

(2002) 05 P&H CK 0018

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 15 of 2002

Virender Mohan Jain

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-05-2002

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3, 3(1)
Constitution of India, 1950 — Article 14, 19, 21, 22, 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Customs Act, 1962 — Section 109, 111, 113, 124, 125

Citation : (2002) 3 CriminalCC 14 : (2002) 3 RCR(Criminal) 82

Hon'ble Judges : M.L. Singhal, J

Bench : Single Bench

Advocate : Vikram Chaudhari, for the Appellant; Sudhir Nehra, AAG Haryana, for the Respondent No. 1, Mr. R.S. Rai, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Singhal, J.—Through this criminal writ petition filed by Virender Mohan Jain-petitioner under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, he has prayed for the quashing of order of detention No.F No.673/22/2001 -CUS, VIII dated 28.9.2001 passed by Sh.Somnath Pal, Joint Secretary to the Government of India, New Delhi tinder Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, hereinafter to be referred as "COFEPOSA" against him dubbing it as illegal, unconstitutional and based on extraneous, irrelevant and vague grounds violative of Articles 14, 19 and 21 of the Constitution of India.

2. It is alleged that he is carrying on business of trading and exports of chemical goods in the name and style of M/s Dadri Inorganics Pvt. Ltd. Charkhi Dadri, Haryana. In the year 1997 Government of India introduced an export incentive scheme under the name "Duty Entitlement Pass Book Scheme hereinafter to be referred as "DEPB Scheme". This scheme was primarily aimed at encouraging

export. Under this scheme, the benefit extended to the exporter making an export mainly consists of duty credit licence granted to him for export of duty free goods. Furthermore, under this scheme, the exporter is under obligation to declare the present market value, herein after to be referred as "PMV" of the goods exported by him since the benefit under the scheme cannot exceed 50% of the PMV. Copy of the public notice No.45/97 dated 12.5.1997 highlighting the DEPB Scheme is Annexure P-1. This DEPB Scheme was introduced in the export and import policy 1.4.1997 to 31.3.2002. After the public notice Annexure P-1, another public notice bearing No.66/97 dated 25.6.1997 was issued by the Customs Department wherein it was, inter alia, clarified that in case upon examination of the goods, the examining officer finds prima facie the declared PMV to be unduly high, then the matter may be referred to the Assistant Commissioner and in such cases, the PMV may be verified/determined through market inquiries etc. It was also clarified that in case of product attracting credit at the rate of 50% or more, the amount of credit shall not exceed 50% of the PMV. Therefore, the exporter was required to declare in the shipping bill filed under the DEPB Scheme, the PMV where the credit entitlement was 15% and above, copy of this public notice is Annexure P-2. Another circular was issued by the Minister of Finance, Department of Revenue bearing No.69/97 dated 8th December, 1997 wherein revised guide-lines for determining/verification of the PMV under the DEPB Scheme were issued. It was highlighted in these guide-lines that the condition of restricting the credit amount under the DEPB Scheme of 50% of the PMV was prescribed to prevent the exporter from obtaining the excessive amount of credit by inflating the FOB price of the export product. It was further stated in these guide-lines that FOB value may be higher as per the contract between the exporter and foreign buyer but the PMV of the goods is an index of their local (whole sale/retail) price exclusive of duties, sales tax etc. Furthermore, comprehensive guide-lines were issued for determining the PMV in case of manufacturer exporters as well as merchant exporters. Copy of the circular is Annexure P-3. The perusal of this circular would show that in-built mechanism has been provided with regard to the verification of the PMV declared by an exporter. It also provides for an opportunity to the exporter to justify the correctness of the PMV declared by issue of a show cause notice. Further the perusal of the circular would show that neither any penal action has been proposed for an inappropriate declaration of the PMV nor any other coercive method has been described for taking action in this regard. Circular further indicates that the process of ascertaining/verification of the PMV is a relative process which may vary and accordingly a show cause notice has been prescribed before taking a final view in the matter. It is further alleged in this petition that the chronology of the entire DEPB Scheme, if read in totality, clearly indicates that no penal action is required in the case of declaration of the PMV as the price in the market varies from person to person/location to location on the basis of quality, design, availability of ready goods in the market, terms of payment etc. Thereafter, another circular was issued bearing No.23/99 dated 11.5.1999 (Annexure P-4) in which a period of 5 years for the issue of show

