Dropti Devi & Anr vs Union Of India & Ors on 2 July, 2012

Equivalent citations: AIR 2012 SUPREME COURT 2550, 2012 (7) SCC 499, 2012 (6) ALL LJ NOC 353, (2012) 3 CHANDCRIC 21, 2012 (3) SCC(CRI) 387, 2012 (6) SCALE 80, (2012) 116 ALLINDCAS 40 (SC), 2012 (116) ALLINDCAS 40, 2012 (3) KER LT 78 SN, (2012) 4 CRIMES 736, (2012) 2 EFR 710, (2012) 52 OCR 746, (2012) 8 ADJ 32 (ALL), (2012) 78 ALLCRIC 943, (2012) 3 CURCRIR 95, (2012) 3 RECCRIR 687, (2012) 3 ALLCRIR 2507, (2012) 6 SCALE 80, (2012) 3 DLT(CRL) 35, (2012) 78 ALLCRIC 761, 2012 (95) ALR SOC 56 (SC)

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Bench: H. L. Gokhale, R. M.Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL JURISDICTION

WRIT PETITION (Crl.) NO. 65 OF 2010

Dropti Devi & Anr. …. Petitioners

Versus

Union of India & Ors.
….Respondents

JUDGMENT

R.M. Lodha, J.

The central issue in this petition under Article 32 of the Constitution concerns constitutional validity of Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, 'COFEPOSA') to the extent it empowers the competent authority to make an order of detention against any person 'with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange'.

2. It is necessary to state few material facts which have given rise to this petition. The first petitioner – Dropti Devi – is the mother of second petitioner – Raj Kumar Aggarwal. In respect of second petitioner an order of detention has been passed on September 23, 2009 by Smt. Rasheda Hussain, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the COFEPOSA (as amended). The said order reads as follows :

> "No. 673/02/2009-Cus. VIII Government of India Ministry of Finance Department of Revenue Central Economic Intelligence Bureau COFEPOSA Unit 6th Floor, 'B' Wing, Janpath Bhawan, Janpath, New Delhi – 110001 Dated 23rd September, 2009 ORDER Whereas, I Smt. Rasheda Hussain, Joint Secretary to the Government of India, specially empowered under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (as amended), am satisfied with respect to the person known as Shri Raj Kumar Aggarwal @ Munna, R/o SU-184, G.F. Near Park Citi Hostel Pitampura, New Delhi that with a view to preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange in future, it is necessary to make the following order:-
>
> Now, therefore, in exercise of the powers conferred by Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (as amended), I direct that the said Shri Raj Kumar Aggarwal @ Munna , be detained and kept in custody in the Central Jail, Tihar, New Delhi.
>
> Sd/-
>
> (Rasheda Hussain) Joint Secretary to the Government of India"

3. The above detention order came to be passed in the backdrop of the following events. On February 17, 2009 the premises of Ambika Electronics situate at 136, MCD Market, Karol Bagh, New Delhi was raided by the Office of the Directorate of Enforcement, New Delhi. In the course of search, Indian currency amounting to Rs. 8.9 lacs (approximately) was recovered along with some documents. The enforcement authorities took into custody the passport of second petitioner (hereinafter referred to as 'detenue') as well. On that day itself, i.e. February 17, 2009 Office of the Directorate of Enforcement also raided the residential premises of detenue's brother Anil Kumar Aggarwal at Pitam Pura, New Delhi and another commercial premises of Ambika Electronics at Beadanpura, Karol Bagh, New Delhi and M/s. Bhagwati Electronics, 135 Municipal Market, Karol Bagh, New Delhi belonging to one Kapil Jindal were also raided. The detenue was also taken away by the officials of the Directorate of Enforcement to their office at Jamnagar House, Akbar Road,

New Delhi in the intervening night of February 17, 2009 and February 18, 2009. The detenue was interrogated and his statement was recorded. On February 19, 2009 the detenue retracted from the statement recorded in the previous night. The detenue was summoned on various occasions but he did not appear before the authorities on the ground of his illness. On May 15, 2009 the detenue appeared before the authorities and his statement was recorded on that day and subsequently on May 18, 2009. May 20, 2009 and May 28, 2009. The evidence gathered in the course of searches and the follow up action revealed that the detenue was indulging in hawala activities, the last of such activity being on April 24, 2009. Hence, the detention order which has been quoted above.

4. Initially a writ petition was filed before this Court challenging the detention order but that was withdrawn. The first petitioner then filed a writ petition before Delhi High Court being W.P. (Crl.) No. 1787 of 2009 challenging the detention order dated September 23, 2009.

5. The Division Bench of the Delhi High Court on December 14, 2009 by an interim order directed that the detenue – Raj Kumar Aggarwal shall not be arrested till the next date of hearing, i.e. December 22, 2009.

6. On December 22, 2009 the Division Bench allowed the application for impleadment of Raj Kumar Aggarwal as petitioner no. 2, issued rule and made interim order dated December 14, 2009 absolute during the pendency of writ petition, subject to his joining the investigation as and when called. The court on that day also issued a direction to the detenue to remain present in the matter during the course of hearing.

7. The Division Bench completed the hearing on February 4, 2010 and reserved the judgment in the matter. On March 18, 2010, the Division Bench dismissed the writ petition. While dealing with the effect of Foreign Exchange Management Act, 1999 (for short, 'FEMA') and the repeal of Foreign Exchange Regulation Act, 1973 (for short, 'FERA') , the Division Bench relied upon a decision of this Court in Union of India & Anr. vs. Venkateshan S. and another[1] and observed that if the activity of any person was prejudicial to the conservation or augmentation of foreign exchange, the authorities were empowered to make a detention order against such person.

