Subhash Popatlal Dave vs Union Of India & Anr on 16 July, 2013

Author: Altamas Kabir

Bench: Altamas Kabir, Gyan Sudha Misra, J. Chelameswar

|REPORTABLE |

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL) NO.137 OF 2011

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2 SUBHASH POPATLAL DAVE … PETITIONER

VS.

2 UNION OF INDIA & ANR. … RESPONDENTS

WITH

W.P. (CRL) NOS.35, 138, 220 & 249 OF 2011
AND W.P. (CRL) NO.14 OF 2012

WITH

Crl.A. NO.932 OF 2013 (@ SLP (CRL) NO.1909 OF 2011)
Crl.A. NO.931 OF 2013 (@ SLP (CRL) NO.1938 OF 2011)
Crl.A. NO.930 OF 2013 (@ SLP (CRL) NO.2442 OF 2012) AND
Crl.A. NOS. 961-962 OF 2013
@ SLP(CRL)NOS.2091-2092 OF 2012

WITH

TRANSFERRED CASE (CRL.) NOS.2-3 OF 2013
@ TRANSFER PETITION (CRL.) NOS.38-39/2013

J U D G M E N T

ALTAMAS KABIR, CJI.

1. Leave granted in the Special Leave Petitions. Transfer Petition (Crl.) Nos.38-39 are allowed.

2. The common thread which runs through these matters being heard together is the challenge thrown in each matter to detention orders passed either against the Petitioners themselves or the persons represented by them. The common question of law involved in these Appeals, Writ Petitions and Transfer Petitions is whether a detention order passed under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as "the COFEPOSA Act, 1974", could be challenged at the pre-execution stage only on any of the five exceptions carved out by this Court in Addl. Secretary, Govt. of India vs. Alka Subhash Gadia [(1992) Supp. (1) SCC 496], or whether such challenge could be maintained on other grounds as well. The matter had come up for hearing on the said question on several days when we had occasion to consider the decisions referred to by the learned Additional Solicitor General, Mr. P.P. Malhotra in Sayed Taher Bawamiya Vs. Joint Secretary, Government of India [(2000) 8 SCC 630] and in the case of Union of India Vs. Atam Prakash & Anr. [2009) 1 SCC 585], wherein it had been held that the grounds of challenge to a detention order at the pre- execution stage could only be confined to the five exceptions set out in Alka Subhash Gadia’s case (supra). After having considered all the said decisions and the submissions made on behalf of the respective parties and keeping in mind the fact that the most precious right of a citizen is his right to freedom, we were convinced that the right of a detenue to challenge a prevention detention order passed against him at the pre- execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case (supra) required further examination. We had accordingly directed these matters to be listed for final hearing on all the grounds of challenge directed against the detention orders.

3. Appearing for the Appellants and the Writ Petitioners, Mr. Mukul Rohatgi, learned Senior Advocate, submitted that the question as to whether the five exceptions mentioned in Alka Subhash Gadia's case (supra) were only illustrative and not exhaustive had already been considered in the common judgment dated 10th July, 2012, wherein it was also held that the law is not static, but dynamic. Mr. Rohatgi reiterated his earlier submission that if a citizen's right to freedom is to be interfered with in the public interest, such powers would have to be exercised with extra caution and not simply as an alternative to the ordinary laws of the land.

4. Mr. Rohatgi submitted that if it is to be accepted that challenge to a detention order could be made at the pre-execution stage only on the five exceptions mentioned in Alka Subhash Gadia's case, it would result in restrictions being imposed on the powers vested in the Supreme Court under Article 32 and in the High Courts under Article 226 of the Constitution. Mr. Rohatgi submitted that with the passage of time since the decision rendered in Alka Subhash Gadia's case in 1992, new grounds of challenge, such as absence of live link and intervention of Settlement Proceedings under the Customs Act, 1962, have been canvassed which could not have been contemplated in Alka Subhash Gadia's case and cannot be ignored in the facts of cases now being brought before the Courts. Mr. Rohatgi submitted that a detenue must, therefore, be held to have the right to challenge the detention order passed against him, at the pre-execution stage, on different grounds in addition to the five exceptions carved out in Alka Subhash Gadia's case, but each matter would have to be considered and decided on its own set of facts.

5. In all these cases, the common refrain is that the object sought to be achieved by passing the detention orders, were no longer relevant and had become otiose, having regard to the fact that the object of a detention order is not to punish a citizen for a crime with which he had not been charged, but to prevent him from committing such crime in the future. Mr. Rohatgi submitted that in these cases the said principles have been violated and had been used by the concerned authorities as a convenient alternative to the ordinary laws of the land.

6. In this background, the matter which was taken up first and treated as the lead matter, is Writ Petition (Crl.) No. 137 of 2011, filed by Subhash Popatlal Dave, questioning the detention order issued by the Joint Secretary, Government of India, on 18.08.1997, under Section 3(1) of the COFEPOSA Act, 1974.

7. Mr. Rohatgi submitted that this was a classic example of the sheer misuse of the powers vested in the authorities to issue orders of detention as an alternative to the ordinary laws of the land. Mr. Rohatgi submitted that, unless and until, it could be shown that after the detention order was passed the detenue had indulged in activities which were similar to those on account whereof the detention order had been passed, the very reason for the detention order stood eroded. The detention order, which was to be valid for a period of one year, outlived its purpose after the said period, since there is nothing on record to show that the proposed detenue had indulged in any activities of a similar nature after the detention order was passed. Mr. Rohatgi urged that there was no existing live link between the detention order and the intention of the authorities to detain the detenue by virtue of such detention order. Apart from the above, Mr. Rohatgi submitted that a prosecution has also been commenced against the proposed detenue before the Court of Additional Chief Metropolitan Magistrate, Esplanade, Mumbai, for offences alleged to have been committed under Sections 8(1), (2), (4), 9(1)(b), 9(1)(d), 14, 27(1), 49(3),(4), 56(1) of the Foreign Exchange Regulation Act, 1973, and the matter is now pending before the FERA Appellate Tribunal, New Delhi. Mr. Rohatgi submitted that, as has been held in the recent judgment of this Court in Rekha Vs. State of Tamil Nadu [(2011) 5 SCC 244], when adequate measures and remedies under the ordinary criminal law had already been taken, there could be no necessity for issuance of detention orders by resorting to preventive detention law, on which count the impugned order of detention stands vitiated. The Petitioner prayed that the impugned detention order No. F.673/89/97-CUS.VIII dated 18.8.1997, issued by the Joint Secretary, Government of India, under Section 3(1) of the COFEPOSA Act, 1974, be declared void, unconstitutional and illegal in the interest of justice.

8. The next case is that of Nitish Prakashchand Kothari [W.P.(Crl) No. 138 of 2011], who is himself the proposed detenue under the detention order dated 3.12.2009. The said order has been challenged on several grounds, including the ground relating to the existence of a live link between the preventive detention order and the circumstances prevailing today. Mr. Rohatgi submitted that in the present case more than three and a half years have passed since the impugned detention order was passed and there is nothing on record to indicate that the proposed detenue had or was likely to indulge in activities described in the detention order.

Accordingly, the order of detention passed in respect of the Petitioner is required to be quashed.

9. In Suresh D. Hotwani's case [W.P.(Crl.) No. 35 of 2011], the proposed detenue is one Nitesh Ashok Sadarangani, and the detention order was passed on 12.3.2001. The said detention order was challenged by the Writ Petitioner before the Bombay High Court, being Criminal Writ Petition No. 1645 of 2010, which dismissed the same on 5.1.2011. S.L.P.(Crl.) No. 2442 of 2012 was filed on 29.2.2012 against the said order of dismissal of the Writ Petition filed before the Bombay High Court. However, in the meantime, the Petitioner also moved the present Writ Petition [W.P.(Crl.) No. 35 of 2011] challenging the same order of detention. Mr. Rohatgi submitted that, in fact, the challenge in the Special Leave Petition filed before this Court is against the judgment and order of the Bombay High Court dismissing the challenge to the detention order. On the other hand, Writ Petition [W.P.(Crl.) No. 35 of 2011] challenges the same detention order directly in this Court. Mr. Rohatgi submitted that the cause of action for the two proceedings are different, although, they may both arise out of the order of detention passed against the proposed detenue, Nitesh Ashok Sadarangani.

10. Mr. Rohatgi urged that the grounds for challenge of the detention order are the same as those in Subhash Popatlal Dave's case [W.P.(Crl.) No. 137 of 2011] to the extent that after an interval of more than 11 years the detention order had become stale since there is no material to indicate that the proposed detenue had indulged in any activity during this period which may have given some justification to the continuance of the concerned detention order. Mr. Rohatgi submitted that the long interval between the passing of the detention order and the execution of the order has diluted the detention order and defeated the very purpose for which it was passed. Mr. Rohatgi also drew an analogy with the case of one Shri Nikunj Kirti Kanaria, whose detention order was revoked at the pre-execution stage, since the same had become stale owing to passage of time. Mr. Rohatgi submitted that in the present case the live link stood snapped as there was no explanation for the long delay between the date of the detention order and the failure to execute the same. Referring to the decision of this Court in Maqsood Yusuf Merchant Vs. Union of India[(2008) 16 SCC 31], learned counsel submitted that this Court had set aside the detention order under the COFEPOSA Act, 1974, because of the long delay during which there was nothing on record to indicate that the proposed detenue had indulged in activities similar to those indicated in the detention order. Mr. Rohatgi submitted that on the ground of delay in serving the detention order, the same had lost its very purpose and was, therefore, liable to be quashed.

11. S.L.P. (Crl.) No. 1909 of 2011 has been filed by Anil Kailash Jain against the judgment and order dated 5.1.2011 passed by the Bombay High Court in Criminal Writ Petition No. 2675 of 2010, whereby several Writ Petitions, including that filed by Suresh D. Hotwani, were disposed of. In the instant case, the detention order was passed on 13.12.2007 and the challenge thereto was taken up for consideration by the Bombay High Court along with several other matters, including the Writ Petition filed by Suresh D. Hotwani (Criminal Writ Petition No. 1645 of 2010) and Ajay Bajaj (Criminal Writ Petition No. 103 of 2009). The same were disposed of by the Bombay High Court by a common judgment dated 5.1.2011. In fact, the same arguments, as were advanced in Suresh D. Hotwani's case, were advanced regarding the absence of a live link between the impugned detention order and the attempt to detain the Petitioner on the basis thereof after an interval of six years. It was submitted that the detention order was not sustainable, since the very object of the detention order had become stale and, therefore, redundant in the absence of any material on record to

suggest that the Petitioner had, since the passing of the detention order, indulged in any activity, similar to the one mentioned in the detention order, during the intervening years.

