PREVENTIVE DETENTION AND THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974 (52 OF 1974): 15 KEY ASPECTS

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Article 13 (2) of the Constitution of India, 1950 mandates that the State shall not make any law which takes away or abridges the rights conferred by Part III of the Constitution of India, 1950 and any law made in contravention of this provision shall be void to the extent of the contravention. Article 31-B of the Constitution of India, 1950 saves challenge to the Acts and Regulations specified in the Ninth Schedule on the ground of inconsistency with, taking away or abridging any fundamental right. The COFEPOSA Act came into force on: 13.12.1974, and is specified in the Ninth Schedule at Item No. 104. The amendment in the COFEPOSA Act by the Central Act 20 of 1976 is specified at Item No. 129 in the Ninth Schedule[1].

According to Section 2 (39) of the Customs Act, 1962, "smuggling", in relation to any goods, means any act or omission, which will render such goods liable to confiscation under Section 111 or Section 113 of the Customs Act, 1962. Article 22 of the Constitution of India, 1950 is in two parts. The first part that comprises of Clauses (1) and (2) is applicable to those persons arrested or detained under a law otherwise than a preventive detention law. The second part that comprises of Clauses (4) to (7) applies to persons arrested or detained under the preventive detention law.

One of the safeguards provided by the Constitution of India, 1950 for minimizing as much as possible the danger of the misuse of preventive detention laws is review by Advisory Board. The reference to the Advisory Board is a safeguard against Executive vagaries and high-handed action and is a machinery to review the decision of the Executive on the basis of a representation made by the detenu against the grounds of

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[1] *Dropti Devi & Anr* V/s *Union of India & Ors*, (2012) 6 SCR 307

detention. **Advisory Board is to be set up for all cases of detention under a law authorizing detention for more than 3 months.** The Advisory Board is required to report whether there is sufficient cause for detention of detenu. If the Advisory Board reports that there is sufficient cause for detention then only the detaining authority can continue the detention of the detenu beyond the period of 3 months. If the Advisory Board reports that there is no sufficient cause for the detention then the detained person has to be released. The function of the Advisory Board is purely consultative. **Review by Advisory Board may be dispensed with under Article 22 (4) (b) of the Constitution of India, 1950 by enacting a law of preventive detention by the Parliament under Clause 7 (a) and (b) of Article 22 of the Constitution of India, 1950.**

Article 22 (4) of the Constitution of India, 1950 provides that no law providing for preventive detention shall authorize detention of a person for a longer period than 3 months unless Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court, has reported before the expiration of the said period of 3 months that there is, in its considered opinion 'sufficient cause' for such detention.

The duty and function of the Advisory Board is to determine whether there was sufficient cause for detention of the person concerned on the date on which the order of detention was passed and whether or not there is sufficient cause for the detention of that person on the date of its report.

While generally the period for which a person may be preventively detained under the COFEPOSA Act in connection with smuggling activities may not exceed a period of 1 year, in case of certain kinds of activities of smuggling into, out of or through 'any area vulnerable to smuggling' the period may extend up to 2 years. In the latter event a declaration is required to be made in the manner provided by Section 9 (1) of the COFEPOSA Act.

The requirement of Article 22 (4) of the COFEPOSA Act is satisfied by the enactment of Section 8 of the COFEPOSA Act. Section 8 (b) of the COFEPOSA Act provides that in case of every detention, the Appropriate Government shall, within 5 weeks from the date of detention, make a reference to the Advisory Board. Whenever any order of detention is made, whether the detention is to continue for a period longer than 3 months or a period of 3 months or less or the detaining authority has not yet applied its mind and determined how long the detention shall be continued, the Appropriate Government is bound within 5 weeks from the date of detention to make a reference to

the Advisory Board and if it fails to do so, the continuance of the detention after the expiration of the period of 5 weeks would be rendered invalid.

I. Even a single act of smuggling can constitute the basis for issuing an order of detention under the COFEPOSA Act:

In the matter of: ***Pooja Batra* V/s *Union of India***[2], it was held that:

i. Under the COFEPOSA Act, even based on one incident, the detaining authority is free to take appropriate action including detaining the detenu. In an appropriate case, an inference can legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activities, however, for that purpose antecedents and nature of the activities already carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him. If there is no adequate material for arriving at such a conclusion based on solitary incident the court of law is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India, 1950.

ii. In Para 40 and 41 of the report in the matter of *Pooja Batra* (Supra) it was observed that:

"… *40. Further, subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. In the matter of preventive detention, what is required to be seen is that it could reasonably be said to indicate any organized act or manifestation of organized activity or give room for an inference that the detenu would continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not repeat this activity in future.*

41. In other words, while a single act of smuggling can also constitute the basis for issuing an order of detention under the COFEPOSA Act, the highest standards of proof are required to exist. In the absence of any specific and authenticated material to indicate that he had the propensity and potentiality to continue to indulge in such activities in future, the mere fact that on one occasion person smuggled goods into the country would not constitute a

[2] (2009) 5 SCC 296

legitimate basis for detaining him under the COFEPOSA Act. This can be gathered from the past or future activities of the said person …"

II. Doctrine of Preventive Detention: Section 3 (3) of the COFEPOSA Act read with Article 22 (5) of the Constitution of India, 1950:

In the matter of: ***Rekha* V/s *State of Tamil Nadu***[3], it was held that:

i. If no bail application was pending and the detenu was already, in fact, in jail in a criminal case, the detention order under the preventive detention law is illegal. In the matter of: ***Haradhan Saha* V/s *State of West Bengal***[4], it was held that:

"*… where the person concerned is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardize the security of the State or public order…*"

ii. Article 22 (3) (b) of the Constitution of India, 1950 which permits preventive detention is only an exception to Article 21 of the Constitution of India, 1950. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution of India, 1950. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial.

iii. It is settled law that, the imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.

iv. In Para 17 of the report in the matter of *Rekha* (Supra) it was observed that:

"*… Article 22 (1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22 (3) specifically excludes the applicability of Clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers,*

[3] (2011) 5 SCC 244

[4] (1975) 3 SCC 198

who were also freedom fighters, after long, arduous and historical struggles, will become nugatory…"

v. Article 22 of the Constitution of India, 1950 cannot be read in isolation but must be read as an exception to Article 21 of the Constitution of India, 1950. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.

vi. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of one year or any other period is a punishment of one year's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive?

Thus, Article 22 (3) (b) of the Constitution of India, 1950 cannot be read in isolation, but must be read along with Articles 19 and 21 of the Constitution of India, 1950, as was held in the matter of: ***A.K. Roy* V/s *Union of India***[5].

vii. In the matter of: ***Union of India* V/s *Paul Manickam***[6], it was held that, if the detaining authority is aware of the fact that the detenu is in custody and the detaining authority is reasonably satisfied with cogent material that there is likelihood of his release and in view of his antecedent activities he must be detained to prevent him from indulging in such prejudicial activities, the detention order can validly be made.

viii. In Para 27 of the report in the matter of *Rekha* (Supra) it was observed that:

"… *In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However,*

[5] (1982) 1 SCC 271

[6] (2003) 8 SCC 342

details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed…"

ix. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22 (3) (b) of the Constitution of India, 1950 permits preventive detention, it cannot be held illegal but the power of preventive detention must be confined within very narrow limits, otherwise it will amount to taking away the great right to liberty guaranteed by Article 21 of the Constitution of India, 1950. The point of emphasis is that, if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

x. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: *was the ordinary law of the land sufficient to deal with the situation?* If the answer is in the affirmative, the detention order will be illegal.

xi. It is settled law that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

xii. Article 22 (3) (b) of the Constitution of India, 1950 is only an exception to Article 21 of the Constitution of India, 1950 and it is not itself a fundamental right.

xiii. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a "jurisdiction of suspicion". The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 of the Constitution of India, 1950 specifically excludes

the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however technical, is mandatory and vital.

xiv. The procedural requirements are the only safeguards available to a detenu (preventive detention) since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard.

xv. Procedural rights are not based on sentimental concerns for the detenu (preventive detention). The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts; they are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experiences. Moreover, it is settled law that if any person (detaining authority) procures the imprisonment of another (detenu) he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.

III. Scope of Section 5-A of the COFEPOSA Act, and, the "Grounds of Detention" ('Basic Facts' as distinguished from 'Subsidiary Details'):

In the matter of: ***Gautam Jain* V/s *Union of India & Anr.***[7],

i. An order of detention can be challenged at the pre-execution stage by the person against whom it has been passed under Article 32 of the Constitution of India, 1950.

ii. Principle of segregation of grounds enumerated in Section

[7] Criminal Appeal No. 2281 of 2014 (along with Writ Petition (Criminal) No. 203 of 2015), Supreme Court of India, Date of Decision: 04.01.2017, Coram: A.K. Sikri & A.M. Sapre, JJ.:

5-A of the COFEPOSA Act, 1974:

a. Section 5-A of the COFEPOSA Act provides that where there are two or more grounds covering various activities of the detenu, each activity is a separate ground by itself and if one of the grounds is vague, non-existent, not relevant, not connected or not proximately connected with such person or invalid for any other reason whatsoever, then that will not vitiate the order of detention.
b. Section 5-A of the COFEPOSA Act applies where the detention is based on more than one ground, not where it is based on a single ground.
c. If the detention order is based on more than one ground, independent of each other, then the detention order will still survive even if one of the grounds found is non-existing or legally unsustainable.
d. If the detention order is founded on one composite ground, though containing various species or sub-heads, the detention order would be vitiated if such ground is found fault with.

iii. Section 5-A of the COFEPOSA Act stipulates that when the detention order has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly that if one irrelevant or one inadmissible ground had been taken into consideration that would not make the detention order bad.

iv. Once it is found that the detention order contains many grounds, even if one of them is to be rejected, principle of segregation contained in Section 5-A of the COFEPOSA Act gets attracted.

v. Article 22 (5) of the Constitution of India, 1950 commands communication of the grounds on which the order of detention has been passed and to afford the detenu the earliest opportunity of making a representation against the order.

vi. In the matter of: ***Hansmukh*** **V/s** ***State of Gujarat & Ors***[8], it was held that:

"*… From these decisions it is clear that while the expression "grounds" in Article 22 (5), and for that matter, in Section 3 (3) of the COFEPOSA, includes not only conclusions of fact but also all the 'basic facts' on which those conclusions are founded, they are different from subsidiary facts or further particulars of these basic facts. The distinction between 'basic facts' which are essential factual constituents of the 'grounds' and their further particulars or subsidiary details is important. While the 'basic facts' being integral part of the 'grounds' must, according to Section 3 (3) of COFEPOSA "be communicated to the detenu, as soon as may be, after the detention, ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days from the date of detention", further particulars of those grounds in compliance with the second constitutional imperative spelled out from Article 22 (5)… are required to be communicated to the detenu, as soon as may be practicable, with reasonable expedition. It follows, that if in a case the so-called "grounds of detention" communicated to the detenu lack the basic or primary facts on which the conclusions of fact stated therein are founded, and this deficiency is not made good and communicated to the detenu within the period specified in Section 3 (3) the omission will be fatal to the validity of the detention. If, however, the grounds communicated are elaborate and contain all the "basic facts" but are not comprehensive enough to cover all the details or particulars of the "basic facts", such particulars, also, must be supplied to the detenu, if asked for by him, with reasonable expedition, within a reasonable time. What is "reasonable time conforming with reasonable expedition", required for the supply of such details or further particulars, is a question of fact depending upon the facts and circumstances of the particular case. In the circumstances of a given case, if the time taken for supply of such additional particulars, exceeds marginally, the maximum fixed by the statute for communication of the grounds it may still be regarded "reasonable", while in the facts of another case, even a delay which does not exceed 15 days, may be unjustified, and amount to an infraction of the second constitutional imperative…*"

[8] (1981) 2 SCC 175

IV. The order passed by the competent authority on the representation made by the detenu against the order of detention has to be communicated to the detenu by the competent authority and it cannot be that the order passed by the competent authority may be extracted in *extenso* or completely by a subordinate officer and that may be communicated to the detenu.

In the matter of: ***Union of India & Ors*** **V/s *Saleena*[9]**, it was held that:

i. In terms of Section 3 (3) of the COFEPOSA Act read with Article 22 (5) of the Constitution of India, 1950, there is a constitutional command to intimate the detenu the grounds on which the order of detention has been made; there is a statutory mandate that grounds of detention have to be communicated within five days and delay up to fifteen days is allowed, if reason is given in writing. There can be no shadow of doubt that if reasons are not communicated within the said time, the order of detention would be vitiated.

ii. In the matter of: ***Union of India*** **V/s *Arvind Shergill*[10]**, it was observed that, the language of Section 3 of the COFEPOSA Act clearly indicates that the responsibility for making a detention order rests upon the detaining authority which alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction is grounded. 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, cannot be stated to be invalid.

[9] Criminal Appeal No. 1251 of 2015, Supreme Court of India, Date of Decision: 29.01.2016, Coram: Dipak Misra & Prafulla C. Pant, JJ.