cause notice was provided in cases involving fraud, mis-statement or suppression of facts etc. It was further indicated in this circular that where the PMV declared by the exporter is not accepted then a show cause notice can be issued to the exporter for either the rejection or revision of the PMV. It is alleged that the entire perusal of DEPB Scheme alongwith all the circulars as stated above, leave no scope of doubt that the benefit under the scheme can be availed by an exporter, only when the PMV declared by him is accepted and not before that. In order to ascertain the PMV, a full-fledged mechanism has been provided and an opportunity of hearing the exporter before the fixing of the PMV is also provided. The competent authority has been empowered to either reduce or reject the PMV and, thus the entitlement of an exporter under the DEPB Scheme is variable. Proceedings for verification of the PMV are totally independent and cannot be compared with any other process initiated under the Customs Act etc. There is not even a whisper as to what penal action is to be taken following the assessment of the PMV, even in a case where the PMV declared is found to be on the higher side. It is alleged that the scheme has left no scope of doubt that even in case of fraud/collusion, willful misstatement or suppression of facts regarding the PMV, no penal action is contemplated. The authorities are competent to reject or reduce the PMV declared by an exporter which is the only action contemplated to be taken under DEPB Scheme. It is alleged that petitioner exported eight consignments of Magnesite Chrome Magnesite Ramming Mass, between November, 1998 to January 1999 to M/s Fairdeal Building Chemicals, Sharjah, UAE, valuing approximately Rs.1.99 crores (US\$4,67,600) under claim of "Duty Entitlement Pass Book Scheme" (DEPB). Copy of shipping bill for one such consignment bearing No.23166 dated 15.12.1998 is Annexure P-5.

Copy of the DEPB licence issued for one such consignment bearing No.0199137 dated 10.3.2000 is annexure P-6. It is alleged that thus the exports were initially allowed on provisional basis subject to chemical tests of the sample drawn and price verification. The shipping bills were, however, finalised later after the receipt of test reports from the Central Revenues Control Laboratory (CRCL). Credits against 4 consignments were issued by the Director General of Foreign Trade (DGFT) during the period between August, 1999 to March, 2000 amounting to approximately Rs.21.67 lacs but no credit was utilized by the petitioner at all. It is further alleged that it was alleged by the department of customs that they had received an information that number of exporters at Delhi were availing undue DEPB benefit by exporting goods at highly inflated prices and mis-declaring the description of the products. Accordingly, searches were conducted at the enquiries were made with various exporters including him (petitioner), who in his statement, inter alia stated that he was procuring his supplies through M/s. Ratanlila and Co. Ltd. and M/s Lila Enterprises against bills, payments for which were being made through cheques and were duly reflected in their accounts. It is further alleged that it is further the allegation of the department of customs that Mr. C.P. Gupta, Director of M/s Ratanlila and Co. Ltd., Prop, of M/s Lila Enterprises stated that while he was issuing bills and receiving cheques for

payment, he was not supplying any material. He stated that he was persuaded by a friend of Mr. K.K. Jain to provide bills without supplying materials. Further Mr.K.K. Jain, collected blank cheque books of the accounts duly signed by him (C.P. Gupta) to withdraw the money deposited in above account. After all the above enquiries, Customs Department again sent another set of samples to CRCL on 8.12.2000 out of samples retained from the consignments sent by the petitioner between November, 1998 to January, 1999 and claimed that this time they found the samples deficient in chromium oxide content. The above reports of CRCL of samples drawn nearly 2 years ago, were however not made available to the petitioner till date. On the basis of the above and some other material, it is gathered, that the department came to the conclusion that the petitioner and some other exporters in collusion with other parties were defrauding the Government for wrongful gains under the DEPB Scheme. As a follow up of the above allegation was the cancellation of the Import-Export Control Code issued to him on 23.3.2001. He was thereby rendered incapable to exporting/importing any material thereafter. Copy of the order in this behalf is Annexure P-7.

EXIM policy clearly debars any person to export/import without Import/Export Code No. as per 4.9 of the EXIM policy Annexure P-8. Apprehending that the Customs Department would falsely implicate him under the Customs Act, 1962 or under the Central Excise Act, 1944, petitioner approached this Court through criminal misc. petition No.43180-M of 2000 for the grant of anticipatory bail to him. This Court passed order Annexure P-9. It is alleged that the whole case has been conceived with malafide intentions and ulterior motives of investigating officer, Sh.Sanjeev Gautam, Deputy Commissioner (SIIB), New Customs House, New Delhi as he could not fulfil his illegal demands During investigation, he was threatened number of times for arrest. He made complaint against Sh. Sanjeev Gautam for harassment, mis-behaviour and man-handling and using foul and sordid language against him He also mentioned in the complaint against Sh. Sanjeev Gautam that inspite of the order of this Court granting him anticipatory bail, he was taken to the police station and subjected to physical harassment, he was forcibly dragged into the Customs House in utter violation an contempt of the order passed by this Court. He sent complaint against Sh. Sanjiv Gautam to various authorities. Annexure P-10 is the copy of the said complaint. The detention order passed against him is illegal. unconstitutional, arbitrary and against the settled provisions of law and is liable to be set aside on the grounds that it is evident from the chronology of the events as narrated in this petition that the DEPB Scheme is absolutely independent from the other schemes formulated by the Government. It has in-built mechanism and the entire process had been detailed therein, Government has issued revised circulars from time to time and" comprehensive guidelines have been issued for determination and verification of the PMV under the Scheme. Scheme provides for opportunity to the exporter in order to enable him to justify the correctness of the PMV declared by him by issuing a show cause notice. It is clearly provided under the scheme that the PMV can only be reduced or rejected. The allegation that there was a

gross over-valuation of the export consignment cannot stand the test either of illegality or of fairness.