12. S.L.P.(Crl.) No. 1938 of 2011 was filed against the judgment and order dated 31.1.2011, passed by the Bombay High Court in Criminal Writ Petition No. 3233 of 2010, challenging the validity of the detention order No. PSA-1206/2/Spl-3(A) dated 21.8.2006, passed under Section 3(1) of COFEPOSA Act, 1974. The grounds of challenge in the Writ Petition are the same as those urged in the earlier matters, to which reference has also been made by the learned Judges of the Bombay High Court. One of the questions of law, which had been raised, is whether under the Right to Information Act, 2005, the Petitioner was entitled to copies of the detention order before its execution, which question was negated in the judgment and order dated 10.7.2012.

13. S.L.P.(Crl.) Nos.2091-92 of 2012 is directed against the judgment and order dated 24.2.2012, passed by the Delhi High Court in Writ Petition (Crl.) No. 1629 of 2011 and Criminal Misc. Application No. 18497 of 2011 filed in the said Writ Petition. In the Writ Petition before the High Court, the Petitioners challenged a detention order dated 7.10.2004, passed under Section 3(1) of COFEPOSA Act, 1974. The High Court, while considering the said Writ Petition and Criminal Miscellaneous Application, took note of the fact that the Petitioners had challenged the detention order in a previous Writ Petition, being W.P. (Crl.) No. 566 of 2005, which was dismissed by a Division Bench of the Delhi High Court on 2.1.2007. It was also noticed that after the dismissal of the Writ Petition, the judgment of the Division Bench was challenged in S.L.P.(Crl.) No. 3132 of 2007, which was also dismissed on 10.7.2007. It was also noticed that the second Petitioner, namely, the proposed detenue, Rajeev Verma, was residing in the United States and was represented by his learned Advocate, Mr. Nikhil Jain. On behalf of the Shri Rajeev Verma, the detention order has now been challenged in these Special Leave Petitions on grounds which are similar to the grounds taken in the earlier matters, namely, that seven years had passed since the detention order had been issued for a limited period of one year. The order was also challenged on the ground that the High Court had failed to appreciate the fact that an order of preventive detention is not to punish the detenue for having committed an offence but to prevent him from doing so. It was submitted that the cause of action for challenge of the detention order at this stage was on grounds which were totally different from those taken in the Writ Petition before the High Court. Reliance was placed on several decisions of this Court in Maqsood Yusuf Merchant (supra), Yusuf Razak Dhanani Vs. Union of India [W.P.(Crl.) No. 132 of 2007] and Sanjeev Jain Vs. Union of India [Crl. Appeal No. 1060 of 2010, wherein the detention orders were quashed on account of absence of any live link between the detention order and the attempt now being made to detain the proposed detenues on the basis of the same order, without any fresh material to indicate that after the passing of the detention order the proposed detenues had indulged in acts, which were similar to those indicated in the detention order.

14. Transfer Petition (Crl.) Nos. 38-39 of 2013 have been filed by one Vijay Ram Bilas Gupta, against whom a detention order, being No. PSA- 1211/CR-21(1)/SPL-3(A), was passed on 23.1.2012. Prior to the passing of the detention order, the Petitioner had filed an application for settlement of the case arising out of the Show Cause notice dated 13.12.2011, which was allowed by the Settlement Commission, Customs and Central Excise, Additional Bench, Mumbai on 29.3.2012, and the case

was settled. While settling the case, the Settlement Commission granted the Petitioner immunity from prosecution under the Customs Act, 1962. The Writ Petition filed by the Petitioner challenging the detention order, being W.P.(Crl.) No. 48 of 2012, was disposed of by this Court on 4.4.2012, with leave to the Petitioner to approach the High Court for appropriate relief, if any.

15. Pursuant to the leave granted by this Court, on 14.4.2012, the Petitioner filed Criminal Writ Petition No. 1502 of 2012, before the Bombay High Court, praying for quashing and setting aside the impugned order of detention dated 23.1.2012, in view of the settlement of the case on payment of the admitted duty liability. In view of the settlement of the case, the Bombay High Court passed an ad interim order directing the Respondents authorities not to take coercive action against the Petitioner, till the next date. On 13.6.2012, the Union of India filed Writ Petition (Lodg) No. 1523 of 2012, before the Bombay High Court, challenging the final order dated 29.3.2012, passed by the Settlement Commission. The same is still pending. During the pendency of the matter, this Court, by its interim judgment dated 10.7.2012, held that the detention orders could be challenged at the pre-execution stage even on grounds other than the five exceptions indicated in Alka Subhash Gadia's case (supra). Accordingly, the Petitioner prayed for transfer of the two pending Writ Petitions, before the Bombay High Court, one filed by the Petitioner and the other by the Union of India, to be heard along with the other matters, since the same questions of law were involved.

16. The main challenge in the Writ Petition by the Petitioner before the Bombay High Court was that instead of passing a detention order for preventive purposes, the same has been issued for punitive purposes, since the detention order issued on 23.1.2012, was in respect of evidence recorded between October and November, 2010, in respect whereof the Petitioner was arrested on 2.11.2010 and enlarged on bail on 14.12.2010. It was submitted, as in other cases, that there is nothing on record to indicate that anything has been done by the Petitioner, after the detention order was passed till date. The other relevant ground of challenge is that when the Settlement Commission under the Customs Act, 1962, had granted conditional immunity under Sub-section (1) of Section 127H of the Customs Act, there could be no further ground for either issuing or continuing with the detention order, which arises out of the facts in respect of which the Settlement Commission had granted immunity to the Petitioner.

17. Writ Petition (Crl.) No. 14 of 2012, filed by Mohan Lal Arora, is for quashing Detention Order No. 673/18/2011-CUS.VIII dated 8.9.2011, on the same grounds, as urged in the other matters relating to delay in issuing the detention order on stale grounds. It was also contended that the Detaining Authority acted merely as a rubber stamp of the Sponsoring Authority, without applying its mind independently. It was further urged that, as in other matters, the Sponsoring Authority took recourse to an order of preventive detention, without taking recourse to the ordinary laws of the land available for prosecution of offences referred to in the detention order.

18. Writ Petition (Crl.) No. 249 of 2011 filed by Manju R. Agarwal was in respect of her husband, Rajesh Kumar Agarwal, against whom detention order No. PSA-1210/CR-60/SPL-3(A) had been passed on 23.12.2010, in terms of Section 3(1) of COFEPOSA Act, 1974. The facts of this case are no different from the facts in Transfer Petition (Crl.) Nos. 38-39 of 2013. As in the said Transfer Petitions, in the instant case, on the same set of accusations, the detenue was arrested on 2.3.2010

and was, thereafter, released on bail by the Sessions Court on 5.4.2010. Thereafter, the proposed detenue, along with others, approached the Settlement Commission for settlement of the disputes in respect of the show cause notices issued to them in the manner contemplated under Sections 127-A to 127-M of the Customs Act, 1962. By an order dated 17.10.2011, the Settlement Commission allowed the applications to be proceeded with and while imposing penalty upon the proposed detenue under Sections 112-A and 114-F of the Customs Act, 1962, granted full immunity to Shri Rajesh Kumar Agarwal from payment of penalty as well as complete immunity from prosecution under the Customs Act.

19. It was urged that the detention order has lost its significance and relevance in view of the immunity from prosecution granted by the Settlement Commission under Sub-section (1) of Section 127-H of the said Act.

20. The last of this batch of matters, which was heard together, is Writ Petition (Crl.) No. 220 of 2011, filed by one Kamlesh N. Shah, the father of the proposed detenue, Bhavik Kamlesh Shah, against whom Detention Order No. PSA-1211/CR-18/SPL-3(A) was passed on 16.9.2011, under Section 3(1) of COFEPOSA Act, 1974. The grounds of challenge to the detention order are a little different from those which had been taken in the earlier matters. In the present case, apart from the grounds of delay, it has been indicated that on 7.12.2010, the proposed detenue had been taken into custody and was shown to be formally arrested on 9.12.2010, by the Director of Revenue Intelligence, Mumbai. On 3.2.2011, he was granted bail by the Court of Sessions and, while the matter was pending, the impugned detention order was passed on 16.9.2011, after a lapse of more than nine months from the date of his arrest. The Petitioner has also taken a ground that certain vital and material documents, as indicated in Ground A of the Petition, had not been placed before the Detaining Authority, as a result of which the detention order stood vitiated on the ground of non-application of mind. Reference was made to the several decisions of this Court in Asha Devi Vs. K. Shivraj [(1979) 1 SCC 222]; State of U.P. Vs. Kamal Kishore Saini [(1988) 1 SCC 287]; and Ayya alias Ayub Vs. State of U.P. [(1989) 1 SCC 374], and several other cases, where this Court had quashed the orders of detention, when relevant documents which could have had a direct bearing on the detention order, had not been placed before the Detaining Authority. It was urged that, in the instant case, the retraction of the detenue on various dates was not placed before the Detaining Authority, which not only prejudiced the detenue, but also resulted in the illegal order of preventive detention being passed against him.

21. Responding to Mr. Mukul Rohatgi's submissions as also the submissions made by the other learned counsel, the learned Additional Solicitor General, Mr. P.P. Malhotra, submitted that although the matter as far as challenge to detention orders at the pre-detention stage on grounds other than those categorized in Alka Subhash Gadia's case, had been considered earlier on 10th July, 2012, the Court was of the view that the matter required further consideration. In that context, the learned Additional Solicitor General repeated his earlier submissions, with particular reference to the decision of this Court in Sayed Taher Bawamiya's case (supra) and Atam Prakash's case (supra), wherein it had been held that a detention order could be challenged at the pre-execution stage but only with regard to the five exceptions carved out in Alka Subhash Gadia's case (supra).

22. In addition, Mr. Malhotra submitted that the delay in execution of the order of detention was mostly on account of the fact that the proposed detenue had absconded either just before or after the passing of the detention order, thereby making execution difficult, or at times impossible, but, as was held in the case of Union of India Vs. Maj. Gen. Madan Lal Yadav [(1996) 4 SCC 127], a detention order which had been validly passed by the concerned authority cannot be rendered invalid in view of the fact that the proposed detenue had absconded and was evading arrest. It was indicated that the proposed detenue should under no circumstances be allowed to take the benefit of his own wrong. Mr. Malhotra submitted that the same principle had also been followed by this Court in Dropti Devi Vs. Union of India [(2012) 7 SCC 499], where it was found that the order of detention had been passed as far back as on 23rd September, 2009, and though the order was preventive in nature and the maximum period of detention was one year, the detention order could not be executed because the second petitioner had evaded arrest wilfully and, he could not, therefore, take advantage of his own conduct.

