

(1987) 03 KAR CK 0011
In the Karnataka High Court
Case No : Writ Petition (HC) No. 4 of 1987

Shivaji Jadhav

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 27-03-1987

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
(COFEPOSA) — Section 3 (1), 3 (1) (iii)
Customs Act, 1962 — Section 108

Citation : (1987) ILR (Kar) 2011

Hon'ble Judges : Prem Chand Jain, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : J. Jeshtmal, for the Appellant; N. Santhosh Hegde, General, for the Respondent

Judgement

Shivashankar Bhat, J.—The petitioner, who is a detenu, has challenged the order of his detention dated 1-10-1986 made by the State of Karnataka under S. 3(1) (iii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (shortly called "the COFEPOSA"). The order states that the same was issued with a view to prevent him from engaging in keeping and transporting smuggled goods. He was arrested on 15-10-1986 and has been lodged in the Central Prison at Bangalore. It is an admitted fact that the petitioner has been served with the grounds of detention along with the relevant documents stated in the said grounds.

2. The petitioner is stated to be a native of Walvan in Sangli District (Maharashtra), but he is carrying on business at Kollegal, Mysore Dist., in Karnataka State wherein he is having a silver refinery. He lives with his family at Kollegal.

3. On 28-3-1986 he was travelling in a KSRTC but plying from Badami to Bangalore via Bagalkot. The officers of the Customs and Central Excise, Headquarters Preventive Unit, Belgaum headed by a Superintendent Customs

enquired from the petitioner travelling in the said bus, at bus-stand Hospet, at 00.10 hours on 23-8-1986. The petitioner was enquired about the place from which he was travelling and his destination and the petitioner stated that he boarded the bus at Bagalkot on 27-3-1986 and was going to Tumkur from where he intended to go to Kollegal in Mysore District. According to the authorities, the petitioner did not give satisfactory information to certain questions and therefore the Superintendent detained him along with his bag etc., on the reasonable belief that he was carrying on contraband gold with him and took him for detailed checks. A primary panchnama was held in the presence of two witnesses. Thereafter the petitioner was taken to Priyadarshini hotel at Hospet and was checked in the presence of witnesses. Another panchnama was prepared, which states that, the Officers detained the petitioner on the reasonable belief that he was carrying on contraband gold. In the presence of the witnesses the black rexine handbag of the petitioner was opened and examined, but there was nothing incriminatory material. However, when the petitioner was searched, in the front side pocket of his pant they noticed two heavy paper packets which were removed and opened in the presence of witnesses. In the first paper packet there were six primary gold crude rods and in the second packet there were similar four primary gold crude rods, all of which were shapeless. The witnesses who held gold dealer's licence at Hospet stated in the panchnama that these gold rods were not ornaments as per their experience. They tested the purity of the gold rods by "touch-stone-method" and weighed them. The panchnama gives the description including the weight of the gold rods and the purity of the gold. The total weight of 10 gold rods is stated as 583.100 gms. having 24 ct. purity.

4. The petitioner was asked as to whether he had any document with him to prove licit possession of the said primary gold rods. He admitted that he did not have any document. The panchnama further states that the said officers "on the reasonable belief that the said primary gold rods in crude form totally weighing 583.100 gms. net, valued Rs. 1,23,624/- purity 24 ct. have been acquired without any valid authorisation in contravention of the provisions of the Gold Control Act, 1968 and that the said primary gold rods have been manufactured by melting smuggled gold pellets of foreign origin in contravention of the provisions of the Customs Act, 1962, seized the said primary gold and taken to their custody". The said primary gold rods were again packed in the same Hindi Navbharat papers on which the panchas signed.

5. The statement of the petitioner was also recorded by the Superintendent of Central Excise referred to above at the said Hotel Priyadarshini. The said statement states that the provisions of Ss. 63 and 70 of the Gold Control Act (referred to as "the Act") and S. 108 of the Customs Act were read over and explained to the petitioner in Marathi. The petitioner stated that he was running a silver refinery in Kollegal and that he was getting an income of Rs. 500/- p.m. from the said refinery. He further stated that his father was looking after 17.5 acres of land in his native village (obviously referring to Walvan in Sangli

District). To one of the questions, he answered as follows :-

"The said 10 primary gold bars totally weighing 583.100 gms. of 24 ct. purity valued Rs. 1,23,624/- were obtained by melting my family gold ornaments through Sri Anandachar, goldsmith, Chowdeswari street, Kollegal, one month back and also got made designs on these bars. I got it entered in the books also. I got manufactured crude and unfinished rods since the sizes may vary. I have not purchased the said gold from anybody".