3. Section 3 of the COFEPOSA shows that the provision of this Section can be invoked if the Government is satisfied with respect to any person that with a view of preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling goods, order u/s 3 is necessary to be passed, it can be passed.

4. Petitioner is now being sought to be detained with a view to prevent him from indulging in smuggling activities in future, u/s 2(c) of the COFEPOSA. According to Section 2(39) of the Customs Act, smuggling in relation to any goods means any act or omission, which will render such goods liable to confiscation u/s 111 or u/s 113. The perusal of Section 113 of the Customs Act according to the petitioner shows that the case of the petitioner does not fail in any of the clauses mentioned therein. No penal action has been proposed for an improper declaration under the DEPB and no coercive method has been described for taking action in this regard. The perusal of the entire scheme indicates that the process which may vary and accordingly, a show cause notice has been prescribed before taking a final view in to the matter. The chronology of the entire DEPB Scheme, if read in totality clearly indicates, that no penal action is required in the case of declaration of the PMV as the price in the market varies from person to person/location to location on the basis of quality, design, availability of ready goods in the market, terms of payment etc. The goods exported by the petitioner were neither prohibited as contemplated under Section 2(33) of the Customs Act. As such, the export made by the petitioner does not attract the provision of Section 133 of the Customs Act. COFEPOSA was enacted for the purpose of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith. If the petitioner has indulged in over-invoicing the exports, it follows that instead of adversely affecting the said object, it has augmented the foreign exchange as in fact the import proceeds of all the consignments have indeed been received in the country. Annexure P-13 is the copy of one such bank certificate of export and realisation indicating that entire FOB value in foreign exchange had been repatriated. Various clauses u/s 133 of the Customs Act deal with either dutiable or prohibited goods or for clearances under duty draw back scheme amongst other things. There is no clause which deals with clearances under the DEPB Scheme. In such a situation, the impugned goods under the DEPB Scheme are not liable to confiscation u/s 113 of the Customs Act. No smuggling could be said to have taken place. The provisions of COFEPOSA cannot be said to have been attracted. The impugned order or detention is wholly illegal and void ab-initio. The consignments were first cleared on provisional basis, the same were finalised after the test reports were received without any adverse finding. After nearly two years the samples were again sent for re-test without any notice/intimation to the petitioner, which it is alleged, were found deficient in certain respects which defies imagination unless the samples had deteriorated on

account of uncertain chemical stability over two years period. He has not been supplied with the re-test report till date to react about the deficiency claimed. He had obtained Import-Export Control Code No. in 1998, which was cancelled on 23.3.2001 subsequent to the search of his business place on 9.8.2000. On cancellation of the Code, there was no question of petitioner's conducting his export business and, therefore, there can be no justification for a preventive detention after about 6-7 months of the cancellation of the Code. It is alleged that there will be serious in-roads in his liberty and fundamental rights.

5. Vide circular No. 11/2001 dated 12.2.2001, the Directorate of Revenue Intelligence had intimated to the Commissioner of Customs and various other authorities all over India that various companies including M/s Dadri Inorganics Pvt. Ltd., of which he is the Director have mis-declared the description as well as the value of the export goods to fraudulently claim undue benefit under the DEPB/draw back Scheme. The circular has allowed the authorities that they should not allow the import clearance against the DEPB licence of these companies. Copy of the circular is Annexure P-14. It is thus clear is the version of the petitioner that sufficient preventive measures have already been taken by the authorities to prevent the petitioner from claiming any benefit under the scheme or to indulge in any such activity of export. Export in question took place in November/ December. 1998. Order of detention was passed on September 28, 2001 after nearly 3 years. There is no explanation for the delay in the passing of detention order which shows that there is no live or proximate link between prejudicial activity or order of detention. There is apparently no genuine subjective satisfaction on the part of the detaining authority in the passing of the detention order. Against 8 consignments exported between November, 1998 to January, 1999 petitioner was issued DEPB Credit in case of 4 consignments for a sum of Rs.21.67 lacs by DGFT Between August, 1999 to March, 2000, which he or on his behalf has not been availed at all. The entitlements lapsed on 24.8.2000, 9.3.2001 and 21.3.2001. There is thus no possibility of utilisation of credit on the date of passing of the purported order. The detaining authority has not taken into consideration this fact at all and thus non-application of mind. In support of the allegations that the petitioner was over-invoicing the value of export, department made enquiries in Dubai and the value of the goods entered by the importer was much lower, leading them to believe that the petitioner had over-invoiced the value of exports. The petitioner had received, through proper legal channels. Neither any show cause notice under the provisions of Section 124 of the Customs Act has been issued nor any complaint u/s 132 or 135 of the Customs Act has been filed against him. In these circumstances, the resort to the passing of detention order is a gross abuse of the process of law. The detention order is not a substitute for criminal prosecution or any adjudication proceedings. The detention order cannot be passed to obviate the launching of the prosecution or the initiation of adjudication proceedings.