23. On the ground of the detention order having become stale, Mr. Malhotra urged that as was pointed out by this Court in Saeed Zakir Hussain Malik Vs. State of Maharashtra [(2012) 8 SCC 233], no hard and fast rule can be laid down on the question of delay and it will depend on the facts of each case. The learned ASG referred to the decision of this Court in Bhawarlal Ganeshmalji Vs. State of Tamil Nadu [(1979) 1 SCC 465], wherein it had been urged that the detention order was liable to be quashed on the ground of delay since it had been passed in 2009 and had not been executed till that date. Mr. Malhotra pointed out that this Court held that while it is true that the purpose of detention under the COFEPOSA Act is not punitive but preventive and that there must be a live and proximate link between the grounds of detention alleged by the Detaining Authority and the purpose of detention, and that in appropriate cases it may be assumed that the live link is snapped, one may strike down an order of detention, but where the delay is found to be on account of the recalcitrant conduct of the detenue in evading arrest, it may be considered that the link had not snapped, but had been strengthened. In the said case, the detenue was found to be absconding and action was accordingly taken under Section 7 of the COFEPOSA Act and he was declared to be a proclaimed offender. Despite the several efforts made to apprehend the proposed detenue, he could not be arrested till he surrendered on 1st February, 1978, and in that context this Court held that Mr. Jethmalani's submissions regarding the delay in execution of the detention order could not be accepted. Mr. Malhotra submitted that this Court had not only refused to quash the detention order, but had categorically observed that it would strengthen the link.

24. Mr. Malhotra also referred to the decisions of this Court in Union of India Vs. Amrit Lal Manchanda [(2004) 3 SCC 75] as also in M. Ahamedkutty Vs. Union of India [(1990) 2 SCC 1], wherein it had also been observed that where the passage of time is caused by the detenue himself by absconding, the satisfaction of the Detaining Authority cannot be doubted and the detention order cannot be held to be bad on that ground. Mr. Malhotra urged that in Union of India Vs. Arvind Shergill [(2000) 7 SCC 601], this Court looked into the continued validity of a detention order after a passage of 13 years. This Court came to the conclusion that since the proposed detenue was himself instrumental in causing the inordinate delay, he could not challenge the order of detention on the ground of delay. Reference was also made to the decisions of this Court in Vinod K. Chawla Vs. Union of India [(2006) 7 SCC 337], Hare Ram Pandey Vs. State of Bihar [(2004) 3 SCC 289],

Naresh Kumar Goyal Vs. Union of India [(2005) 8 SCC 276] and Subhash Muljimal Gandhi Vs. L. Himingliana [(1994) 6 SCC 14], wherein in common it had been held that the delay in executing the order of detention could not be taken as a ground for quashing of the detention order, where such delay was occasioned by the detenue himself.

25. Mr. Malhotra submitted that in all of the aforesaid judgments cited by him, even though there was a delay in execution of the detention order, yet, the same were not quashed on that account, as the proposed detenues were wilfully evading arrest and were absconding. Mr. Malhotra submitted that once an order of detention had been passed, the person against whom the detention order was directed cannot abscond and take benefit of his own wrong. It was further submitted that it was not possible for anyone, other than the proposed detenue, to know the acts which may have been committed by the proposed detenue after the passing of the detention order, and it was, therefore, not possible for the Government to keep a track of the same and a presumption ought to be drawn against the absconder that he is absconding with the intention of evading his arrest. Accordingly, it would be wrong to contend or presume that the accused, who was absconding, would not continue or was not continuing his prejudicial activities and that the live and proximate link was snapped.

26. It was lastly submitted that for the purpose of detaining a person under the COFEPOSA Act, a Warrant of Arrest is issued under Section 4 of the Act and the said warrant continues to be in force unless the same is executed, withdrawn or cancelled. Once a valid warrant had been issued, it could not be taken as a ground to quash the detention order simply because the detenue had been successful in evading arrest or detention. The learned ASG, therefore, prayed that the Writ Petitions filed by the Petitioners, as also the Appeals and the Transfer Petitions, were liable to be dismissed.

27. Out of the 11 matters heard together, detention orders had been passed by the State of Maharashtra, under delegated powers, in six matters. Dealing with each case on its own merit, Mr. B.H. Marlapalle, learned Senior Advocate, who appeared on behalf of the State of Maharashtra in all the matters, submitted that in Nitish Prakashchand Kothari's case [W.P.(Crl) No. 138 of 2011], the detention order had been passed under Section 3(1) of the COFEPOSA Act, 1974, but the same was not executed till the Petitioner himself approached this Court. It was submitted that action under Section 7(1)(b) of the COFEPOSA Act was taken by the Detaining Authority on 27.1.2010, and an arrest warrant was also issued against him. Mr. Marlapalle submitted that the Petitioner had relied on the revocation of the detention order passed against co-accused, Shri Tarun Popatlal Kothari, against whom an order of detention was also passed simultaneously on 3.12.2009, on the basis of a common proposal. However, the said detention order was revoked on the views expressed by the Advisory Board. Mr. Marlapalle urged that the proposed detenue was claiming parity with the order passed in Shri Tarun Popatlal Kothari's case and that he had not been absconding, which caused the detention order to become stale. Mr. Marlapale submitted that the Petitioner had also claimed that he had not indulged in any prejudicial activity during the said intervening period. Furthermore, his case could not be placed before the Advisory Board and, there was no occasion, therefore, for the Board to record its opinion in this case. Despite the above, Mr. Marlapalle submitted that since the Petitioner did not choose to challenge the detention order for about two years, his Petition deserves to be dismissed.

28. With regard to Suresh Kumar Ukchand Jain's case [S.L.P. (Crl.) No. 1938 of 2011 (now Appeal)], the detention order was passed on 21.8.2006, under Section 3(1) of the COFEPOSA Act, and the said order could not also be executed. Mr. Marlapalle submitted that although the detention order had been passed in 2006, it came to be challenged for the first time before the Bombay High Court in Criminal Writ Petition No. 3233 of 2010, and was dismissed on 31.1.2011. Mr. Marlapalle submitted that in this matter the main ground of challenge to the detention order was the ground of delay, which caused the order of detention to become stale. Responding to Mr. Rohatgi's submissions, Mr. Marlapalle contended that the delay in execution of the detention order was partly on account of the authorities themselves, since in the affidavit filed by the Detaining Authority before the High Court, it was indicated that the detention order had been passed on 21.8.2006, but was received in the Office of the Commissioner of Police on 6.4.2007, and was received, in turn, by Vashi Police Station on 20.4.2007. Mr. Marlapalle submitted that when an attempt was made to serve the detention order on the Appellant at his permanent address on 30.5.2007, the Appellant was reported not to be living at the address given and the occupant of the room, one Neena Modi, informed the police officer concerned that the detenue was not staying at the said address and that the Appellant had given five different addresses, but the address at Vashi, Navi Mumbai had not been furnished. However, Mr. Marlapalle accepted the fact that there is no explanation provided as to why the detention order could not be executed by taking recourse to Section 7 of the COFEPOSA Act, 1974, or why steps were not taken to declare the Appellant as an absconder from 9.7.2007, till he approached the High Court in Writ Petition No. 3233 of 2010.

29. In the third case, which is S.L.P.(Crl.) No. 1909 of 2011 (now Appeal), filed by one Anil Kailash Jain, the detention order was passed on 13.12.2007, on the ground of duty evasion. Mr. Marlapalle submitted that a joint proposal had been submitted for the preventive detention of 13 persons including the Appellant, and orders were passed accordingly. However, while the detention orders against the co-accused individually were executed, in the Appellant's case, the same could not be executed. Subsequently, orders were passed under Section 7(1)(b) of the COFEPOSA Act and a report under Section 7(1)(a) of the said Act was submitted to the Judicial Magistrate, First Class, New Delhi. Mr. Marlapalle submitted that the Appellant filed Criminal Writ Petition No. 2675 of 2010, at the pre- execution stage, and the same was dismissed by the Bombay High Court on 5.1.2011, on the basis of the decision in Alka Subhash Gadia's case.

30. In W.P. (Crl.) No. 220 of 2011, filed by Kamlesh N. Shah, the detention order had been passed under Section 3(1) of the COFEPOSA Act, 1974, on 16.9.2011, in regard to Bhavik Shah, the proposed detenue. The proposed detenue, who is the son of the Petitioner, was alleged to be a havala operator, who had allegedly evaded customs duty to the tune of Rs. 3 crores. Mr. Marlapalle submitted that despite efforts to serve the detention order, the same could not be served as the proposed detenue remained untraceable. Summons to the detenue were also issued by the Sponsoring Authority and served on the family members of the detenue. On his failure to respond to the summons, an order was passed under Section 7(1)(b) of the COFEPOSA Act, on 7.12.2011. Mr. Marlapalle also submitted that as far as the retractions made by the purported detenue are concerned, the same were made after he had been granted bail and copies thereof were placed before the Additional Chief Metropolitan Magistrate on 31.5.2011, without copies of the same being served on the prosecutor of the departmental representative. Mr. Marlapalle submitted that it is

obvious that the Petitioner had knowledge of the detention order before he applied for bail and the retractions were made thereafter. Mr. Marlapalle submitted that the retractions, which were sent by post, were only for the purposes of challenging the detention order, when it was passed.

31. W.P.(Crl.) No. 249 of 2011 has been filed by Manju R. Agarwal, the wife of the proposed detenue, Shri Rajesh Agarwal, against whom the detention order was passed under Section 3(1) of the COFEPOSA Act, on 23.10.2010. The detention order could not be executed, till 12.12.2011, when the Writ Petition came to be filed before this Court. Mr. Marlapalle submitted that this is one of those cases in which the proposed detenue had approached the Settlement Commission under Section 127H of the Customs Act, 1962 and a settlement had been arrived at and the Settlement Commission had granted immunity from prosecution under the Customs Act to the Petitioner and the co-accused. It is on that basis that a representation was made on 11.11.2011 for revocation of the detention order dated 23.12.2010. Mr. Marlapalle submitted that it is not known as to whether the said representation was decided or not. No submission was made by Mr. Marlapalle on the issue as to whether the detention order was sustainable after the Settlement Commission had granted immunity from prosecution under the Customs Act, 1962.