He asserted that the primary gold rods belong to his family and were not manufactured by purchasing and melting foreign gold pellets. He admitted that at Hotel Priyadarshini in the presence of panchas he was searched and the Officers recovered from his right side front pocket of the pant two paper packets one containing six primary gold rods and another containing four primary gold rods, totally weighing 583.100 gms. of 24 ct. purity valued at Rs. 1,23,624/- and seized the same, under a panchnama. He also stated that he did not have any document for possession of the same. When the aforesaid Anandachar was questioned on 30-3-1986 by the Superintendent of Central Excise he denied having received any gold from the petitioner. Anandachar also asserted that whenever he received any gold ornaments for conversion from a customer the same was entered in the GS. 13 Register. His GS. 13 Register was also produced by him before the said authority.

6. On 28-3-1986 an arrest memo was issued while arresting the petitioner, it states inter alia that the petitioner had committed an offence under S. 8 read with S. 85 of the Act. When the petitioner was produced before the JMFC, Hospet, again the officer stated that the petitioner contravened the provisions of S. 8 read with S. 85 of the Act. The petitioner presented a bail application before the Magistrate at Hospet. This was opposed by the Superintendent of Customs wherein again reference was made only to the provision of the Act and the assertion was that the petitioner contravened the provisions of the Act. Since Sri Jeshtmal, counsel for the petitioner, made much of these statements, as will be presently dealt with, we thought it necessary to state these facts at the outset.

7. On 1-4-1986 samples of the gold rods seized on 28-3-1986 were drawn in the presence of witnesses. A Panchnama drawn on that day states that the witnesses were called to Headquarters office of the department of Belgaum and that the Superintendent showed the witnesses the panchnama dated 28-3-1986 for their perusal and also read over its contents, according to which the said Superintendent had seized 10 primary gold rods etc. This panchnama of 1-4-1986 further states that the said primary gold rods were kept in a sealed card-board box covered with a white cloth and was opened in the presence of witnesses. The said ten primary gold rods were contained in two paper packets. In the first paper packet there were six primary gold rods and in the second there were four primary gold rods. At the request of the Superintendent the witnesses examined the said gold rods and tested the purity of the gold by "touch-stone-methods. The panchnama states that on examination they found all

the ten primary gold rods were of 24 ct. purity. There is a categorical statement herein which is relevant as follows :-

".... the details of the primary gold rods recorded in the panchnama dated 28-3-1986 and the one that were placed before us today for testing the purity giving our expert opinion and for drawal of samples are one and the same".

8. The samples were sent to the India Mint at Bombay along with a letter dated 2-4-1986 for assaying. A letter dated 14-5-1986 was addressed to the Superintendent, Headquarters, Preventive-II, Office of the Collector of Customs at Belgaum by the Government of India Mint, Bombay, stating that the gold is of foreign origin and to the best of their knowledge and belief, no dealer, refiner, etc., in India is known to manufacture gold of this purity. It was further stated that the Assay certificates will be sent only after the receipt of payment towards the Mint bill.

9. It has come on record that the assay certificates were received at Belgaum on 5-8-1986. It is also on record through the affidavit of the Secretary to the Government of Karnataka, Home Department, as to what transpired thereafter, and ultimately an order of detention was made on 1-10-1986.

The writ petition is dated 7-1-1987.

10. In support of the writ petition, Mr. Jeshtmal, learned counsel for the petitioner, raised the following contentions :-

(i) The order of detention is vitiated since there was no relevant material for the Detaining Authority from which it could have been satisfied that gold in question was smuggled.

(ii) The order of detention is the result of a wrong test in applying the provisions of the Customs act and the said provisions have been wrongly construed.

(iii) The report of the Mint-master regarding the gold is not relatable to the gold seized from the detenu.

(iv) There is a discrepancy as to the weight of the gold seized as stated in the first panchnama and the weight of gold stated in the panchnama dated 1-4-1986 and this discrepancy has not been considered by the Detaining Authority.

(v) The Advisory Board has failed to consider the representation dated 18-11-1986 made by the detenu. Further, it has not called for the gold in question and examined the same in the light of detenu's representation.