6. When the Import-Export Code of the petitioner was cancelled and his bank account had been sealed, there was no occasion for him to indulge in any activity

much less prejudicial. The detention order is based on a solitary action i.e. a single incident of alleged smuggling and there is no other material on record to infer that the petitioner had been indulging in such activities previously. The declaration under the DEPB Scheme is not equivalent to declaration contemplated in the Customs Act which is made punishable u/s 132 of the Customs Act. Since the petitioner is required to be given an undertaking that he is not claiming any drawback, it clearly strengthens the assertion of the petitioner that DEPB Scheme is absolutely independent and it is not at par with the entitlement of duty drawback etc. and as such the provisions of the Customs Act can not be invoked in a case of export made under the DEPB Scheme.

7. Union of India submitted reply in the form of affidavit of Sh. Somnath Pal, Joint Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi, resisting this prayer of the petitioner. It was urged that Virender Mohan Jain, who was Director of a company namely M/s Dadri Inorganics Pvt. Ltd., exported 167 MT of goods from Inland Container Depot (ICD) Tughlakabad, New Delhi declaring the goods as "Magnesite Chrome Magnesite Ramming Mass" and valued at Rs. 1,99,03,380/- (US\$ 4,67,600) which on subsequent verification was found to be grossly mis-declared and over-invoiced. The goods were exported to a firm owned by one of the co-accused in this group case under claim for the benefit of Duty Exemption Pass Book (DEPB) Scheme. Based on the export, a duty credit of Rs.21,66,886/- was issued by the Directorate General, Foreign Trade (DGFT), New Delhi. The petitioner was further involved in the apparent mis-declaration of goods declared to be "Calcium Stearate" through a firm namely M/s J.K. Impex, New Delhi through Kandla Port. He was also involved in the export fraud attempted by another firm namely M/s R.S. International at ICD, Ahmedabad where the said firm exported "Magnesite Ramming Mass" which on testing was found to be nonconforming to the declaration and was over-valued with the sole intention of getting ineligible DEPB benefits. A detention order dated 28.9.2001 was accordingly passed against him by the specially empowered officer of the Central Government u/s 3(1) of the COFEPOSA, 1974 with a view to preventing him from smuggling goods in future. It was urged that the petitioner has been deliberately avoiding service of the detention order and ground of detention together with relied upon documents on him despite action under Sections 7(1)(b) and 7(10(a) of the COFEPOSA Act, 1974. Instead of surrendering to the due process of law, the petitioner has moved this petition in this Court at the pre-execution stage. Writ petition is not maintainable for the reason that the same has been filed at the pre-detention stage. As laid down by the Hon'ble Supreme Court, the Courts should not interfere with the detention order at pre-detention stage except in the following circumstances:-

- i) that the impugned order is not passed under the Act under which it is purported to have been passed;
- ii) that it is sought to be executed against a wrong person;

- iii) that it is passed for a wrong purpose;
- iv) that it is passed on vague, extraneous and irrelevant grounds; or
- v) that the authority which passed it had no authority to do so.

8. The Hon"ble Supreme Court has observed that the detenu must surrender before filing writ petition, at the pre-execution stage. After surrendering it will be open to him to take all permissible legal grounds to challenge the detention order by filing a Habeas Corpus Writ Petition, *Union of India v. Parasmal Rampuria*, (1988) 8 SCC 402. It was further urged that the Court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenu from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, can not be said to be invalid.

9. The order of detention which has been sought to be challenged has been passed under the proper Act, against a right person, for a right purpose, by the duly empowered authority and on the specific and relevant ground based on the material placed before the Detaining Authority.

10. I have heard the learned counsel for the petitioner, learned counsel for the Union of India and gone through the record.

11. It was submitted by the learned counsel for the petitioner that the impugned order of detention passed by Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi (Annexure P-11) together with the grounds couched in Annexure P-12 on which it is based is misconceived, illegal, null and void, unconstitutional, as the acts imputed to him do not fall within the mischief of any provision of COFEPOSA, 1974. He is not indulging into smuggling activities. The object of the COFEPOSA is to prevent the engaging into smuggling activities by unscrupulous element of the society and thereby to hit the conservation and augmentation of foreign exchange.

12. Explaining the nature of preventive detention, Hon"ble Supreme Court in *Khudiram Das Vs. The State of West Bengal and Others*, stated as follows:

"The power 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 proof....This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable 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 any of sub-clauses (1), (ii) and (iii) of clause (1) of sub-section of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court can not be invited to consider the propriety or sufficiency of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose, but the subjective opinion of the detaining authority as regards the necessity of detention for a specified purpose the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi-judicial power."