32. Writ Petition (Crl.) No. 35 of 2011 and S.L.P. (Crl.) No. 2442 of 2012 (now Appeal), have been filed challenging the detention order passed under Section 3(1) of the COFEPOSA Act on 12.3.2001. Although, the petition has been filed by one Shri Suresh D. Hotwani, the name of the proposed detenue is Nitesh Ashok Sadarangani. The main ground of challenge is that the detention order had become stale since it could not be executed for nine years. Mr. Marlapalle urged that the Writ Petition was a duplication of the relief prayed for in the Special Leave Petition and was not, therefore, maintainable. Mr. Marlapalle submitted that the detention order had earlier been challenged by the Petitioner before the Bombay High Court in Criminal Writ Petition No. 1645 of 2010. The Writ Petition was finally dismissed on 5.1.2011, which order had been challenged in the Special Leave Petition, in the first instance, and it is, thereafter, that Writ Petition (Crl.) No. 35 of 2011 was filed on 2.2.2011 under Article 32 of the Constitution. Accordingly, the Writ Petition is not maintainable and is liable to be dismissed.

33. Mr. Marlapalle submitted that, on behalf of the Detaining Authority, it had been stated on affidavit that the detention order could not be served on the proposed detenue, as he remained absconding despite the steps taken to declare him as an absconder under Sections 7(1)(a) and 7(1)(b) of the COFEPOSA Act. Mr. Marlapalle submitted that the question of snapping of live link was not available to the Petitioners having regard to the fact that the same was not a ground which came within the five exceptions in Alka Subhash Gadia's case. Mr. Marlapalle repeated that the passage of time between the passing of the detention order and the challenge thrown thereto could not, by itself, be a reason to hold that the detention order had become stale. Whether the detention order had become stale or not was required to be examined in the circumstances of each case and, in any event, the proposed detenue could not take advantage of his own wrong by evading the detention order and then challenging the same on the ground of delay.

34. Mr. Marlapalle urged that in Hare Ram Pandey (supra), there was a delay of nine years, but it was held that such delay, in itself, was insufficient to hold that the detention order had become stale.

Learned counsel also referred to the other decisions in Alka Subhash Gadia (supra), Subhash Muljimal Gandhi (supra), Naresh Kumar Goyal (supra) and also State of Maharashtra Vs. Bhavrao Gawanda [(2008) 3 SCC 613], in which the delay ranged between four years and seven years, but it was held by this Court that such a ground was inadequate as the proposed detenue, having absconded, could not, thereafter, asked for the protection of the law.

35. Mr. Marlapalle lastly submitted that, in each case, there was a likelihood of the proposed detenues being released on bail, which was also one of the reasons which prompted the Detaining Authorities from passing the detention orders impugned in these several proceedings.

36. In addition to the above, Mr. Marlapalle drew the Courts' attention to Section 5A of the National Security Act, 1980, hereinafter referred to as "NSA Act, 1980", which provides that the grounds of detention are severable on certain defined grounds so as not to affect the validity of the detention order as a whole. Reference was also made to Section 7 of the Act which empowers the Central Government to pass appropriate orders in relation to absconding persons, which are in pari materia with the provisions of Section 7(1)(b) of the COFEPOSA Act, 1974.

37. Mr. Marlapalle submitted that all the Writ Petitions, Appeals and Transfer Petitions were liable to be dismissed.

38. The grounds taken on behalf of the several Petitioners/ Appellants may be encapsulated in the following manner:

> (i) That, the detention orders passed in respect of the several proposed detenues were challenged at the pre-detention stage, on grounds other than those indicated in Alka Subhash Gadia's case (supra), and that the five exceptions carved out in Alka Subhash Gadia's case were illustrative and not exhaustive.
>
> (ii) Whether any live link could be said to exist between the order of detention and the object sought to be achieved by treating the detention order as valid after the passage of several years ranging from three to sixteen years, during which period there is no record of the proposed detenue having undertaken any activities similar to the ones indicated in the detention order?

In the absence of any live link, can the detention order survive?

(iii) Whether having absconded or evaded the execution of the detention order, the proposed detenue could take advantage of such fact and challenge the detention order, which remains unexecuted?

(iv) Once the Settlement Commission under the Customs Act accepts a settlement and provides complete immunity from prosecution under Section 127H of the Customs Act, could the detention order be passed or proceeded with?

(v) Whether, when the ordinary law of the land is available, orders of preventive detention can be passed?

(vi) Whether the provisions of Section 7 of the COFEPOSA Act, 1974, and Section 7 of the National Security Act, 1980, can be made the basis for making an order of preventive detention?

39. As far as the first ground of challenge is concerned, we have already indicated in our earlier order of 10th July, 2012, that the five exceptions culled out in Alka Subhash Gadia's case were not intended to be exclusive and that the decision in Sayed Taher Bawamiya's case could not be accepted. We had indicated that it was not the intention of the Hon'ble Judges in Alka Subhash Gadia's case to confine the challenge at the pre-execution stage only to the five exceptions mentioned therein, as that would amount to stifling and imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. After considering other decisions delivered on the aforesaid proposition, after the decision in Alka Subhash Gadia's case, we had also held that the exercise of powers vested in the superior Courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions, as such powers are untrammelled and vested in the superior Courts to protect all citizens and non-citizens, against arbitrary action. As submitted by Mr. Rohatgi at the very beginning of his submissions, we had indicated that law is never static, but dynamic and that the right to freedom being one of the most precious rights of a citizen, the same could not be interfered with as a matter of course and even if it is in the public interest, such powers would have to be exercised with extra caution and not as an alternative to the ordinary laws of the land.

40. With regard to the second, third and sixth grounds of challenge, I had also dealt at length on whether a preventive detention order, which was not meant to be punitive, but preventive, could be executed after a lapse of several years during which period the live link between the order and the objects sought to be achieved by executing the order, was snapped. In my view, since it was the intention of the Sponsoring Authorities that a person having criminal propensities should be prevented from indulging in the same to the prejudice of the public at large and from also indulging in economic offences against the Revenue, it would have to be established that the intention with which the preventive detention order had been passed continued to subsist so that the same could be executed even at a later date. In none of the instant cases, have the Sponsoring Authorities or the Detaining Authorities been able to establish that after the passing of the detention order the proposed detenues had continued with their activities, as enumerated in the detention orders, which would support the proposition that the object of the detention orders continued to be valid, even after the lapse of several years. Having regard to the above, where the detention orders in the instant group of cases have not been executed for more than two years and there is no material on record to indicate that the proposed detenue had, in the meantime, continued his anti-social activities, it has to be held that the detention orders in respect of such proposed detenues were no longer relevant and must be quashed.

41. As far as the fourth ground is concerned, one has to bear in the mind that the provision of the Customs Act and other Revenue laws are mainly aimed at recovery of dues and penalties, payment whereof had been avoided and it is such manner of thinking which resulted in the amendment of the

Customs Act, 1962, by the inclusion of Chapter XIVA, by Act 21 of 1998. Chapter XIVA relates to settlement of cases and contains Sections 127A to 127N. Section 127B empowers any importer, exporter or any other person to make an application in respect of a case pertaining to him, to the Settlement Commission, to have the case settled. The Settlement Commission has been given powers to reopen completed proceedings and, thereafter, allow the said applications under Section 127F. In addition, the Settlement Commission has been empowered under Section 127H to grant immunity from prosecution and penalty. Section 127M lays down that any proceeding under Chapter XIVA before the Settlement Commission would be deemed to be a judicial proceeding, within the meaning of Sections 193 and 228 of the Customs Act, 1962 and also for the purposes of Section 196 of the Indian Penal Code.

42. Clearly, the object with which the said provisions had been introduced in the Customs Act, was not to continue with criminal prosecution or to take other steps, if a settlement proposed by an alleged offender was accepted by the Settlement Commission, which granted immunity from prosecution under the Act to the said applicant, after considering the matter from its various angles. Once such immunity from criminal prosecution is granted, the question of preventive detention for the same cause of action loses its relevance, unless the proposed detenue under the provisions of the COFEPOSA Act, 1974, or any other ancillary provisions, is involved in fresh transgression of the law.

43. At this stage, I may take notice of the provisions of Sections 6 and 7 of the COFEPOSA Act, 1974. Section 6 of the said Act provides as follows:

> "6. Detention order not to be invalid or inoperative on certain grounds – No detention order shall be invalid or inoperative merely by reason –
>
> (a) That the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or the officer making the order of detention, or
>
> (b) That the place of detention of such person is outside the said limits."

44. Section 7, on the other hand, deals with matters which are relevant to the facts of this case, since when a detention order cannot be executed against the proposed detenue, it may be presumed that he was absconding. Section 7 deals with the powers of the Government in relation to absconding persons. Since the same is of considerable relevance to the facts of this case, being one of the main grounds on which the orders of detention have been challenged, the same is also reproduced hereinbelow:

> "7. Powers in relation to absconding persons – (1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, the Government may–
>
> (a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily

> resides ; and thereupon the provisions of sections 82, 83, 84 & 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate ;
>
> (b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order ;

and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognizable."

45. It will be seen from the provisions of Section 7 that if the appropriate Government has reason to believe that a person in respect of whom a detention order has been made, is absconding, or is concealing himself so that the order cannot be executed, the Government may take recourse to the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure and his property, as if the order directing him that he be detained were a warrant issued by the Magistrate. Section 7(1)(b) also provides for penal consequences, in the event directions given thereunder, are not complied with by the proposed detenue.

46. Accordingly, Section 7 empowers the Government to take recourse to either the provisions of the Code of Criminal Procedure relating to absconding persons or pass an order directing the person concerned to appear before the concerned officer and on the detenue's failure to do so, to inflict punishment with imprisonment for a term which could extend to one year or with fine or both.

47. The provisions of Sections 6 and 7 of the National Security Act, 1980, are identical to the provisions of Sections 6 and 7 of the COFEPOSA Act, 1974.

48. In my view, the said provisions clearly enumerate the powers vested in the Authorities when a proposed detenue absconds. That, in my view, is the ordinary law of the land, and not preventive detention, which is meant to prevent the commission of offences, and not to punish an individual for violation of statutory provisions. Accordingly, in my view, the submissions made on behalf of the Union of India and the State of Maharashtra, cannot be accepted and absconsion cannot, therefore, be made a ground for making an order of preventive detention. Neither in Dropti Devi's case (supra) nor in Amrit Lal Manchanda's case or in M. Ahamedkutty's case had the above-mentioned provisions been brought to the notice of the learned Judges who heard the matters, but had no occasion to consider the same.