(vi) The detention is based on a solitary incident which could not be the basis for the detention, and there has been inordinate delay between the incident and the date of detention order.

11. Counsel took us through the various panchnamas, recorded statements, the detention order and other documents and urged that there has been no finding that the gold in question was a smuggled one and therefore detention under S.

3(1) of the COFEPOSA was impermissible. Since this contention covers contention Nos. 1, 2, 3 and 4 and are inter-linked they may be considered together.

12. Counsel pointed out that in the panchnama dated 28-3-1986 the words used are "the said officers on the reasonable belief that the said person is carrying contraband primary gold, detained him"

After testing the purity of the said primary gold rods by touch-stone-method and weighing them, the detains are recorded in the said panchnama. The last para of the panchnama states that the officers asked the detenu as to whether he has got any valid documents or gold dealers' licence or gold-smith certificate for licit possession of the said primary gold rods, to which the detenu replied in the negative. The next sentence is "therefore, the said officer, on the reasonable belief that the said 10 primary gold rods in crude form totally weighing 583.100 gms net valued Rs. 1,23,624/- purity 24 ct. have been acquired without any valid authorisation in contravention of the provisions of the Act and that the said primary gold rods have been manufactured by melting the smuggled gold pellets of foreign origin in contravention of Customs Act, 1962, seized the said primary gold and taken to their custody".

12A. With reference to the earlier portion of this panchnama referred to above, counsel urged that the phrase "contraband primary gold" need not necessarily be smuggled gold and hence the reasonable required to attract S. 123 of the Customs Act was absent; under S. 123, the burden is cast on the person from whom gold is seized, to prove that it is not smuggled gold, only if the said gold is seized in the "reasonable belief" that it is smuggled gold.

13. This contention, on the face of it is not correct. The phrase "contraband gold" necessarily conveys the idea of "smuggled gold". The dictionary meaning of the word "contraband" is "goods or merchandise whose importation, exportation, or possession is forbidden; also smuggled goods". (see Websters' New Collegiate Dictionary - Indian Edn. page 244). This apart, the concluding part of the aforesaid panchnama quoted above categorically refers to the gold rods having been manufactured by melting the "smuggled gold pellets of foreign origin in contravention of Customs Act, 1962".

14. Learned Advocate General placed before us an earlier panchnama referred as the "preliminary panchnama". The relevant sentence there in as follows :-

"He did not give satisfactory information to certain questions asked to him; therefore the Superintendent detained the said Sri Shivaji, s/o Yeshwant Jadhav along with his black rexine hand bag in our presence under preliminary panchnama on the reasonable belief that he was carrying contraband gold with him and took him for detailed checks".

This was at 00.45 hrs. of 28-3-1986. This document was also supplied to the detenu along with the grounds for detention, as is seen at Sl. No. 1 of the list of

documents supplied to the detenu.

15. Learned Advocate General also pointed out by reference to the Rules framed under the Act that it was not permissible for anyone in India to manufacture gold of such purity except, as stated in the Gold Control (Specification of Standard Gold Bars and Conditions of Refining) Rules, 1986. He further asserted that it is not possible, normally for anyone in India to have gold of such a fineness and purity as the gold under seizure. Therefore, one can reasonably entertain a belief that such a gold is of foreign origin and has been smuggled into India.

Mr. Jeshtmal urged that, whether manufacture of gold rods of such a purity is legal or not, is not relevant for a detention under COFEPOSA. The relevant question is, whether the gold is a smuggled one or not. He contended that it is possible to convert old jewellery having perfect gold fineness into gold rods of high fineness. He urged that though such conversion may be illegal, it will not render the gold rods into a smuggled gold. Therefore, his contention was that there was no material at all for the authorities to entertain the requisite belief while seizing the gold rods and S. 123 of the Customs Act cannot be applied to throw the burden on the petitioner to prove that the gold in question was not smuggled.