[10] (2000) 7 SCC 601

iii. In the Para 23 of the report in the matter of *Saleena* (Supra) it was observed that:

"… *The individual liberty has to be given paramount importance. But such liberty can be controlled by taking recourse to law. Preventive detention is constitutionally permissible. The Courts can interfere where such detention has taken place in violation of constitutional or statutory safeguards. Treating the issue of communication of rejection of the representation by the competent authority or incorporation of the order passed by the competent authority in the order of communication as a constitutional safeguard, would not be correct. The duty of the Court in this regard is to see whether the representation submitted by the detenu has been rejected in a mechanical manner without application of mind. We are inclined to hold that for the said purpose, the relevant file can be called for and perused*…"

iv. It is settled law that, the Government considers the representation made by the detenu to ascertain whether the detention order has been made within power under the law and the Advisory Board, on the other hand, considers whether in the light of the representation, there is sufficient cause for detention of the detenu.

The order of the Government rejecting the representation of the detenu should show real and proper consideration by the Government. The competent authority while considering the representation is not required to pass a speaking order but it must reflect that there has been real and proper consideration of the representation, that is 'subjective satisfaction'. But the 'subjective satisfaction' must show that the authority had the opportunity to peruse the material obtained against the detenu. The competent authority is not required to pass an adjudicatory order.

v. It is incorrect to state that a speaking order is to be passed by the Government or by the Advisory Board while approving or advising the continuance of detention of the detenu.

vi. In the Para 34 of the report in the matter of *Saleena* (Supra) it was observed that:

"… *The detaining authority on the basis of certain material passes an order of detention. The same has to be communicated at the earliest as*

mandated under Article 22 (5) of the Constitution. A period has been determined. Non-communication within the said period would be an impediment for sustaining the order of detention. Similarly, if a representation is made and not considered with promptitude and there is inordinate delay that would make the detention order unsustainable…"

vii. The correct proposition of law is that, the order passed by the competent authority on the representation made by the detenu against the order of detention has to be communicated to the detenu by the competent authority and it cannot be that the order passed by the competent authority may be extracted in *extenso* or completely by a subordinate officer and that may be communicated to the detenu.

V. Consequences following the order of detention being quashed by the High Court, but in appeal, the Supreme Court setting aside the order of the High Court:

In the matter of: ***Sunil Fulchand Shah* V/s *Union of India***[11], it was observed that:

"*… The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court* (Supreme Court), *setting aside the order of the High Court… A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there still exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of "further" or "continued" detention… That where, however, a long time has not lapsed or the period of detention initially fixed in the order of detention has not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the appellate court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention though*

[11] (2000) 3 SCC 409

normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a "set-off" against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute…"

VI. Concept of Preventive Detention & the COFEPOSA Act:

In the matter of *Dropti Devi* (Supra) it was held that:

i. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same.

ii. Since, preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of the State or public order, it has been recognized as "a necessary evil" and is tolerated in a free society in the larger interest of security of the State and maintenance of public order.

iii. The COFEPOSA Act contemplates two situations for exercise of power of preventive detention:
   a. To prevent violation of foreign exchange regulations; and,
   b. To prevent smuggling activities.

   Under Section 2 (e) of the COFEPOSA Act, "smuggling" is to be understood as defined under Clause (39) of Section 2 of the Customs Act, 1962 that provides that "smuggling" in relation to any goods, means any act or omission, which will render such goods liable to confiscation under Section 111 or Section 113 of the Customs Act, 1962. Section 111 of the Customs Act, 1962 contemplates confiscation of improperly imported goods and Section 113 of the Customs Act, 1962 contemplates confiscation of goods attempted to be improperly exported.

iv. It is incorrect to state that for exercising power under the COFEPOSA Act for detaining a person, he must be involved in criminal offence.

v. The power of Parliament to enact a law of preventive detention for reasons connected with: **(a)** defence, **(b)** foreign affairs, **(c)** security of India, **(d)** security of State, **(e)** maintenance of public order, or, **(f)** maintenance of supplies and services essential to the community, is clearly traceable to Article 22, Article 246 and Schedule Seven (List I, Entry 9, and, List III, Entry 3) of the Constitution of India, 1950.

vi. Section 3 (3) of the COFEPOSA Act mandates compliance set out therein as required in Article 22 (5) of the Constitution of India, 1950. Certain other safeguards as required in Article 22 (4) (a), and, Article 22 (7) (c) of the Constitution of India, 1950 have been provided in Sections 8 and 9 of the COFEPOSA Act. Maximum period of detention is provided in Section 10 of the COFEPOSA Act, notwithstanding the provision contained in Section 10 of the COFEPOSA Act, Section 10-A of the COFEPOSA Act provides for extension of period of detention in the situations contemplated therein and to the extent provided. Section 11 of the COFEPOSA Act empowers the Central Government or the State Government, as the case may be, to revoke any detention order.