49. In order to arrive at a decision in these matters and to answer the question as to whether an order of preventive detention can continue to subsist after a long period had lapsed from the date of passing of the order, it will, first of all, be necessary to appreciate the difference between preventive detention and the ordinary criminal law providing for detention and arrest. While the Constitution, which is the cornucopia of all laws, accepts the necessity of providing for preventive detention, it also provides certain safeguards against arbitrariness and making use of the provision as a tool against political opponents. Since the said provision deprives a citizen of some of the basic and fundamental rights guaranteed to him under the Constitution, the Courts have dealt with laws relating to preventive detention with great care and caution to ensure that the provision was not misused by the Investigating Authorities as an easy alternative to proper investigation. Normally, the life of a preventive detention order is one year. Such a period is intended to give the detenue, who is detained without any trial, an opportunity to introspect and reflect into his past deeds, and to dissuade him from indulging in the same in future. In other words, the period of detention is intended not to punish the detenue, but to make him realize the impact of his earlier indiscretions on society and to discontinue the same.

50. Both, the Revenue, as also the police authorities, appear to be myopic in regard to the dividing line between preventive detention and arrest for a crime actually committed. On account of the above, the State and its authorities have attempted to justify the continuance of the validity of detention orders even after the lapse of several years after the passing of the detention order, citing principles such as a person cannot take advantage of his own wrong, in support thereof. Learned counsel for the respondent authorities have fused the two principles together in dealing with the question of preventive detention. A person evading service of an order of preventive detention cannot, in my view, be treated with the same yard-stick as a person, accused of having committed a criminal offence and evading arrest to thwart the criminal process initiated against him. The two principles stand on different footings. In the first place, the proposed detenue is detained without being made an accused in connection with any particular case, but to prevent him from committing an offence, whereas in the second place, a person actually charged with having committed an offence is on the run to avoid the consequences of his criminal acts. Once this difference is appreciated, an order of detention passed and remaining unexecuted for several years becomes open to question regarding its executability. If the intention of the authorities in passing a detention order is to prevent the commission of an offence by the proposed detenue in the future, then after the passage of a number of years, the concerned authorities will have to consider whether the order of preventive detention should at all be executed in the absence of any information that the proposed detenue had continued with unlawful activities. When the object of a preventive detention order is to prevent the proposed detenue from committing any offence, which is either against the national interest or the interest of society in the future and there is nothing on record to indicate that the proposed detenue had indulged in any such activity after the order of preventive detention was passed, it would, in my view, be illogical to pursue the execution of the detention order as the arrest and detention of the proposed detenue would become irrelevant and would not achieve the object for which it had been passed.

51. The decisions cited by Mr. Malhotra and Mr. Marlapalle, and in particular in Dropti Devi's case (supra), do not help the stand taken by the authorities in this regard. The concept of a person being

prevented from taking advantage of his own wrong cannot, in my view, be applied in the case of a detention order where the object of passing such an order is quite different from proceeding against a person charged with having committed a criminal offence. In my view, the continued validity of a detention order would depend on whether the proposed detenue was in the record books of the authorities as a person habitually indulging in activities which were against the national interest and society in general and that it was, therefore, necessary in the public interest to detain him for a period of one year to prevent him from continuing with such activities and not to punish him as such. In Dropti Devi's case (supra) and in the several other decisions cited by the learned Additional Solicitor General, the Court had confined itself only to the question regarding the validity of the detention order, and in the process appears to have missed the main issue regarding the difference between an order of preventive detention and the issuance of a Warrant of Arrest against a person in connection with a particular offence.

52. Accordingly, after taking into account the submissions made on behalf of the respective parties on the different aspects of the detention orders, I am inclined to hold that not only is a proposed detenue entitled to challenge the detention order at the pre-execution stage, but he is also entitled to do so after several years had elapsed after the passing of the detention order on grounds other than the five grounds enumerated in Alka Subhash Gadia's case(supra). I am also inclined to hold that orders of detention must not, as a matter of course, be read as an alternative to the ordinary laws of the land to avoid the rigours of investigation in order to make out a case for prosecution against the proposed detenue. I also hold that if a dispute leading to the issuance of the detention order is settled on the basis of a statutory provision such as Chapter XIVA of the Customs Act, 1962 and in terms of the Statute immunity from prosecution under Section 127H of the Act is given, the continuance of the order of detention would be completely illogical and even redundant. Accordingly, in such cases, the orders of preventive detention are liable to be quashed along with the Warrants of Arrest and Proclamation and Attachment issued under Sections 82 and 83 of the Code of Criminal Procedure.

53. In the light of the views expressed by me hereinbefore, the matters indicated hereinbelow are allowed and the orders of detention challenged therein are quashed on the ground that the said orders had become stale and the live link between the orders of detention and the object sought to be achieved by the said orders, stood snapped. Some of the orders had been made thirteen years ago and the very purpose of such detention orders had been rendered meaningless in the absence of any material that the proposed detenues had continued to indulge in activities which form the basis of the preventive detention orders. The following matters include Appeals arising out of the Special Leave Petitions and Writ Petitions either filed by the detenues themselves or their agents:

(i) Writ Petition (Crl.) No. 137 of 2011, filed by Subhash Popatlal Dave.

(ii) Writ Petition (Crl.) No. 35 of 2011, filed by Suresh D. Hotwani.

(iii) Writ Petition (Crl.) No. 138 of 2011, filed by Nitin Prakashchand Kothari.

(iv) Writ Petition (Crl.) No. 249 of 2011, filed by Manju R. Agarwal, wife of proposed detenue, Rajesh Kumar Agarwal.

(v) Criminal Appeal @ SLP (Crl.) No. 1909 of 2011, filed by Anil Kailash Jain.

(vi) Criminal Appeal @SLP(Crl.) No. 1938 of 2011, filed by Sureshkumar Ukchand Jain.

(vii) Criminal Appeals @ SLP (Crl.) Nos. 2091-2092, filed by Rajesh Verma.

54. However, the Transferred Cases @ Transfer Petition (Crl.) Nos. 38-39 of 2013, filed by Vijay Ram Bilas Gupta, Writ Petition (Crl.) No. 220 of 2011, filed by Kamlesh N. Shah and Writ Petition (Crl.) No. 14 of 2012, filed by Mohan Lal Arora are, in my judgment, pre-mature and are disallowed at this stage.

55. Special Leave Petition (Crl.) No. 2442 of 2012, filed by Suresh D. Hotwani is directed against the order dated 5th January, 2011, passed by the Division Bench of the Bombay High Court in Criminal Writ Petition No. 1645 of 2010, rejecting the prayer made for quashing the detention order passed against Nitesh Ashok Sadarangani on 12.3.2001. Since the said detention order is being quashed in Writ Petition (Crl.) No. 35 of 2011, also filed by the Petitioner directly against the detention order, the order of the High Court impugned in the Special Leave Petition has necessarily to be set aside also. Criminal Appeal @ S.L.P.(Crl.) No. 2442 of 2012 is, accordingly, allowed and the order of the High Court impugned therein is set aside.

.....CJI.

(ALTAMAS KABIR) New Delhi Dated:July 16, 2013.

Reportable IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION WRIT PETITION (CRL.) NO.137/2011 ETC.ETC.

Subhash Popatlal Dave .. Petitioner

Versus

Union of India & Anr. .. Respondents

J U D G M E N T

GYAN SUDHA MISRA, J.

Having deliberated over the arguments advanced by learned counsel for the contesting parties in the light of the ratio of the authoritative pronouncements of this Court referred to hereinafter on the issue involved herein which also includes a Constitution Bench judgment, I have not been able to persuade myself to accept the position that the Writ Petitions, Appeals and Transfer Cases under consideration are fit to be allowed.

2. A common question initially arose in all these matters as to whether detention order passed under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (shortly referred to as 'the COFEPOSA Act 1974) could be challenged at the pre-execution stage confined to the five exceptions carved out by this Court in the case of Additional Secretary to the Govt. of India And Ors. vs. Alka Subhash Gadia And Anr. 1992 Supp (1) SCC 496 or whether such challenge could be maintained inter alia on other grounds. This Court (Bench) has already delivered a judgment on this question vide judgment and order dated 10.07.2012 reported in (2012) 7 SCC 533 that the right of a proposed detenue to challenge a preventive detention order passed against him may be challenged at the pre-execution stage on grounds other than those set out in paragraph 30 of the judgment in Alka Subhash Gadia's case and it was held therein that the order of preventive detention can be challenged beyond the five conditions enumerated in Alka Subhash Gadia's case. To make it explicitly clear it may be reiterated that this Court has already held that the order of preventive detention can be challenged beyond the five grounds which have been enumerated in the case of Alka Subhash Gadia's case even at the pre-execution stage.

3. However, the next important question that has cropped up in all these petitions/appeals is as to whether the proposed detenues having absconded or evaded the execution of the detention order, who subsequently challenged the order of his detention even at the pre-execution stage after a long lapse of time could take advantage of non-execution and challenge the detention order which remained unexecuted. For the sake of brevity, I refrain from repeating the facts of each writ petition, Appeals and transfer petition herein which have been consolidated and heard as a batch, as they have already been recorded in the judgment and order of Hon'ble the CJI Justice Altamas Kabir.

4. Learned counsels representing the petitioners' cause submitted, which again have been elaborately stated in the judgment and order of the Hon'ble CJI, that if the detention orders which were under challenge were no longer relevant and had become otiose as it ceased to have a live link between the order of detention and the subsequent circumstances when it loses its purpose, as also having regard to the fact that the object of a detention order is not to punish its citizen for a crime with which he has not been charged but to prevent him from committing such crime in future then, whether such order of preventive detention can be held to be valid after a long lapse of time during

which the order could not be executed as also the fact that it was not executed because the same was allowed to be challenged even at the pre-execution stage, for any ground available to the proposed detenue. Hence, if such order could not be executed as the detenue was evading execution by absconding or even by challenging it in a court of law on any ground available to him under the law, then whether such order of detention can be quashed and set aside merely due to the fact that it remained pending even before it was executed and consequently lost its efficacy and purpose due to long lapse of time.

5. The life and duration of the order of preventive detention is no doubt usually for a period of one year or the period to the extent which may be extended. But if the order of preventive detention gets enmeshed into litigation by virtue of its challenge on the ground that it was fit to be challenged even before it was executed or if the same could not be executed on account of the fact that the order of detention could not be served on the proposed detenue as he was absconding and evading his arrest, then whether such detention order is fit to be quashed and set aside merely due to efflux of time rendering the order of detention a nullity in spite of existence of valid, legal and sustainable grounds for issuance of the detention order.