16. The Officers who initially took the detenu into custody, interrogated him and seized the gold rods under a panchnama. They may form their opinion as to the nature of the gold from various factors and circumstances. The answers given by the detenu to several questions, broad probabilities as to the truth or otherwise of his answers, suspicious circumstances, informations received, generally prevailing conditions as to the fineness of gold etc. may lead to a particular belief in the mind of such officers, whether the belief is reasonable or not cannot be decided on mere possibility that the gold rods may have been manufactured by melting old ornaments. It is true that a "reasonable belief" is different from a whimsical, fanciful or arbitrary state of mind. But in this case, the belief of the authorities cannot be characterised as falling under any one of these vitiating factors. Even for conviction for contravening the provisions of the Customs Act, provisions of Ss. 106 and 114 of the Evidence Act have been applied as is clear from the following passage if a decision of the Supreme Court in Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra,

"Even if we were to apply the ratio decidendi of Gian Chand and Others Vs. The State Of Punjab, in the case before us, we find that the result would only be that no presumption under S. 123 of the Act could be used against the appellant. We do not think that the High Court or the Magistrate had used this presumption. We find that they had relied upon circumstantial evidence in the case to infer the character of the gold recovered and the accused's guilty knowledge".

17. Mr. Jeshtmal emphasised the fact that these Officers of Customs Department who seized the gold, did not rely on the Customs Act, and in case they had reasonably believed that the detenu was in possession of smuggled gold, they

should have relied on the said Act in various documents such as the arrest memo, their counter opposing the bail application of the detenu before the JMFC, Hospet etc. He pointed out that these authorities arrested the detenu only under the Gold Control Act and hence the idea of gold being smuggled one was not in their mind at any time.

18. Learned Advocate-General met these contentions by pointing out that officers are statutory authorities under several enactments such as the Customs Act, Central Excises and Salt Act and Gold Control Act. If they launch a prosecution for contravening the provisions of the Act and earlier thereto arrest the petitioner for an offence under the said Act, it does not necessarily follow that they did not reasonably believe the seized gold as smuggled gold. It is in this context, he drew out attention to the preliminary panchnama as well as the next panchnama both dated 28-3-1986 where in it was stated that he gold rods were seized under a reasonable belief that they were smuggled gold. He also drew our attention that since they believed the gold was smuggled they invoked the provisions of Customs Act in the panchnama as well as while recording petitioner's statement. In these circumstances, it is rightly urged by the learned Advocate General that there has been no misconstruction of Statute and no wrong test has been applied by the detaining authority while relying on these materials.

19. Mr. Jeshtmal contended that the samples drawn of gold rods on 1-4-1986 and sent for assay purposes were not from the gold seized. He questioned the identity of the gold samples by reference to the panchnama drawn on 1-4-1986 while samples were drawn at the office of the Collector of Central Excise, Belgaum. This panchnama stated that gold rods were removed from a sealed card-board box, whereas, he panchnama dated 28-3-1986 stated that the seized gold were kept packed in two paper packets.

20. The panchnama of 1-4-1986 stated that after panchas were called, the Superintendent, first, read the panchnama prepared on 28-3-1986. Thereafter, it says that the same Superintendent who seized the gold rods on 28-3-1986 called the panchas on 1-4-1986 and read over the earlier panchnama to them. Thereafter the panchas stated that they examined all the 10 primary gold rods and found them to be "primary gold" having the purity of 24 ct. as found by the touch-stone-method. Here also the two panchas were licensed gold dealers of Belgaum. It is also stated therein that samples were drawn for assaying purposes from two paper packets".

21. Argument of Mr. Jesthmal was that the panchnama dated 1-4-1986 stated that the gold rods were kept in a sealed card board box, covered with a while cloth and this box was opened, from which gold rods were taken our for drawing the samples for assay purposes etc. Therefore, he says these gold rods must be quite different from the ones packed in Navbharat papers on 28-3-1986. He further pointed out that there was a difference in the total weight of 10 rods as stated in the two panchnamas; whereas the earlier panchnama state the total

weight to be 583.100 gms., the total weight of 10 gold rods, if added comes to 583.300 gms. in the panchnama of 1-4-1986. Though the difference is only 0.200 gms., Mr. Jeshtmal contended that this shows that samples drawn were not from the gold rods seized on 28-3-1986 and therefore the report of the Mint-master based on these samples cannot be relied upon. The Mint-master has opined that the samples of gold sent to him were of foreign origin and to the best of his knowledge and belief no dealer, refiner etc., in India is known to manufacture gold of said purity.