13. It was submitted that the detention order can not be punitive in nature and that it would be the duty of this Court to lift the veil and see for itself whether the real intent of the detaining authority in passing the detention order is punitive or preventive. If it is found that the order is punitive, the same is liable to be struck down. Section 3 of the COFEPOSA, 1974 provides that the Government can make an order for detaining any person if it is satisfied that the person has to be prevented from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or it is necessary to prevent him from indulging in smuggling of the goods etc. It was submitted that in this case, the impugned order of detention Annexure P-11 was passed on the satisfaction of the detaining authority that with a view to preventing him from smuggling goods in future, it is necessary that he be detained and kept in custody u/s 3(1) of the COFEPOSA, 1974. It was submitted that word "smuggling" has not been defined in the COFEPOSA, 1974. It is stated in Section 2(e) of COFEPOSA, 1974 that "smuggling" has the same meaning as in clause 39 of Section 2 of the Customs Act. Section 2(39) of the Customs Act defines smuggling to mean that any goods which are liable to confiscation u/s 111 or 113 of the Customs Act, 1962. Section 111 of the Customs Act deals with confiscation of improperly imported goods etc. It reads as follows:

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

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed

- under CI. (a) of Section 7 for the unloading of such goods;
- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under CI.(c) of Section 7 for the import of such goods;
- (c) any dutiable or prohibited goods brought into any bay gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance;
- (f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;
- (g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of Section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of Section 45;
- (h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of Section 33 or Section 34;
- (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
- (j) any dutiable or prohibited goods removed or attempt 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;
- (k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced u/s 109 is not produced or which do not correspond in any material particular with the specification contained therein;
- (1) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made u/s 77;
- (m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of Section 54;
- (n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer:

(p) any notified goods in relation to which any provisions of Chapter IV-A or of any rule made under this Act for carrying out the purpose of that chapter have been contravened."

14. Section 113 of the Customs Act deals with confiscation of the goods attempted to be improperly exported etc. Section 113 read as follows:

"113. Confiscation of goods attempted to be improperly exported, etc.-The following export goods shall be liable to confiscation.

(a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted to be exported by land or inland through any route other than a route specified in a notification issued under CI. (c) of Section 7 of the export of such goods;

(c) any dutiable or prohibited goods brought near land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

(f) any dutiable or prohibited goods which are loaded or attempted to be loaded in contravention of the provisions of Section 33 or Section 34;

(g) any dutiable or prohibited goods loaded or attempted to be loaded on any conveyance or water-borne or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India without the permission of the proper officer;

(h) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of a baggage in the declaration made u/s 77;

(i) any dutiable or prohibited goods or goods entered for exportation under claim for draw-back which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77 in respect thereof;

(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act relating to the fixation of rate of drawback u/s 75;

(j) any goods on which import duty has been paid and which are entered for exportation under a claim for drawback u/s 74;

(k) any goods cleared for exportation under a claim for drawback which are not loaded for exportation on account of any wilful act, negligence or default of the exporter, his agent or employee, or which after, having been loaded for exportation are unloaded without the permission of the proper officer;

(1) any specified goods in relation to which any provisions of Chapter IV-B or of any rule made under this Act for carrying out the purposes of that chapter have been contravened."

15. It was submitted that assuming the allegations which are stated in the grounds of detention are correct, even then he has not committed any offence under COFEPOSA, 1974, so that the order of preventive detention could be passed against him. It was submitted that the petitioner was carrying on the business of trading and exports of chemical goods and in the year 1997, Government of India introduced an export incentive scheme under the name "Duty Entitlement Pass Book Scheme" (DEPB Scheme). This scheme was primarily aimed at encouraging export. Under this scheme, the benefit extended to the exporter making an export mainly consists of duty credit licence granted to him for export of duty free goods. Under this scheme the exporter is under obligation to declare the present market value (PMV) of the goods exported by him since the benefit under the scheme cannot exceed 50% of the PMV. If upon examination of the goods, examining officer finds prima facie the declared PMV to be unduly high then the matter may be referred to the Assistant Commissioner and in such cases, the PMV may be verified/determined through market enquiries etc. Exporter was required to declare in the shipping bill filed under the DEPB Scheme, the PMV where the credit entitlement was 15% and above. It was submitted that thereafter Ministry of Finance issued revised guidelines for determining/verification of the PMV under the DEPB Scheme vide the Department of Revenue letter bearing No.69/97 dated 8.12.1997. The conditions of restricting the credit amount under the DEPB Scheme of 50% of the PMV was prescribed to prevent the exporter from obtaining the excessive amount of credit by inflating the FOB price of the export product. It was submitted that the petitioner was concerned only in exporting chemical goods and earn credit entitlement, as for instance that if FOB of an export product is Rs.300/- per unit and it attracts credit entitlement, as for instance that if FOB of an export product is Rs.300/- per unit and it attracts credit entitlement at the rate of 15%, the permissible credit works out to Rs.45/- per unit. If the PMV of the goods is Rs.80/- per unit, the credit will have to be restricted to Rs.40/- (50% PMV of the goods);, hence the party would be eligible for credit at the rate of Rs.40/- per unit

and not Rs.45/-per unit.