VII. Period of detention not specified in the detention order:

In the matter of: ***Secretary to Government of Tamil Nadu, Public (Law and Order) Revenue Department & Anr.*** **V/s** ***Kamala & Anr.***[12], it was held that:

i. An order of detention cannot be quashed on the basis that no period of detention is specified in the order of detention.

ii. In the report, namely, ***T. Devaki*** **V/s** ***Government of Tamil Nadu***[13], it was held that:

"… *This Court has consistently taken the view that an order of detention is not rendered illegal merely because it does not specify the period of detention. A Constitution Bench of this Court in Ujagar Singh V/s State of Punjab [(1952) 3 SCR 756], while considering validity of*

[12] Criminal Appeal No. 507 of 2018, Supreme Court of India, Date of Decision: 10.04.2018, Coram: Chief Justice of India Dipak Misra, Justice A.M. Khanwilkar & Justice D.Y. Chandrachud

[13] (1990) 2 SCC 456

detention order made under Section 3 of the Preventive Detention Act, 1950 held that non-specification of any definite period in a detention order made under Section 3 of the Act was not a material omission rendering the order invalid. In Suna Ullah Butt V/s State of Jammu & Kashmir [(1973) 1 SCR 870], validity of detention order made under Jammu and Kashmir Preventive Detention Act, 1964 was under challenge on the ground that the State Government while confirming the detention order under Section 12 of the Act had failed to specify the period of detention. The court held that since the State Government had power to revoke or modify the detention order at any time before the completion of the maximum period prescribed under the Act, it was not necessary for the State Government to specify the period of detention. In Suresh Bhojraj Chelani V/s State of Maharashtra, [(1983) 1 SCC 382], while considering the validity of the detention order made under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 this Court rejected similar submission made on behalf of the detenu that order of detention was vitiated as the government had failed to mention the period of detention while confirming the order of detention. The court held that the COFEPOSA Act did not require the detaining authority to mention the period of detention in the order of detention. When no period is mentioned in an order, the implication is that the detention is for the maximum period prescribed under the Act…" (emphasis supplied)

VIII. It is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution.

In the matter of: ***Additional Secretary to the Government of India & Ors*** **V/s** ***Alka Subhash Gadia & Anr***[14], it was held that:

i. In Para 28 of the report in the matter of *Additional Secretary to the Government of India & Ors* (Supra) it was observed that: "… *It is to prevent the possible abuse of this draconian measure* (the COFEPOSA Act) *that the legislature has taken care to provide certain salutary safeguards*

[14] 1992 Supp (1) SCC 496

such as ***(i)*** *the obligation to furnish to the detenu the grounds of detention ordinarily within five days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention,* ***(ii)*** *the right to make representation against the order of detention,* ***(iii)*** *the constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as Judges of the High Court,* ***(iv)*** *the reference of the case of the detenu to the Advisory Board within five weeks of the date of detention,* ***(v)*** *the hearing of the detenu by the Advisory Board in person and the submission by the board of its report to the government within 11 weeks from the date of detention,* ***(vi)*** *the obligation of the government to revoke the detention order if the Advisory Board reports that there is in its opinion no sufficient cause for the detention of the person concerned,* ***(vii)*** *the provision of the maximum period for which a person can be detained and* ***(viii)*** *revocation of the detention order by the government on the representation of the detenu independently of the recommendation of the Advisory Board… In addition, the detenu or anyone on his behalf has a right to move the High Court and the Supreme Court by way of a habeas corpus petition challenging the detention…*"

ii. In Para 29 of the report in the matter of *Additional Secretary to the Government of India & Ors* (Supra) it was observed that:

"*… The provisions of Article 22 (3) (b) permit the arrest or detention of a person under any law providing for preventive detention without complying with the provisions of sub-clauses (1) and (2) of Article 22 which require that no person who is arrested shall be detained in custody, among other things, without being informed "as soon as may be" of the grounds of such arrest and that he shall not be denied the right to consult and to be defended by a legal practitioner. He shall also be required to be produced before the nearest magistrate within twenty-four hours of his arrest. Although sub-clause (5) of Article 22 also requires that the person detained under a preventive detention law would be communicated the grounds of his detention "as soon*

as may be", it also does not specify the maximum period within which the grounds are to be so communicated. In other words, the provisions of the Constitution permit the legislature to make a law under which a person may be arrested and detained without first communicating to him the grounds of his arrest…"

iii. In Para 30 to 32 of the report in the matter of *Additional Secretary to the Government of India & Ors* (Supra) it was observed that:

"*… it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied* ***(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. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question… Lastly, it is always open for the detenu or anyone on his behalf to challenge the detention order by way of habeas corpus petition on any of the grounds available to him. It is not, therefore, correct to say that no judicial review of the detention order is available… the question as to whether the detenu is entitled to the order of detention prior to its execution at least to verify whether it can be challenged at its pre-execution stage on the limited grounds available… the answer to this question has to be firmly in the negative…*" (emphasis supplied)

iv. The courts have power to interfere with the detention

orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases.

v. According to Section 2 (b) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as the "SAFEMA"), the provisions contained in the SAFEMA are applicable in respect of whom an order of detention has been made under the COFEPOSA.

IX. Four principles which should govern the consideration of representation of the detenu:

In the matter of: ***Jayanarayan Sukul*** **V/s** ***State of West Bengal***[15], it was observed that:

"… ***First****, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible.* ***Secondly****, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board.* ***Thirdly****, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State.* ***Fourthly****, the appropriate government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate government will release the detenu the government will not send the matter to the Advisory Board. If, however, the government will not release the detenu the government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the government may still exercise the power to release the detenu…*" (emphasis supplied)

X. Whether the government ought to consider the representation submitted to it irrespective of the opinion that would be given by the Advisory Board?

[15] (1970) 1 SCC 219

In the matter of: ***K.M. Abdulla & Anr* V/s *Union of India & Ors***[16], it was observed that:

"… *The obligation of the government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing the references. The government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers the representation and the case of the detenu to examine whether there is sufficient case for detention. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the government. The right to have the representation considered by the government, is safeguarded by clause (5) of Article 22* (of the Constitution of India, 1950) *and it is independent of the consideration of the detenu's case and his representation by the Advisory Board under clause (4) of Article 22* (of the Constitution of India, 1950) *read with Section 8 (c) of the Act* (COFEPOSA Act) …"

In the matter of: ***Padmavathi* V/s *Secretary to Government (Government of India, Ministry of Home Affairs) & Ors***[17], it was held that:

"… *In the case on hand, it is no doubt true that the Advisory Board had given an opinion opining that there is sufficient cause for detention of the detenu, which opinion has been accepted by the Government while confirming the order of detention. But it is to be pointed out that the Government, with an independent and open mind, has not considered the representation submitted by the detenu, without reference to the opinion of the Advisory Board and passed an order on the said representation. However, the materials available on record reveals that the detenu has been informed to place the representation before the Advisory Board, which is not the intent of Article 22 (5) of the Constitution. The Government has abdicated its power in not considering the representation submitted by the detenu, but had asked the detenu to place the representation before the Advisory Board, is against the constitutional guarantees as envisaged under Articles 22 (4) and (5) of the Constitution. Further, it is to be pointed out that though the order of detention has been confirmed on the basis of the opinion of the Advisory Board, no order has been passed on the representation submitted by the detenu till date, thereby, independent application of mind having not shown by the Government would definitely vitiate the confirmation of detention. For the reasons*

[16] (1991) 1 SCC 476

[17] High Court of Madras, H.C.P. No. 386 of 2018 and Crl. M.P. No. 2965 of 2018, Date of Decision: 12.10.2018, Coram: S. Vimala & S. Ramathilagam, JJ.

aforesaid, the constitutional mandate under Article 22 (5) having not been satisfied, there being no consideration of the representation submitted by the petitioner, the non-consideration of the representation vitiates the order of detention and is liable to be quashed…" (emphasis supplied)

XI. Non-placement by Sponsoring Authority of vital documents before the Detaining Authority for its consideration results in non-application of mind on those vital documents by Detaining Authority and thereby vitiation of subjective satisfaction, rendering the detention order illegal, null and void.

In the matter of: ***Joit Kumar Jain*** **V/s** ***State of Punjab & Ors***[18], it was observed that:

1. Resort to preventive detention instead of taking resort to ordinary law of the land is a good ground for challenging detention order even at the pre-execution stage.
2. Preventive detention is not a substitute for prosecution, and where prosecution is possible, there is no justification to resort to preventive detention.
3. It is essential for the Sponsoring Authority to place on record relevant documents before the Detaining Authority for being considered before arriving at subjective satisfaction for issuance of detention order or else the detention order would be vitiated.
4. If the material and vital documents which could influence the mind of the Detaining Authority one way or the other on the question whether or not to issue the detention order are not placed before the Detaining Authority and are thereby not considered by it, then it would be said that subjective satisfaction was vitiated rendering the detention order illegal.
5. The High Court has ample power to grant temporary release of the detenu on bail in a preventive detention matter, which however, can be exercised in exceptional circumstances.