22. In the statement of objections it is stated that on 28-3-1986 the gold after being packed in the newspapers, were kept in a sealed card board box. On 1-4-1986 the gold rods were ultimately found in packed condition in the same newspaper. Panchnama of 1-4-1986 also refers to the gold rods being in paper packets, removed from the card-board box. As to the weight of gold rods, it was stated in the objection statement that some mistake in recording the weight was caused by the panchas on 1-4-1986. The total number of gold rods, their placement in two different paper packets and the satisfaction of the panchas that the gold rods opened for the inspection and drawing of samples on 1-4-1986 were the same as the one seized under panchnama dated 28-3-1986 show that samples were drawn only from the seized gold. If so, the opinion of the Mint-master and the assay certificates pertain to the gold rods seized on 28-3-1986.

23. We accept the above explanation and opine that there cannot be any doubt as to the identity of the gold.

24. It was also pointed out that the mistake was committed inadvertently in respect of only one rod out of ten rods, which cannot vitiate the satisfaction of the detaining authority. The learned Advocate General is fully justified in stating that the High Court is not sitting in appeal over the subjective satisfaction of the detaining authority and there is no scope to reappraise the materials on record. The High Court is not deciding any criminal case and there is absolutely no scope to apply the approach of criminal jurisprudence in these matters. How far, the prosecution will succeed in getting a conviction of the petitioner on these materials is entirely a different matter.

25. The scope for the court's interference in such matters has been settled by Supreme Court on more than one occasion. In *Khudiram Das Vs. The State of West Bengal and Others*, it has been pointed out that the exercise of the power of detention is made dependent on the subjective satisfaction of the detaining authority. After pointing out that such a detention is only a preventive measure, it is stated further thus :

"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 proof."

26. The Supreme Court further proceeded to point out that it is impossible to

conceive how it can be (i.e., the subjective satisfaction) probably be regarded as capable of objective assessment.

27. The court's power is limited to see as to whether the requisite satisfaction is arrived at by the authority. If such a satisfaction is not there, then the condition precedent to the exercise of the power would not be fulfilled. Some of the grounds on which the court may set aside the order of preventive detention as gathered from paras 9 and 10 of the said decision of the Supreme Court in Khudiram Das's case (1975 Cri LJ 446) are as follows :-

- (i) Whether the authority has not applied its mind at all;
- (ii) whether the power has been exercised dishonestly or for an improper purpose;
- (iii) the satisfaction must be a satisfaction of the authority itself and should not have been exercised at the dictation of another body;
- (iv) whether by any self created policy or in any other manner, the authority has disobeyed itself from applying its mind to the facts of each individual case;
- (v) whether the satisfaction is based on the application of a wrong test or misconstruction of a statute;
- (vi) satisfaction must be grounded on materials which are of materially probable value and such grounds must be relevant to the subject matter of inquiry. The authority should have regard to all those matters which the statute considers as relevant; and
- (vii) the satisfaction must not be whimsical, fanciful, arbitrary etc. In other words, the grounds on which the authority has reached the subjective satisfaction are such that any reasonable person could possibly arrive at such satisfaction. Perversity of approach and conclusion would reduce the satisfaction to extinction.

There is a note of caution at page 558 on this aspect by observing that "it is true that this ground in a sense tends to blur the dividing line between subjective satisfaction and objective determination but the dividing line is very much there however faint or delicate it may be, the courts have never failed to recognise it".

The real task of all courts is to discern such thin mark of distinction that separates the truth from the unreal.

28. Another decision referred to by the learned Advocate General is in Asha Keshavrao Bhosale Vs. Union of India (UOI) and Another, . In this case, the only link between the alleged transaction of smuggling and the detenu was established by the statement of an employee of Rajbhavan, Bombay, to the effect that the detenu had asked him to allow the truck to enter into Raj Bhavan premises with a view to tamper the contraband materials clandestinely received there. Reliance on the statement of this employee (Sabnis) of Raj Bhavan by the

Detaining Authority was challenged as one of the grounds in support of the writ petition. At para-10 of the judgment, Supreme Court observed :

"It was up to the detaining authority to accept the statement of Sabnis and to be satisfied that such statement provided the link between the detenu and the receipt of the contraband articles and the bundle of facts relating thereto. This satisfaction under the law is subjective and it is not for the Court to test the adequacy of the material on which satisfaction is reached. It is quite possible as suggested in the writ application and reiterated in the submission of learned counsel that at a trial conviction may not have been secured on the basis of the statement of Sabnis. But that argument is not available for challenging an order of detention if the satisfaction of the detaining authority has been reached on bona fide basis."