6. There is absolutely no difficulty in accepting the unequivocal position that the purpose of passing the order of preventive detention is not punitive but merely preventive which clearly means that if the authorities are in possession of sufficient materials indicating that the proposed detenue had been indulging in economic offences violating the provisions and jumping the riders imposed by the COFEPOSA Act or other Acts of similar nature, then whether such order can be allowed to be set aside merely due to long lapse of time accepting the plea that there is no live link between the order sought to be quashed and the intention of the authorities to detain the detenue by virtue of such detention order. This Court in a series of decisions, some of which have been referred to hereinafter have consistently dealt with this question and have been pleased to hold that merely because the execution of the detention order has taken long years before it could be executed, the proposed detenue cannot be allowed to take advantage of the passage of time during which the detention order remain pending and thereafter take the plea that the order of detention is fit to be quashed due to its pendency on which the authorities had no control specially when the order of detention is allowed to be challenged before the appropriate court even at the pre-execution stage on any ground that may be available to him except of course the materials which has weighed with the authorities to pass the order of detention as it is obvious that justifiability of the material cannot be gone into at the pre-execution stage since the order of detention and the ground for such order is yet to be served on the proposed detenue as the proposed detenue was absconding or evading the execution of the order on him for one reason or the other.

7. It would be worthwhile to refer to some of the authorities relied upon by the respondent- Union of India and the State of Maharashtra which clearly addresses the issues on the point involved herein. A judgment and order of the Constitution Bench may be cited as the first and foremost authority on the issue involved which is the matter of Sunil Fulchand Shah vs. Union of India, (2000) 3 SCC 409 wherein the Constitution Bench observed that a person may try to abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is infructuous. It was clearly held that the same plea even if raised deserved to be rejected as without

substance. It should all the more be so when the detenu stalled the service of the order and/or detention in custody by obtaining orders of the court. In fact, in Sayed Taher Bawamiya vs. Govt. of India, (2000) 8 SCC 630, the factual position shows that 16 years had elapsed yet this Court rejected the plea that the order had become stale.

8. These aspects were once again highlighted in Hare Ram Pandey vs. State of Bihar & Ors., (2004) 3 SCC 289, Union of India vs. Amrit Lal Manchanda & Anr., (2004) 3 SCC 75 and Union of India vs. Vidya Bagaria (2004) 5 SCC 577. In yet another matter of Union of India & Ors. vs. Atam Parkash & Anr. (2009) 1 SCC 585, the detention order was challenged at the pre-execution stage which remained pending for long and the High Court had allowed the writ petition filed by the respondents detenue therein and quashed the detention order restraining the appellants from enforcing the order. But, this Court overruled it and held that the judgment of the High Court was clearly unsustainable and hence was set aside. It was further held therein that the question as to whether it would be desirable to take the respondents (detenue) back to custody shall be taken by the Government within two months and appeal filed by the Union of India was allowed.

9. Similarly, in the case of Bhawarlal Ganeshmalji vs. State of Tamil Nadu And Anr. (1979) 1 SCC 465, the appellant had evaded arrest and surrendered 3 years after making of the order of detention but this Court had held that the order was still effective if detenu himself were to be blamed for delay. It is no doubt true that in this matter, the Court had further held that the purpose of detention under the COFEPOSA is not punitive but preventive and there must be a 'live and proximate link' so that if there is a long and unexplained delay between the order of detention and arrest of the detenue, the order of detention may be struck down unless the grounds indicate a fresh application of mind of the detaining authority to the new situation and the changed circumstances. But where the delay is adequately explained and is found to be the result of recalcitrant or refractory conduct of the detenu in evading the arrest, there is warrant to consider that the link is not snapped. On the contrary, it could be strengthened and that was what precisely happened in the said case.

10. In yet another case of Vinod K Chawla vs. Union of India & Ors., (2006) 7 SCC 337, this Court had occasion to consider regarding the effect of delay in execution of the detention order wherein their Lordships held that detenu evaded arrest and absconded and in spite of best possible efforts made by the authorities to serve the order, the order could not be executed. Taking the circumstances into consideration under which the order of detention could not be served, it was held that in view of detenue's own act of evading arrest, delay in execution of the order did not render the detention invalid.

11. This Court's decision in Union of India vs. Parasmal Rampuria, (1998) 8 SCC 402 also throws considerable light as to what would be the proper course for a person to adopt when he seeks to challenge an order of detention on the available grounds like delay in execution of detention order, delay in consideration of the representation and the like and while dealing with the impact of such situations on the order of detention, it was observed therein that these questions were really hypothetical in nature when the order of detention had not been executed at all and challenge is made at pre-execution stage. Their Lordships relied upon and observed as follows in paras 4 and 5 which is fit to be quoted herein for facility of reference:-

> "4. In our view, a very unusual order seems to have been passed in a pending appeal by the Division Bench of the High Court. It is challenged by the Union of India in these appeals. A detention order under Section 3(1) of the COFEPOSA Act was passed by the authorities on 13.9.1996 against the respondent. The respondent before surrendering filed a writ petition in the High Court on 23.10.1996 and obtained ad interim stay of the proposed order which had remained unserved. The learned Single Judge after hearing the parties vacated the ad interim relief. Thereafter, the respondent went in appeal before the Division Bench and again obtained ad interim relief on 10.1.1997 which was extended from time to time. The writ appeal has not been still disposed of.
>
> 5. When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution....."

12. In the matter of Hare Ram Pandey vs. State of Bihar & Ors., (2004) 3 SCC 289, effect of delay in execution of detention order was the principal issue for consideration before the court. This Court held that the plea of delay taken by the person who himself was responsible for the delay having adopted various dilatory tactics cannot be accepted. In this matter, the question regarding service of the detention order after expiry of the period specified therein was a subject matter of consideration wherein it was contended that the order was yet to be executed. This Court held that the grounds like delay in execution of the order, delay in consideration of the representation etc. are hypothetical in nature. Where a person against whom detention order passed was absconding, plea taken by him or on his behalf that the period for which detention was directed expired, deserved to be rejected. While considering this question, it was held that although the nature and object of the preventive detention order is anticipatory and non-punitive in nature, object is to maintain public order and security of State. This gives jurisdiction to curtail individual liberty by passing the detention order. Order of detention is passed on the basis of subjective satisfaction of detaining authority.

13. The legal position was reiterated in the matter of Dropti Devi and Anr. vs. Union of India & Ors., (2012) 7 SCC 499 wherein one of the questions which arose for consideration was whether the detenue could be allowed to take advantage of his own wrong on the plea that the maximum period of detention prescribed having expired and the detenue in the said case having failed to join investigation despite High Court's order would justify questioning of such order. This Court held that the detenue could not take advantage of his own wrong and challenge the detention order on the plea that the purpose of execution of detention order no longer survived as maximum statutory period of detention would have lapsed by then.

14. From the ratio of the aforesaid authoritative pronouncements of the Supreme Court which also includes a Constitution Bench judgment having a bearing and impact on the instant matters, the question which emerges is that if the order of detention is allowed to be challenged on any ground

by not keeping it confined to the five conditions enumerated in the case of Alka Subhash Gadia except the fact that there had been sufficient materials and justification for passing the order of detention which could not be gone into for want of its execution, then whether it is open for the proposed detenue to contend that there is no live link between the order of detention and the purpose for which it had been issued at the relevant time. In the light of ratio of the decisions referred to hereinabove and the law on preventive detention, it is essentially the sufficiency of materials relied upon for passing the order of detention which ought to weigh as to whether the order of detention was fit to be quashed and set aside and merely the length of time and liberty to challenge the same at the pre-execution stage which obviated the execution of the order of preventive detention cannot be the sole consideration for holding that the same is fit to be quashed. When a proposed detenue is allowed to challenge the order of detention at the pre-execution stage on any ground whatsoever contending that the order of detention was legally unsustainable, the Court will have an occasion to examine all grounds except sufficiency of the material relied upon by the detaining authorities in passing the order of detention which legally is the most important aspect of the matter but cannot be gone into by the Court as it has been allowed to be challenged at the pre-execution stage when the grounds of detention has not even been served on him.

15. Thus, if it is held that howsoever the grounds of detention might be weighty and sustainable which persuaded the authorities to pass the order of detention, the same is fit to be quashed merely due to long lapse of time specially when the detenue is allowed to challenge the order of detention even before the order of detention is served on him, he would clearly be offered with a double-edged weapon to use to his advantage circumventing the order of detention. On the one hand, he can challenge the order of detention at the pre-execution stage on any ground, evade the detention in the process and subsequently would be allowed to raise the plea of long pendency of the detention order which could not be served and finally seek its quashing on the plea that it has lost its live link with the order of detention. This, in my view, would render the very purpose of preventive detention laws as redundant and nugatory which cannot be permitted. On the contrary, if the order of detention is allowed to be served on the proposed detenue even at a later stage, it would be open for the proposed detenue to confront the materials or sufficiency of the material relied upon by the authorities for passing the order of detention so as to contend that at the relevant time when the order of detention was passed, the same was based on non-existent or unsustainable grounds so as to quash the same. But to hold that the same is fit to be quashed merely because the same could not be executed for one reason or the other specially when the proposed detenue was evading the detention order and indulging in forum shopping, the laws of preventive detention would surely be reduced into a hollow piece of legislation which is surely not the purpose and object of the Act.

16. Therefore, in my view, the order of detention is not fit to be quashed and should not be quashed merely due to long lapse of time but the grounds of detention ought to be served on him once he gains knowledge that the order of detention is in existence so as to offer him a plank to challenge even the grounds of detention after which the courts will have to examine whether the order of detention which was passed at the relevant time but could not be served was based on sufficient material justifying the order of detention. Remedy to this situation has already been offered by this Court in the matter of Union of India Vs. Parasmal Rampuria, (Supra) viz. (1998) 8 SCC 402 wherein it was observed as under:

> " the proper order which was required to be passed was to call upon the Respondent first to surrender pursuant to the detention order and then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the Constitution of India……."

17. The consequence that follows from the above is that each individual/proposed detenue will have to be served with the order of detention which had been passed against them alongwith the grounds and the materials relied upon by the authorities to pass the order of detention leaving it open to them to challenge the correctness of the order by way of a representation before the appropriate Authority or Court as per procedure prescribed. It is no doubt true that the materials relied upon at the relevant time would be on the basis of which the order of detention was passed so as to hold whether the materials were sufficient and justified or not but when the correctness of the order of detention is challenged in a court of law at the pre-execution stage, then setting aside the order of detention merely on the ground of long lapse of time might lead to grave consequences which would clearly clash with the object and purpose of the preventive detention laws.