XII. The object of detention under the COFEPOSA Act is not to punish but to prevent the commission of certain offences.

[18] 2014 SCC Online P&H 6530

In the matter of: ***Boris Sobotic Milkolic*** **V/s** ***Union of India & Ors***[19], it was held that:

1. In the matter of: ***Rajesh Gulati*** **V/s** ***Government of NCT of Delhi***[20],:

   "… *It cannot be over emphasized that the object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3(1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data…*"

2. In Para 33 in *Boris Sobotic Milkolic* (Supra), it was stated as follows:

   "… *In a given case, where there have been developments subsequent to the passing of the order of detention that make its continuation and execution otiose, it might not preclude the Court from interfering even at the pre-execution stage. In the present case, the stage at which the Petitioner has approached this Court is where the Advisory Board has declined to confirm identical detention orders of the co-detenues…*"

3. The purpose of preventive detention (detention order passed under the COFEPOSA Act) is to prevent the commission of crime.

XIII. A valid preventive detention law must satisfy requirements of both Articles 21 and 22 of the Constitution of India, 1950.

In the matter of ***Francis Coralie*** **V/s** ***Union Territory of Delhi***[21], it was held that:

i. Article 21 of the Constitution of India, 1950 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure has to be reasonable, fair and just and not arbitrary, whimsical or fanciful. **The law of preventive detention has to pass the test not only of Article 22 of the**

[19] W.P. (Crl.) 577/2018 & Crl. M.A. 3688/2018, High Court of Delhi, Date of Decision: 29.05.2018, Coram: S. Muralidhar & I.S. Mehta, JJ.

[20] (2002) 7 SCC 129

[21] (1981) 1 SCC 608

Constitution of India, 1950, but also of Article 21 of the Constitution of India, 1950.

A prisoner or detenu is not stripped of his fundamental or other legal rights, save those which are inconsistent with his incarceration and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. If the procedure is not reasonable, fair and just, the court will immediately spring into action and run to the rescue of the detenu.

ii. Punitive Detention V/s Preventive Detention:

There is a vital distinction between two kinds of detention, namely, punitive detention and preventive detention. In case of "punitive detention", the person concerned is detained by way of punishment after he is found guilty of wrongdoing as a result of a trial where he has the fullest opportunity to defend himself, while "preventive detention" is not by way of punishment at all, but it is intended to pre-empt detenu from indulging in any conduct injurious to the society.

In case of preventive detention, detenu is detained merely on suspicion with a view to prevent the detenu from doing harm in future and the opportunity that the detenu has for contesting the action of the executive is very limited. Having regard to this distinctive character of preventive detention, the restrictions placed on a detenu preventively detained must, consistently with the effectiveness of detention, be minimal.

iii. The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is included in the

right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of his right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law. A prison regulation may regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does, it would be violative of Articles 14 and 21 of the Constitution of India, 1950.

iv. In Para 12 of the report in *Francis Coralie* (Supra) it was observed as follows:

"… *We are therefore of the view that sub-clause (i) of clause 3 (b) regulating the right of a detenu to have interview with a legal adviser of his choice is violative of Articles 14 and 21 and must be held to be unconstitutional and void. We think that it would be quite reasonable if a detenu were to be entitled to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail, which appointment should be given by the Superintendent without any avoidable delay. We may add that the interview need not necessarily take place in the presence of a nominated officer of Customs/Central Excise/Enforcement but if the presence of such officer can be conveniently secured at the time of the interview without involving any postponement of the interview, then such officer and if his presence cannot be so secured, then any other jail official may, if thought necessary, watch the interview but not so as to be within hearing distance of the detenu and the legal adviser*…"

XIV. Mandate contained in Section 8 (e) of the COFEPOSA Act: Right to legal representation

In the matter of: ***Kavita* V/s *State of Maharashtra***[22], it was observed that:

i. According to Section 8 (e) of the COFEPOSA Act, a person against whom an order of detention has been

[22] AIR 1981 SC 1641

made under the COFEPOSA Act is not entitled to appear by any legal practitioner in any matter connected with reference to the Advisory Board.