16. M/s. Dadri inorganics Pvt. Ltd. 4/624 Ashram Road, Charkhi Dadri, Distt. Bhiwani exported 8 consignments vide different shipping bills between 27.11.1998 to 23.1.1999 from Inland Container Depot (ICD), Tughlakabad, New Delhi to M/s. Fairdeal Building Chemicals P.O. Box No.21485 Sharjah UAE, declaring the goods as "Magnesite Chrome Magnesite Ramming Mass" and declaring the value as Rs. 1,99,03,380 (US \$ 4,67,600) under claim for the benefit of Duty Exempted Pass Book (DEPB) Scheme as per Sr. No.373 of Product Group-Engineering (Product Code 61) through the authorised custom house agent M/s Deepak Sharma. All these exports were allowed on provisional basis subject to chemical testing of the samples and market enquiries for verification of the description and value of the goods. Samples were drawn from each of the consignment and sent for chemical testing to Central Revenue Control Laboratory (CRCL), New Delhi. On the basis of the test reports received from the Central Revenue Laboratory, New Delhi, the above shipping bills were finalised by the Customs Officers at ICD, Tughlakabad, New Delhi. Duty credit of Rs.5,17,300,5,47,400/- and so on was issued by the DGFT. The exported goods were prepared by crushing the aluminums fire bricks. Since the value of which is Rs. 15/- per kg., they stopped the payment.

17. The test reports furnished by the CRCL showed that the sample was in the form of brown coloured powder and small lumps composed essentially of Magnesium Oxide and small amounts of iron oxide and siliceous matter vide CL-2650 EXP dated 29.1.1999.

18. Detaining authority acted on the information received by the Delhi Customs from Ahmedabad Customs that a firm M/s R.S. International had exported Magnesite Ramming Mass through ICD Ahmedabad during the month of November, 1999 vide shipping Bill DEPB 5233/99,5234/99,5235/99,5236/99 dated 2.11.1999 and that the testing of the samples revealed that the goods have been misdeclared and over-valued with intent to avail undue DEPB benefit. Enquiries revealed that approximate price of Magnesite Ramming Mass was ranging between 12 per Kg. to Rs.25 Kg. Value of Magnesite Ramming Mass was mainly dependent on the percentage of MGO. The higher the percentage, the higher the value. Enquiries were made from M/s Tata Refractories 43, Chowringee Road, Calcutta-71 who are a major/reputed manufacturer of Magnesite Ramming Mass. They informed Ahmedabad Customs that main ingredient of magnesite Ramming Dass is MGO. Price of Magnesite Ramming Mass ranges range d between Rs.8 per kg. to Rs.50. per kg. Price of most commonly used Magnesite Ramming Mass containing 84% MGO was Rs.12 per kg. This information was conveyed to Ahmedabad Customs vide letter dated 18.7.2000, which was with regard to their product. Information received by the Ahrredabad Customs further revealed that in addition to M/s R.S. International, a number of Delhi based exporters had also availed undue DEPB/Drawback benefits by exporting different items by highly over-invoicing the export value

and by mis-declaration of the description of the items. Calcium Sterate and Brick Power was declared as Magnesite Ramming Mass. On scrutiny of the documents seized under panchnama dated 9.8.2000, it was revealed that 167 MT of goods exported by M/s Dadri Inorganics Pvt. Ltd. were purchased from M/s Ratanlila & Co. Delhi invoices numbered as 115 dated 24.11.1998, 120 dated 5.12.1998, 122 dated 7.12.1998, 123 dated 8.12.1998, 125 dated 8.1.1999, 126 dated 9.1.1999 and 137 dated 16.1.1999, which gave the description as "Magnesite Ramming Mass Bricks" @ Rs.300/- per brick and for a total value of Rs. 1,17,00,000/- without indicating the weight of the material purchased.

19. Vide CL-2759 EXP dated 4.2.1999/9.3.1999, it was found that the sample was in the form of grayish brown coarse powder and hard gritty material. It was essentially composed of magnesium oxide together with oxides of aluminium, calcium, iron and siliceous matter. The samples were sought to be retested. Despite the summons issued to the petitioner, he did not appear before the Officer of the SUB New Customs House, New Delhi. The central revenue Central Laboratory, New Delhi vide their letter dated 22.12.2000 sent the report of the retesting of the samples of M/s Dadri Inorganics Pvt. Ltd. which read as under:

"1 CLR/SI-97/27/11.12.2000(S.B.No.397/7/1/1999).

The sample is in the form of brown powder. It is composed mainly of Magnesium Oxide, iron oxide and siliceous matter with small amount of Calcium Oxide.

Percentage of Magnesium Oxide is 44.35.

Percentage of Iron Oxide is 14.86.

The sample does not answer test for the present of chromium oxide."

20. Another sample sent was again in the form of brown powder, composed mainly of Magnesium Oxide, iron oxide and siliceous matter with small amount of Calcium Oxide. Percentage of Magnesium Oxide was 39.51, percentage of Iron Oxide was 12.02. The sample did not answer the test for the presence of chromium oxide.