18. Therefore, I am of the view that since this Court has already held that the order of detention can be challenged on any ground beyond five conditions even at the pre-execution stage, it is in the fitness of things that the materials relied upon by the authorities be served on the proposed detenues so as to be considered before the appropriate forum whether the order of detention was fit to be sustained or not at the relevant time. In the process what has been the activities of the proposed detenue after the order of detention was passed against them so as to quash or sustain the same will have to be considered by the Authority considering the representation or the Court examining its sustainability. If the detenues have not indulged in any illegal nefarious activities giving rise to any economic offence, subsequently they have also not saddled with a fresh order of detention. But when the order of detention of a specific date relating to the relevant period is under adjudication, then the materials relied upon by the authorities at the relevant time alone should weigh with the courts as to whether the order of detention was justified or was fit to be quashed as that has been the consistent view of this Court reflected in the decisions referred to hereinbefore. It is also not possible to lose sight of the fact that if the petitioners and the appellants had preferred not to challenge the order of detention at the pre-execution stage or had not evaded arrest, the grounds of detention would have been served on them giving them a chance to challenge the same but if the petitioners and appellants have taken recourse to the legal remedy to challenge the order of detention even before it was executed, it is not open for them to contend that it should be quashed because there is no live link between the existing/subsequent situation and the previous situation when the order of detention was passed overlooking that they succeeded in pre-empting the order by challenging it at the pre-execution stage never allowing the matter to proceed so as to examine the most crucial question whether there were sufficient material or grounds to pass the order of detention. Subsequent events or conduct in any view would be a matter of consideration for the authorities before whom the representation is filed after the grounds are served on the detenue and cannot be gone into when the only question raised is regarding the correctness and legality of the order of detention. The alternative view is bound to operate as a convenient tool in the hands of the law-breakers which has not been approved earlier by this Court in the decisions referred to earlier.

19. A fall out and consequence of the aforesaid discussion, therefore, in my view, is that the order of detention cannot be quashed and set aside merely due to long lapse of time on the specious plea that there is no live link between the order of detention and the subsequent situation. I am, therefore, of the considered opinion that the order of detention is not fit to be quashed merely due to long lapse of time specially when the orders of detention have been allowed to be challenged even at the pre-execution stage on any ground. It is, therefore, legally appropriate to serve the order of detention on the proposed detenues leaving it open to them to challenge the same after the grounds are served on them so as to appreciate whether there had been sufficient materials before the detaining authorities to pass the orders of detention which were existing at the relevant time and approve or disapprove the same. In any view, events subsequent to the passing of the order of detention is neither before us nor would be relevant at this stage while adjudging the correctness and legality of the order of preventive detention when the said orders were passed specially when this Court had no occasion to peruse the materials which prompted them to pass the order of preventive detention. In fact, there is no material before this Court even to arrive at a definite finding as to whether the proposed detenue have indulged in any activity after the passing of the order of detention nor it is relevant in my view to take into account the subsequent events while considering the correctness of the order of detention passed at the relevant time as the limited issue before this Court is whether the order of detention passed against the proposed detenues which were challenged at the pre-execution stage is fit to be quashed merely due to the passage of time. It would be equally hypothetical to observe that in case the orders of detention were served and approved by the Advisory Board and the same were challenged before the appropriate court, whether it would have been open for the appropriate court to consider the subsequent conduct of the proposed detenue in order to hold that the order of detention was fit to be quashed. Nevertheless, when the duty is cast upon this Court at this stage merely to consider whether the order of detention could be allowed to be challenged on other grounds, than what was delineated in Alka Subhash Gadia's case as also the fact whether the order of detention can be quashed on the ground of long lapse of time, it would not be legally appropriate in my view to hold that the order of detention is fit to be quashed merely because there is no live link between the existing period and situation and the date on which the order of detention was passed. I find it hard to ignore the ratio of authoritative pronouncements of this Court including a Constitution Bench judgment referred to hereinbefore on the issue holding therein that the long lapse of time will not be a valid consideration to set aside the order of detention and may be treated as stare decisis on the point involved.

20. As a consequence of the analysis in regard to the validity of the orders of detention challenged by the petitioners and appellants herein, I deem it correct and legally appropriate to hold that the orders of detention are not fit to be quashed but the same are fit to be served on the petitioners/appellants leaving it open to them to challenge the order of detention by taking recourse to the remedies available to them under the law by way of an independent proceeding including a representation against the order of detention before the competent authority which is the next legal stage after the order of detention is served on the proposed detenue. Holding it otherwise, in my view, would result into acceptance of a sordid situation akin to the adage of "Let be gone be bygone" which cannot be swallowed as that would clearly be defeating the very object and purpose of the preventive detention laws encouraging the proposed detenue to stay away and twist the arms of law misusing the provisions to their advantage. All the matters are consequently fit to be dismissed and

are dismissed leaving it open to the Petitioners/Appellants to take recourse to remedies available to them in accordance with the provisions and procedure established by law after the grounds of detention are served on them.

.....J (Gyan Sudha Misra) New Delhi July 16, 2013 Reportable IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION WRIT PETITION(CRL) NO. 137 OF 2011 Subhash Popatlal Dave ..... Petitioner Vs. Union of India & Anr. ..... Respondents WITH W.P.(CRL) NOS. 35, 138, 220 & 249 OF 2011 AND W.P.(CRL) NO. 14 of 2012 WITH CRL.A. NO. 932 OF 2013 (@ SLP(CRL) NO. 1909 OF 2011) CRL.A. NO. 931 OF 2013 (@ SLP(CRL) NO. 1938 OF 2011) CRL.A. NO. 930 OF 2013 (@ SLP(CRL) NO. 2442 OF 2012) AND CRL.A. NOS. 961-962 OF 2013 (@ SLP(CRL) NOS. 2091-2902 OF 2012) WITH TRANSFERRED CASE (CRL) NOS.2-3 OF 2013 (@ TRANSFER PETITION(CRL) NOS. 38-39 OF 2013) J U D G M E N T Chelameswar, J.

“The task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday. The seesaw between freedom and power makes up most of the history of governments, which, as Bryce points out, on a long view consists of repeating a painful cycle from anarchy to tyranny and back again. The Court’s day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyse or impair authority to defend existence of our society, and to reject as false claims in the name of security which would undermine our freedoms and open the way to oppression.....”

----- Justice Jackson in American Communications Association, C.I.O. Vs. Charles T. Douds [339 US

385) [94 Led 925 at 968].

2. In my opinion, it is a statement which every judge of Constitutional Courts vested with the authority to adjudicate the legality of any state action challenged on the ground that such action is inconsistent with civil liberties guaranteed under the Constitution must always keep in mind while exercising such authority.

3. The core question in these matters is whether this Court would be justified in exercising its jurisdiction to examine the legality of the action of the State in seeking to execute preventive detention orders (passed long ago) at the pre execution stage on the claim of each one of the petitioners herein that such execution would violate the fundamental rights of the proposed detenues.

4. The facts are elaborately described in the judgment of Hon’ble the Chief Justice of India. There is no need to repeat. Suffice to say that an order of preventive detention either under the COFEPOSA Act or the National Security Act is pending unexecuted for varying periods ranging from 2 to 10 years approximately.

5. Hence, these petitions complaining that permitting the State to execute such preventive detention orders would be violative of the fundamental rights under Articles 14, 19, 21 and 22 of the Constitution guaranteed to the proposed detenus. It is fervently argued on behalf of the petitioners

that in view of the inordinate delay in the execution of the impugned detention orders in each of the cases, live nexus between the purpose sought to be achieved by the orders of preventive detention and the cause for such orders of detention stood snapped.

6. As already noticed, in the judgment of Hon'ble the Chief Justice of India, the essential argument of the State in defence is that the proposed detenus (either personally or through proxy) may not be heard to advance such arguments in view of the fact that such delay as is complained of is a consequence of the fact that the proposed detenus evaded the process of law by absconding.

7. Personal liberty is the most valuable fundamental right guaranteed under the Constitution. Deprivation of such liberty is made impermissible by the Constitution except as authorised under the provisions of Articles 20, 21 and 22. Deprivation of personal liberty by incarceration as a penalty for the commission of an offence is one of the recognised modes by which State can abridge the fundamental right of personal liberty. Even in such case the authority of the state is circumscribed by the limitations contained under Articles 20 and 21 of the Constitution of India.

8. Article 22 of the Constitution recognises the authority of the State to preventively detain a person notwithstanding the fact that such a person is neither convicted for the commission of any offence nor sentenced in accordance with law. The authority of the State to resort to such preventive detention is more stringently regulated by the dictates of Article 22. The nature and scope of the authority to preventively detain a person, fell for the consideration of this Court on innumerable occasions.

9. This Court consistently held that preventive detention "does not partake in any manner of the nature of punishment" but taken "by way of precaution to prevent mischief to the community"[1]. Therefore, necessarily such an action is always based on some amount of "suspicion or anticipation". Hence, the satisfaction of the State to arrive at a conclusion that a person must be preventively detained is always subjective. Nonetheless, the legality of such subjective satisfaction is held by this Court to be amenable to the judicial scrutiny in exercise of the jurisdiction conferred under Articles 32 and 226 of the Constitution on certain limited grounds.

10. One of the grounds on which an order of preventive detention can be declared invalid is that there is no live nexus between (1) the material which formed the basis for the State to record its subjective satisfaction, and (2) the opinion of the State that it is necessary to preventively detain a person from acting in any manner prejudicial to the public interest or security of the State etc. In other words, the material relied upon by the State for preventively detaining a person is so stale that the State could not have rationally come to a conclusion that it is necessary to detain a person without a charge or trial.

11. The question before us is not whether the detention order impugned in these matters is illegal on the day of their making on any of the grounds known to law. Whether the execution of the preventive detention order (which might otherwise be valid) after long lapse of time reckoned from the date of the detention order would render the detention order itself illegal or would render the execution of the detention order illegal.

12. It is the settled position of law declared by this Court in a number of cases that absence of live nexus between material forming the basis and the satisfaction (opinion) of the State that it is necessary to preventively detain a person is definitely fatal to the preventive detention order. All those cases where Courts have quashed the orders of preventive detention on the theory of lack of 'live nexus' are cases where the detention orders were executed but not cases of non-execution of the detention orders for a long lapse of time after such orders came to be passed.

13. Whether the test of live nexus developed by this Court in the context of examining the legality of the order of preventive detention can be automatically applied to the question of the legality of the execution of the preventive detention orders where there is a considerable time gap between the passing of the order of preventive detention and its execution is the real question involved in these matters. To answer the question, we must analyse the probable reason for the delay in executing the preventive detention orders.

14. There could be two reasons which may lead to a situation by which the preventive detention order passed by the competent authorities under the various enactments could remain unexecuted, (1) the absconding of the proposed detenu from the process of law (2) the apathy of the authorities responsible for the implementation of the preventive detention orders.