An analysis of Section 8 (e) of the COFEPOSA Act would show that, Section 8 (e) of the COFEPOSA Act does not bar representation of a detenu by a lawyer. It only lays down that the detenu cannot claim representation as of right. Section 8 (e) of the COFEPOSA Act has given discretion to the Advisory Board to permit or not to permit according to the necessity of the case, the representation of a detenu by a lawyer before the Advisory Board. In complicated cases assistance of lawyers may be necessary.

ii. While there is no right under Section 8 (e) of the COFEPOSA Act to legal assistance to detenu in the proceedings before the Advisory Board, the detenu is entitled to make such a request to the Advisory Board and the Advisory Board is bound to consider such a request when so made.

XV. Impact of non-supply of relied upon and relevant documents on the detention order:

In the matter of: ***Thahira Haris* V/s *Government of Karnataka & Ors*[23],** it was held that:

i. The detenu, under Article 22 (5) of the Constitution of India, 1950, has the right to be furnished with particulars of the grounds of his detention, sufficient to enable him to make a representation which on being considered may give relief to him, and this constitutional requirement has to satisfied with respect to each of the grounds communicated to the person detained, subject to a claim of privilege under Article 22 (6) of the Constitution of India, 1950.

ii. An opportunity to make a representation against the order of detention necessarily implies that the detenu is to

[23] Criminal Appeal Nos. 723-724 of 2009, Supreme Court of India, Date of Decision: 15.04.2009, Coram: Dalveer Bhandari & Ashok Kumar Ganguly, JJ.

be informed of all that has been taken into account against him in arriving at the decision to detain him by the detaining authority. Thus, the detenu is to be informed not merely of the inferences of fact but of all the factual materials which led to the inferences of fact.

iii. It is settled law that, "grounds" in Article 22 (5) of the Constitution of India, 1950 do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The "grounds" must be self-sufficient and self-explanatory. The copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds".

iv. In the matter of: ***Icchu Devi Choraria*** **V/s** ***Union of India & Ors***[24]*,* the Hon'ble Supreme Court dealt in great detail with the significance of Article 22 (5) of the Constitution of India, 1950 and Section 3 (3) of the COFEPOSA Act, and observed as follows:

"… *Now it is obvious that when Clause (5) of Article 22 and Sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days* (from the date of detention)*, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated, in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to Clause (6)*

[24] (1980) 4 SCC 531

of Article 22 in order to constitute compliance with Clause (5) of Article 22 and Section 3, Sub-section (3) of the COFEPOSA Act… If this requirement of Clause (5) of Article 22 read with Section 3, Sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void…"

v. The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to supply all the basic facts and materials relied upon in the grounds to the detenu.

vi. The detaining authority cannot whisk away a person and put him behind bars at its own sweet will. It must have grounds for doing so and those grounds must be communicated to the detenu as expeditiously as possible, so that he can make effective representation against the order of detention.

vii. Mere service of the grounds of detention is not a compliance of the mandatory provisions of Article 22 (5) of the Constitution of India, 1950 unless the grounds are accompanied with the documents which are referred to or relied on in the grounds of detention. Any lapse would render the detention order void.

viii. On proper construction of Article 22 (5) of the Constitution of India, 1950 read with Section 3 (3) of the COFEPOSA Act, it is imperative for valid continuance of detention that the detenu must be supplied all documents, statements and other materials relied upon in the grounds of detention.

Excursus:

1. The Appropriate Government should within 5 weeks from the date of detention of the detenu, make a reference to the Advisory Board, and, the Advisory Board is to prepare its report within 11 weeks from the date of detention opining whether or not there is sufficient cause for the detention of the person concerned. If in the opinion of the Advisory Board, there is insufficient cause for detention, the detention order is revoked and the person concerned is

released from detention. (Section 8 of the COFEPOSA Act)

2. In proceedings before the Advisory Board, the question for consideration of the Advisory Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention of the detenu is based not on facts proved either by applying the test of 'preponderance of probabilities' or 'beyond reasonable doubt'. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to the conservation and augmentation of foreign exchange. The proceedings before the Advisory Board are structured in a manner different from the proceedings before the judicial or quasi-judicial tribunals, before which there is a *lis* to adjudicate upon.
3. In the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority.
4. The detenu can offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which are made against him. If the detenu desires to examine any witness, it is incumbent upon the detenu to keep the witness present at the appointed time and no obligation can be cast on the Advisory Board to summon the witness.
5. It is not necessary that a speaking order should be passed by the Appropriate Government or by the Advisory Board while approving or advising continuance of detention although a brief expression of the principal reasons is desirable.