21. As per 1-0 norms published by the DGFT and the specifications of the ISI Code of Magnesite Chrome Magnesite Ramming Mass, it is stated that magnesite chrome magnesite ramming mass according to 1-0 norms should contain chromium oxide to the extent of 40% minimum and according to IS: 3304-1965 (Reaffirmed 1992) Specification for burnt magnesite-chrome refractories for general purposes and IS: 3305-1965 (Reaffirmed 1992) Specification for burnt Chrome-Magnesite Refractories for general purposes should contain magnesium oxide (MGO) percent minimum 55, chromium oxide (CR 203) percent minimum 6 magnesium oxide (MGO) percent minimum 30, chromium oxide (Cr.203) percent 18 respectively. Samples under reference do not show presence of chromium oxide, thus these samples do not conform to the 1-0 norms published by the DGFT as well as IS specifications. The term "ramming mass" refers to "compact mass". The goods exported was not Magnesite Ramming Mass. It was mainly of

granules alongwith powder of crushed fire bricks. It is mentioned in the grounds of detention that he was involved in the fraudulent exports made by M/s Dadri Inorganics Pvt. Ltd. by declaring the goods as "Magnesite Chrome Magnesite Ramming Mass" which were subsequently found to be mis-declared as confirmed by the test reports of the CRCL at the time of re-testing of the samples. He in association with Sh. Sudhir Goyal, Sh.K.K.Jain and Sh.C.P.Gupta were also involved in the preparation of fake purchase bills showing purchase of "Magnesite Chroma Bricks" from M/s Ratanlila and Co. and M/s Lila Enterprises even though these firms at no time made any purchase or sale of these goods as confirmed in the various statements of Sh. C.P. Gupta and he was further responsible for the gross over-valuation of the export consignments as confirmed by the market enquiry and the details the Bill of Entry filed at Dubai which clearly shows that the goods were cleared at Dubai at value which was comparatively very low vis-a-vis their value declared at the time of the export.

22. All the exports were made to M/s Fairdeal Building Chemicals, Sharjah, UAE which is owned and controlled by Sh.Ashok Goyal, elder brother of Shri Sudhir Goyal. The recovery of records of stamps and documents of M/s. R.S. International, M/s Mangali Caramics and M/s Nagesh Construction Co. from his premises further show that he has done this fraud knowingly. The detention order was passed keeping in view his potentiality and propensity to indulge in such prejudicial activities and the magnitude of the operation and the well organised manner in which such prejudicial activities had been carried out and the nature and gravity of the offence as well his dubious conduct and keeping in view the chronological sequence of events set out in the grounds of detention. These grounds were communicated to him in view of clause (5) of Article 22 of the Constitution of India and as required under sub-section (3) of Section 3 of the COFEPOSA, 1974.

23. It was submitted by the learned counsel for the petitioner that petitioner had exported certain goods titled "Magnesite Chrome Magnesite Ramming Mass" with a view to claim benefit under the DEPB Scheme. Under DEPB Scheme no penalty can be imposed. Even if an undue or exaggerated claim is made under the DEPB Scheme, the authorities will give the due credit after proper verification and after giving an opportunity to the exporter to justify the correctness of the declaration.

23A. The duty drawback is governed by Sections 74 and 75 of the Customs Act. Both these sections provide that in case the goods which have earlier been imported are sought to be exported or the goods which have been manufactured in India but any imported material has been used in the manufacturing process, the draw back would be allowed by the Government. The benefit under the drawback scheme is paid in cash whereas the DEPB Scheme is in the form of licence to import the goods. The draw back scheme is governed by the Directorate of Drawback, Ministry of Commerce. Both these schemes are different in nature, contents and form and there is no similarity in them. The DEPB Scheme has come into existence in EXIM policy introduced for the period

with effect from 1997-2002. The benefit under the drawback is a statutory benefit under the Customs Act.

24. The bills were finalised by the Customs Officers and the Director General Foreign Trade i.e. DGFT had issued the duty credit i.e. DEPB Licence to the petitioner after the receipt of the laboratory reports pertaining to the samples drawn from the consignment and after verification of the value of the goods.

25. It was submitted that the samples were sent second time without notice to him for retesting. Exported goods were not prohibited u/s 33 of the Customs Act. The benefit under the DEPB Scheme was to be given only if he was found to be eligible and was to be refused if he was found ineligible. In no case the provisions of the Customs Act are attracted to this case. If the petitioner has not indulged in "smuggling activities" then no order under the COFEPOSA, 1974 could be passed. It was submitted that even otherwise, he cannot be said to have availed ineligible DEPB Benefit merely on the ground that chrome content was missing in the consignment. The petitioner had exported Magnesite Chrome Magnesite Ramming Mass and if chrome content was missing, then the consignment would become Magnesite Magnesite Ramming Mass.

26. In support of this submission, learned counsel drew my attention to "ALPHABETICAL INDEX OF EXPORT ITEMS WITH DEPB RATES FOR 1998-99" which clearly shows that at Sr.No.385, Group Code-61, the petitioner was entitled to some percentage of the DEPB benefit i.e. 22% credit in case of Chrome Magnesite Bricks/ Magnesite Ramming Mass. It was submitted that their goods item in the detention order is Magnesite Chrome Magnesite Ramming Mass, which is covered in Sr. No.373 Group 61 and is entitled to credit rate under the DEPB at 22% i.e. the same with or without chrome. It was submitted that the mis-declaration of the goods to the extent of absence of "Chrome" would not render the petitioner incapable of availing the DEPB benefit. It was submitted that the entire export value was repatriated to our country in foreign exchange. It is absolutely of no consequence as to at what value the goods were cleared at Dubai, when our country had received the entire foreign exchange through proper banking channels. It was submitted thus there are no activities prejudicial to the conservation or augmentation of the foreign exchange involved.