29. In an earlier decision, *State of Gujarat Vs. Adam Kasam Bhaya*, the detenu was member of the crew of a trawler in which contraband wrist watches were found and seized. The detenu denied any knowledge of the contraband goods and knowledge of the contraband goods and asserted that he was an employee engaged on a daily basis by the owner of the trawler. On these facts High Court held that at the time of joining the vessel as a member of the crew, detenu had no full knowledge that the vessel was to be used for smuggling activities and that the material on record was insufficient for reaching a genuine satisfaction that the detenu was engaged in smuggling activity. Accordingly the High Court set aside the order of detention. On appeal by the State, this order of the High Court was reversed by the Supreme Court with the following observations, at para-5 of its decision :-

"Now to turn to the merit. The order of High Court is clearly erroneous. The High Court has misdirected itself to its jurisdiction to inquire into the order of detention by an authority. The High Court, accepting the contention of the counsel of the detenu, before it has held that there was no material on record to prove knowledge of the detenu with the contraband goods in the vehicle. By implication, the High Court has erroneously imported the rule of criminal jurisprudence that the guilt of an accused must be proved beyond a reasonable doubt into the law of detention. The High Court in its writ jurisdiction under Art. 226 of the Constitution is to see whether the order of detention has been passed on any materials before it. If it is found that the order has been based by the detaining authority on materials on record, then the Court cannot go further and examine whether the material was adequate or not, which is the function of an appellate authority of Court. It can examine the material on record only for the purpose of seeing whether the order of detention has been based on no material. The satisfaction mentioned in S. 3 of the Act is the satisfaction of the detaining authority and not of the Court. The judgment of the High Court, therefore, is liable to be set aside"

30. This decision makes it clear that the jurisdiction of the High Court is limited, (i) to examine the material on record only for the purpose of seeing whether the

order of detention has been based on no material, (ii) the satisfaction mentioned in S. 3 of the COFEPOSA is the satisfaction of the detaining authority and not of the court, and (iii) the rule of Criminal Jurisprudence that the guilt of an accused must be proved beyond a reasonable doubt cannot be imported into the law of detention.

31. Having regard to the impugned detention order, the grounds furnished to the detenu and the documents accompanying the said grounds, it cannot be said that there was no material at all for the detaining authority to arrive at the requisite satisfaction before ordering the detention of the petitioner, in this case.

32. In the decision rendered by this Court in *T. Shafeeque Ahmed v. State of Karnataka & another* (W.P. No. 35/86 - D. D/- 6-6-1986) the detention order was set aside on the ground that the government failed to consider the discrepancies in various panchnamas. This decision is based on the particular facts and circumstances of the case. Hence it cannot help the contention of the counsel for the petitioner.

33. (a) : Above discussion also disposes of the contention of Mr. Jeshtmal, that the order of detention was the result of applying a wrong test and that provisions of Customs Act were misconceived. The essence of this contention was that there a wrong application of S. 123 of the Customs Act, which imposes the burden of proving the seized gold as not smuggled one, on the detenu when the gold as not smuggled one, on the detenu when the gold was seized under the Customs Act in the reasonable belief that they are smuggled goods. Almost similar contention as now advanced by Mr. Jeshtmal was considered by a Bench of this Court in *G. Pichaimani v. State of Karnataka* (W.P. Nos. 84 & 85 (HC) - D. D/- 25-7-1986) (reported in 1987 Cri LJ 913) at paras 16 to 18.

(b) : In *Baba Saheb v. State of Karnataka & another* (WP. (HC) No. 1/85 - D. D/- 12-3-1985) another Bench of this Court upheld the applicability of S. 123 of the Customs Act by the authorities under similar circumstances.

(c) : The decision of the Delhi High Court in *Daga Commercial Corpn. P. Ltd. v. Union of India* 1983 ELT 2142, arose out of an adjudication proceeding. Therefore for the first time at a very late stage, presumption was drawn that gold in question was of foreign origin in view of its fineness unlike the present case. Further, it was not a case of preventive detention.

34. The next ground of attack against the detention is that the incident took place on 28-3-1986 and the detention order was made on 15-10-1986 and this inordinate delay is a vitiating circumstance, specially so, since, the incident of 28-3-1986 is the sole instance of alleged smuggling activity of the detenu. The law on the question of delay has been stated by the Supreme Court in *Shiv Ratan Makim Vs. Union of India (UOI) and Others*, and in *Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another*, .