15. The legislature was conscious of the fact that it can happen in some cases that the execution of the preventive detention order could be scuttled by the proposed detention either by concealing himself or absconding from the process of law. Therefore, specific provisions are made in this regard under various enactments dealing with the preventive detention. For example, Section 7 of the COFEPOSA Act recognises such a possibility and stipulates as follows:-

> "7. Powers in relation to absconding persons – (1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, the Government may –
>
> a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 & 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;
>
> b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine

or with both.

2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognizable."

16. It can be seen from the said section that in a case where proposed detenu is absconding or concealing himself, the Government may report the matter to the Magistrate having jurisdiction over the place where the proposed detenu ordinarily resides. On making of such report by the Government, the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure apply to the proposed detenu and his property, as if the order of preventive detention is a warrant issued by the Magistrate under the provisions of the Code of Criminal Procedure.

17. In substance, the property of the proposed detenu could be attached and perhaps even be confiscated in an appropriate case.

18. Apart from that the State can also by notification of official gazette direct proposed detenu to appear before an officer specified in the said notification at such place and time. Failure to comply with such notified direction on the part of the proposed detenu - without a reasonable cause - is made an offence punishable either with imprisonment for a term extending upto one year or with fine or both.

19. If a preventive detention order is to be quashed or declared illegal merely on the ground that the order remained unexecuted for a long period without examining the reasons for such non-execution, I am afraid that the legislative intention contained in provisions such as Section 7(b) of the COFEPOSA Act would be rendered wholly nugatory. Parliament declared by such provision that an (recalcitrant) individual against whom an order of preventive detention is issued is under legal obligation to appear before the notified authority once a notification contemplated under Section 7(b) of COFEPOSA Act is issued. We have already noticed that failure to appear without a reasonable excuse would be an offence and render the defaulter liable for a punishment of imprisonment. Holding that the preventive detention orders are themselves rendered illegal, on the basis of the live nexus theory (which, in my opinion, is valid only for examining the legality of the order, viz-a-viz the date on which the order is passed) would not only exonerate the person from the preventive detention order but also result in granting impunity to such person from the subsequent offence committed by him under the provisions such as Section 7(b) of the COFEPOSA Act.

20. This question fell for consideration of this Court on more than one occasion. In Bhawarlal Ganeshmalji Vs. State of Tamil Nadu & Anr., (1979) 1 SCC 463, this Court speaking through Justice O. Chinnappa Reddy held – "..... where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened." It was a case where the detenu evaded the arrest for a priod of more than 3 years but eventually surrendered himself before the Commissioner of Police, Madras and then challenged the order of detention. One of the submissions before this Court was that the detention order must be considered to have lapsed or ceased to be effective in the absence of the fresh application of mind of the detaining authority to the question of continuing

necessity for preventive detention. This Court rejected the submission.

21. The said principle was followed in M. Ahamedkutty Vs. Union of India & Anr., (1990) 2 SCC 1.

22. Once again in Union of India & Ors. Vs. Arvind Shergill & Anr., (2000) 7 SCC 601, this Court held that – "we do not think that it would be appropriate to state that merely by passage of time the nexus between the object for which the husband of the respondent is sought to be detained and the circumstances in which he was ordered to be detained has snapped".

It was a case where the detention order was challenged at the pre-execution stage before the High Court and the High Court had stayed the execution of the order and the matter was pending for some time. After losing the matter in the High Court, the proposed detenu approached this Court without surrendering and advanced the argument that the live nexus snapped in view of the delay in executing the preventive detention order. The submission was rejected.

23. Therefore, I am of the opinion that those who have evaded the process of law shall not be heard by this Court to say that their fundamental rights are in jeopardy. At least, in all those cases, where proceedings such as the one contemplated under Section 7 of the COFEPOSA Act were initiated consequent upon absconding of the proposed detenu, the challenge to the detention orders on the live nexus theory is impermissible. Permitting such an argument would amount to enabling the law breaker to take advantage of his own conduct which is contrary to law.

24. Even in those cases where action such as the one contemplated under Section 7 of the COFEPOSA Act is not initiated, the same may not be the only consideration for holding the order of preventive detention illegal. This Court in Shafiq Ahmad Vs. District Magistrate, Meerut, (1989) 4 SCC 556 held so and the principle was followed subsequently in M. Ahamedkutty Vs. Union of India & Anr., (1990) 2 SCC 1, wherein this Court opined that in such cases, the surrounding circumstances must be examined[2].

25. In both Shafiq Ahmad and Ahamedkutty's cases, these questions were examined after the execution of the detention order. Permitting an absconder to raise such questions at the pre-detention stage, I am afraid would render the jurisdiction of this Court a heaven for characters of doubtful respect for law.

26. This Court in the case of Alka Subhash Gadia (supra), emphatically asserted that - "it is not correct to say that the courts have no power to entertain grievances against detention order prior to its execution" This Court also took note of the fact that such an inquiry had indeed been undertaken by the Courts in a very limited number of cases and in circumstances glaringly untenable at the pre-execution stage.[3]

27. The question whether the five circumstances specified in Alka Subhash Gadia case (supra) are exhaustive of the grounds on which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not exhaustive.[4] But that does not persuade me to hold that such a scrutiny ought to be

undertaken with reference to the cases of those who evaded the process of law.

28. For all the above mentioned reasons, I regret my inability to agree with the opinion delivered by Hon'ble the Chief Justice of India. I dismiss all the matters.

.....J. (J. Chelameswar) New Delhi;

July 16, 2013.

ITEM NO.1B COURT NO.1 SECTION X
[FOR JUDGMENT]

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
WRIT PETITION (CRL.) NO(s). 137 OF 2011

SUBHASH POPATLAL DAVE Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

WITH
W.P(CRL.) NO. 138 of 2011

W.P(CRL.) NO. 35 of 2011

Crl.A.No.932/2013 arising from SLP(Crl) NO. 1909 of 2011 Crl.A.No.931/2013 arising from SLP(Crl) NO. 1938 of 2011 W.P(CRL.) NO. 220 of 2011 W.P(CRL.) NO. 249 of 2011 W.P(CRL.) NO. 14 of 2012 Crl.A.No.930/2013 arising from SLP(Crl) NO. 2442 of 2012 Crl.A.Nos.961-962/2013 arising from SLP(Crl) NOs.2091-2092 of 2012 T.C.(Crl.)Nos.2-3/2013 arising from T.P.(CRL) NOs.38-39 of 2013 Date: 16/07/2013 These Petitions were called on for JUDGMENT today.

For Petitioner(s) Mr. Ravindra Keshavrao Adsure, AOR Mr. D. Mahesh Babu, AOR Mr. Rakesh Dahiya, AOR Mr. Nikhil Jain, AOR For Respondent(s) Mr. P.P. Malhotra, ASG.

Ms. Ranjana Narayan, Adv.

Mr. Chetan Chawla, Adv.

Mr. B. Krishna Prasad, AOR Ms. Asha Gopalan Nair, AOR Mr. Arvind Kumar Sharma, AOR Mr. Gopal Balwant Sathe, AOR Dr. Kailash chand, AOR Hon'ble the Chief Justice, Hon'ble Mrs. Justice Gyan Sudha Misra and Hon'ble Mr. Justice J. Chelameswar pronounced their separate judgments. Hon'ble the Chief Justice pronounced His judgment, allowing the Writ Petitions, being 137, 35, 138, 249, all of 2011 and after granting leave in Special Leave Petitions, allowing appeals, being Criminal

Appeals @ Special Leave Petitions (Crl.) Nos. 1909 of 2011, 1938 of 2011, 2091-2092 of 2012 and 2442 of 2012 and disallowing at this stage, being pre- mature the following matters, being, Transferred Cases @ T.P.(Crl.)Nos.38-39 of 2013, W.P.(Crl.)No.220 of 2011 and W.P.(Crl.)No.14 of 2012.

Hon'ble Mrs. Justice Gyan Sudha Misra and Hon'ble Mr. Justice J. Chelameswar, while regretting inability to agree with the judgment of Hon'ble the Chief Justice, pronounced separate but concurring judgments, dismissing all the matters, the writ petitions, appeals and the transferred case.

(Sheetal Dhingra) (Juginder Kaur)
AR-cum-PS Assistant Registrar

[Signed three Reportable Judgments are placed on the file]

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[1] (a) Khudiram Das v. State of W.B., AIR 1975 SC 550 – "..... 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 (i), (ii) and (iii) of clause (1) of sub-section (1) 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 maters susceptible of objective determination and they could not be attended 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 cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction 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, and if a subjective opinion is formed by 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." 1(b) In Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another 1992 Supp (1) SCC 496, para 27 reads as -

27. The preventive detention law by its very nature has always posed a challenge before the cours in a democratic society such as ours to reconcile the liberty of the individual with the allegedly threatened interests of the society and the security of the State particularly during times of peace. It is as much a deprivation of liberty of an individual as the punitive detention. Worse still, unlike the latter, it is resorted to prevent the possible misconduct in future, though the prognosis of the conduct is based on the past record of the individual. The prognosis further is the result of the subjective satisfaction of the detaining authority which is not justiciable. The risk to the liberty of the individual under our detention law as it exists is all the more aggravated because the authority entrusted with the power to detain is not directly accountable to the legislature and the people. [2] "14. In Shafiq Ahmad v. District Magistrate, Meerut relied on by appellant, it has been clearly held that what amounts to unreasonable delay depends on facts and circumstances of each case. Where reason for the delay was stated to be abscondence of the detenu, mere failure on the part of the authorities to take action under Section 7 of the National Security Act by itself was not sufficient to vitiate the order in view of the fact that the police force remained extremely busy in tackling the serious law and order problem. However, it was not accepted as a proper explanation for the delay in arresting the detenu. In that case the alleged incidents were on April 2/3/9, 1988. The detention order was passed on April 15, 1988 and the detenu was arrested on October 2, 1988. The submission was that there was inordinate delay in arresting the petitioner pursuant to the order and that it indicated that the order was not based on a bona fide and genuine belief that the action or conduct of the petitioner were such that the same were prejudicial to the maintenance of public order. Sabyasachi Mukharji, J., as my Lord the Chief Justice then was, observed that whether there was unreasonable delay or not would depend upon the facts and circumstances of a particular situation and if in a situation the person concerned was not available and could not be served, then the mere fact that the action under Section 7 of the Act had not been taken, would not be a ground for holding that the detention order was bad. Failure to take action even if there was no scope for action under Section 7 of the COFEPOSA Act, would not by itself be decisive or determinative of the question whether there was undue delay in serving the order of detention." [3] ..Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to the 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....

[4] (2012) 7 SCC 533