27. It was submitted by the learned for the petitioner that the export in question took place in November/December, 1998 but the detention order was passed in September, 2001, after nearly three years. There is no explanation why so much delay took place in passing the detention order. It was submitted that delay in passing the detention order shows that there was no live and proximate link between the prejudicial activity and the order of detention. It was submitted that there was no genuine subjective satisfaction on the part of the detaining authority for passing the detention order. It was submitted that the petitioner was issued DEPB credit in case of 4 consignments for a sum of Rs.21.7 lacs by DGFT between August, 1999 to March, 2000, which he or any one on his behalf has not availed at all. The entitlements lapsed on 24.8.2000, 9.3.2001 and

21.3.2001. There was thus no possibility of utilisation of credit on the date of passing of the purported order. It was submitted that the detaining authority has not taken into consideration this fact at all and thus there was non-application of mind. No show cause notice under the provisions of Section 124 of the Customs Act was issued to the petitioner nor any complaint u/s 132/125 of the Customs Act was filed against him. The detention order is not a substitute for criminal prosecution or any adjudication proceedings. It was submitted that from the declaration given by the petitioner at the time of the export whereby he had claimed the DEPB benefit that he is not claiming any duty draw-back or benefit of duty from licence under the duty exemption scheme in respect of exports made against this shipping bill. When the petitioner was required to give an undertaking that he is not claiming any draw-back, it shows that the DEPB scheme is absolutely independent and is not at par with the entitlement of duty draw-back and as such the provisions of the Customs Act can not be invoked in a case of export made under the DEPB Scheme. It was submitted that exported goods which are neither prohibited nor dutiable, are even otherwise not liable to confiscation u/s 113 read with Section 77 of the Customs Act. It was further submitted since in the present case, the export was made under the DEPB Scheme, provision of Section 113 of the Customs Act was not attracted.

28. Learned Counsel Standing Counsel for the Union of India, on the other hand submitted that the detention order was passed u/s 3(1) of the COFEPOSA, 1974, because of the involvement of the petitioner in the fraudulent activities, which amounts to "smuggling activities". It was passed with a view to prevent from smuggling of the goods in future. It was submitted that the Court will invoke its extra-ordinary jurisdiction to set aside an order of detention passed u/s 3(1) of the COFEPOSA, 1974 only in categories enumerated in Additional Secretary to Government of India v. Alka Subhash Gadia, 1992 Supple (1) SCC 496:

- (i) the impugned order is not passed under the Act under which it is purported to have been passed;
- (ii) that is sought to be executed against a wrong person;
- (iii) that is passed for a wrong purpose;
- (iv) that it is passed on vague, extraneous and irrelevant grounds; or
- (v) that the authority which passed it had not authority to do so.

29. In this case, the order of detention was passed with a view to prevent the petitioner from indulging into smuggling activities so that there was no deleterious effect on the conservation of foreign exchange. In the order of detention, it is mentioned that this order is being passed with a view to prevent him from "smuggling goods" in future. The grounds on which the order of detention is passed have been enumerated in Annexure P-12 attached to the detention order. Among other grounds what weighed was that he had been closely associated in the apparent mis-declaration of the position of the goods

exported by M/s J.K. Impex through J.K. Impex signed by him. He was again involved in the fraud attempted by Sh. Ravinder Bansai, partner of M/s. R.S. on enquiry through Consulate General of India at Dubai UAE the Sharjah Chamber of Commerce and Industry, P.O. Box 580, Sharjah, United Arab Emirates vide their Fossimil Transmission dated 11.6.2001 (RefNo.F/570/01) informed that the owner of M/s Fairdeal Building Chemicals is Ashok Kumar Goyal Indian. He was involved in the fraudulent exports made by M/s Dadri Inorganics Pvt. Limited by declaring the goods as "Magnesite Chrome Magnesite Ramming Mass" which was subsequently found to be mis-declared by the test reports of the CRCL at the time of re-testing of the samples.,

30. It was submitted by the learned counsel for the Union of India that no writ for habeas corpus is maintainable when the petitioner is not in jail. It was submitted that the writ for habeas corpus is maintainable only when one is in detention and he is to be freed from detention.

31. Suffice it to say, at pre-execution or pre-detention stage, writ of habeas corpus is maintainable as held by the Hon''ble Supreme Court in Alka Subhash Gadia's case (supra)

32. In Sunil Chand Shah v. Union of India, 2002(2) RCR Cri 176 at page 179, it was held that personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed in the Constitution. It was for this reason that the founding fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the state and/or maintenance of public order, must be strictly construed.

33. in my opinion, the writ of habeas corpus is maintainable even by a person who is agitating against his detention without going to jail, because if he goes to jail and challenges his order of detention and when it transpires that his detention was unlawful, it would be impossible for the State to restore to him the precious days of liberty which he had to spend in jail because of unlawful order of detention.

34. For the order of detention, it is clearly spelled out that the petitioner was involved in the "smuggling activities" and acted through a number of companies in smuggling activities.

35. For the reasons given above, I am of the opinion that his criminal writ petition must fail. It is accordingly dismissed and the impugned order of detention is upheld.