Union of India,, and that consequently we had no occasion to know the reasons and/or the grounds on which the detaining authority had passed the order of detention. Accordingly, we do not find any reason to upset judgment of the learned trial Judge and, accordingly, the appeal is dismissed without any order as to costs. The interim orders are vacated.

32. On behalf of the Appellant there is a prayer for stay of the operation of this order for moving the Supreme Court which was opposed by the Respondents. Considering the facts and circumstances of the case we stay the operation of this order for four weeks. While granting interim order we directed the Appellant to deposit a Bank draft for a sum of Rs. 36,79,208 which was deposited with the Registrar, Appellate Side of this Court. The said amount was the approximate amount of duty along with interest which appears to have been evaded on account of the removal of goods in question. The learned Advocate appearing on behalf of the Respondents states that his clients have been instructed not to withdraw the said amount. Let the Bank draft be kept with the Registrar, Appellate Side of this Court, for four weeks.

33. Let a Xerox copy of this judgment and order be given to the learned Advocates for the parties on usual terms and conditions.

Abani Mohan Sinha, J.

I agree.