35. In *Shiv Ratan Makim's* case the law as stated at para-5 may be summarised

thus :

"It is no doubt true that where an unreasonably long period has elapsed between the date of the incident and the date of order of detention an inference may legitimately be drawn that there is no nexus between the incident and the order of detention and the order of detention may be liable to be struck down as invalid. But there can be no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident and the order of detention".

36. Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, it is observed at page 13 as follows :-

"Delay ipso facto in passing an order of detention after an incident is not-fatal to the detention of a person, for in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily explained by the detaining authority".

37. It is only when the delay is unexplained by the detaining authority, which the links the nexus between the incident and the order of detention, the said order is liable to be set aside. This essentially involves appreciation of facts placed by the detaining authority as to the cause for the delay.

38. There are two affidavits filed on behalf of the respondents. The affidavit of G. H. Patil, Superintendent of Central Excise and Customs, Headquarters, Preventive, Belgaum, explains the delay between the date of seizure and the receipt of the report of the Mint-master and the assay certificates. The samples drawn on 1-4-1986 were sent to the Indian Government Mint, Bombay, on 2-4-1986. On 22-5-1986 a letter was received from the Mint stating that gold in question was of foreign origin. But the assay certificates were to be despatched only on receipt of the Mint charges. The charges were sent on 26-6-1986 after the competent authority processed the Bill. The assay certificates were received on 7-8-1986, which was thereafter despatched to the COFEPOSA cell at Bangalore.

39. The affidavit of Sri S. K. Ghosal, Secretary to Government of Karnataka, Home Department, explains the delay. Though seizure was effected on 28-3-1986 the investigation was completed only on 1-7-1986. The assay certificates sent by the Mint master were received at the Customs Collectorate, Belgaum, on 19-8-1986 and at COFEPOSA cell on 20-8-1986. The screening committee considered the case on 12-9-1986. It is explained in the counter-affidavit of Mr. Ghosal that the screening committee consists of top-level officers of different departments and the committee could meet only on 12-9-1986 in view of the pre-occupation of the members between 20-8-1986 and 12-9-1986. It is also stated that the screening committee had four other cases to consider and each member had to study the individual cases before the committee met. After the screening committee recommended the detention, the COFEPOSA cell at Customs Office sent the papers to the Detaining Authority on 24-9-1986.

Thereafter papers were scrutinised by the Home Department and the Law Department. The Law Department gave its note on 26-9-1986. Ensuing two days were general holidays. The Under Secretary, after verifying the papers submitted the file to Dy. Secretary, Home Department for his examination. The Dy. Secretary submitted the file to the Home Secretary (Mr. Ghosal) on 30-9-1986. After considering all the papers, the order of the detention was made on 1-10-1986. The delay, thus explained by the detaining authority is acceptable and we do not find anything in the delay to snap the link between the incident and the need to make a preventive detention order.

40. In this connection, it is necessary to refer to the contention urged by Mr. Jeshtmal that the solitary instance alleged against the petitioner cannot be a ground to make an order of detention. This contention also deserves to be rejected. Whether a lone incident can be a relevant factor to be considered before preventive detention can be resorted, is within the realm of subjective satisfaction of the detaining authority. It may be in a given case, such a solitary instance read with other circumstances may give rise to an inference that the order of preventive detention was an arbitrary action. In fact the Supreme Court in Shiv Ratan Makim's case (1986 Cri LJ 813) negated a similar contention at para-4 thus :-

"So far the first ground is concerned, it is obvious that having regard to the nature of the activity of smuggling, an inference could legitimately be drawn even from a single incident of smuggling that the petitioner was indulging in smuggling of gold. Moreover, the written statement given by the petitioner clearly indicated that the petitioner was engaged in the business of purchase and sale of foreign marked gold and that this incident in which he was caught was not a solitary incident. The facts stated by the petitioner in his written statement could legitimately give rise to the inference that the petitioner was a member of a smuggling syndicate and merely because only one incident of smuggling by the petitioner came to light, it did not mean that this was the first and only occasion on which the petitioner tied to smuggle gold. There can be no doubt that having regard to the nature of the activity and the circumstances in which the petitioner was caught smuggling gold and the facts set out by him in his written statement, the second respondent was justified in reaching the satisfaction that the petitioner was engaged in smuggling gold and that with a view to preventing him from smuggling gold, it was necessary to detain him".

41. In view of the foregoing, the contentions urged on behalf of the petitioner are unacceptable and accordingly the writ petition is dismissed.

42. Petition dismissed.