8. Not satisfied with the judgment of the Delhi High Court passed on March 18, 2010, the petitioners filed a special leave petition before this Court and it was mentioned on April 1, 2010. On that day, the Court directed for listing the matter on April 9, 2010 and in the meanwhile continued the interim order that was passed by the High Court operative during the pendency of the writ petition.

9. It may be noted here that while the above special leave petition was pending, the petitioners preferred the present writ petition. On May 11, 2010 the Court ordered the writ petition to be heard along with special leave petition (Crl.) no. 2698 of 2010. On May 13, 2010, the special leave petition and the present writ petition were listed before the Court. On that day in the special leave petition following interim order was passed :

> "By order dated December 22, 2009, the High Court directed the Petitioner No. 2 i.e. Mr. Raj Kumar Aggarwal to join the investigation as and when called. The grievance

made by the respondents is that Mr. Raj Kumar Aggarwal has failed to join the investigation, which is disputed by Mr. Soli J. Sorabjee, learned senior counsel for the petitioners. Mr. Sorabjee further states that Mr. Raj Kumar Aggarwal will present himself on 19th May, 2010 at 11 A.M. in the office of the Enforcement Director, Delhi Zonal Office, Jamnagar House, New Delhi and shall also remain present before the said officer as and when called along with the requisite documents. Mr. Raj Kumar Aggarwal is directed to comply with and act according to the statement made at the Bar by his learned counsel.

Interim orders shall continue subject to the direction given above.

In view of the order passed above, learned senior counsel for the petitioners seeks permission to withdraw the application for extension of interim order granted by this Court on 1.4.2010. The permission, as prayed for, is granted and application is disposed of accordingly.

On the joint request of the learned counsel of the parties, the matter is adjourned to 13th July, 2010."

10. In the writ petition, notice was issued and it was detagged from special leave petition (Crl.) No. 2698 of 2010.

11. On July 13, 2010, the special leave petition was dismissed as withdrawn. The Court passed the following order :

"The Special Leave Petition is dismissed as withdrawn.

The petitioners are at liberty to avail such remedy as may be available in law challenging the order of detention and the grounds on which detention order has been passed after its execution. In which event, the matter shall be considered on its own merits uninfluenced by the observations made in the impugned order as well as dismissal of this petition. The High Court may consider the request of the petitioners/detenue for expeditious disposal of the writ petition to be filed."

12. We have heard Mr. Vikram Chaudhari, learned counsel for the petitioners and Mr. P.P. Malhotra, learned Additional Solicitor General for the respondents.

13. The crux of the argument advanced by Mr. Vikram Chaudhari is this: Articles 14, 19 and 21 of the Constitution do not contemplate preventive detention for an 'act' where no punitive detention (arrest and prosecution) is even contemplated or provided under law. Such an 'act' cannot be made the basis for a preventive detention and such an 'act' could not be termed as prejudicial so as to invoke the power of preventive detention and, therefore, Section 3(1) of COFEPOSA to the extent noted above is unconstitutional.

14. Elaborating his arguments, Mr. Vikram Chaudhari submitted that there were three other Central Preventive Acts apart from COFEPOSA, namely,

(a) National Security Act, 1980, (b) Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 and (c) Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Act, 1974. In all these three enactments, there are corresponding penal provisions in the form of prosecution. However, in COFEPOSA viz., the power to detain a person to prevent him from indulging in any prejudicial activities relating to conservation or augmentation of foreign exchange is given although there is no corresponding penal punitive law available. He referred to various provisions of FEMA, particularly, Chapter IV that deals with contravention and penalties; Chapter V that provides for adjudication as well as appeal against the order of adjudicating authority vide Sections 16 and 17; Chapter VI that provides for establishment of Directorate of Enforcement; Section 40 that stipulates that the Central Government may in any peculiar circumstances suspend either indefinitely or for a limited period the operation of all or any of the provisions of FEMA and Section 49 which provides for repeal of FERA and sub-section (3) thereof that envisages that no court shall take cognizance of an offence under the repealed Act and submitted that there was major shift in the approach of the Legislature inasmuch as foreign exchange violation has been made a civil compoundable offence only under FEMA.

15. It was argued by learned counsel for the petitioners that a dichotomy had arisen on repeal of FERA as conviction under FERA would be no longer a relevant basis for initiation of proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) whereas on the same set of accusations detention order under COFEPOSA could be made thereby warranting proceedings under SAFEMA.

16. Relying on the decisions of this Court in Motor General Traders and another v. State of Andhra Pradesh and others[2], John Vallamattom and another v. Union of India[3] and Satyawati Sharma (Dead) by LRs. v. Union of India and another[4], learned counsel for the petitioners contended that impugned portion of Section 3 might not have been unconstitutional at the initial stage when it was enacted but by reason of the new legal regime articulated in FEMA and replacement of FERA by FEMA, the said provision has become unconstitutional in the changed situation.

17. Learned counsel for the petitioners submitted that though Article 31B of the Constitution provided protection to the laws added to the Ninth Schedule by amendments but, as exposited by this Court in I.R. Coelho (Dead) by LRs. v. State of T.N.[5], constitutionality of such laws can be examined and if in judicial review, it is found that any of such laws abrogates or abridges rights guaranteed by Part-III of the Constitution, the Court can invalidate such law. According to him, since the impugned provision violates fundamental rights reflected in Article 21 read with Articles 14 and 19, despite protection granted to COFEPOSA being part of Ninth Schedule, in the judicial review the Court has power to declare the said law unconstitutional.

18. Mr. Vikram Chaudhari contended that preventive detention was aimed at preventing a person from committing prejudicial act which is necessarily an offence capable of inviting penal consequences. If such prejudicial act was not prosecutable in law and such act has not been made

part of criminal penal law, preventive detention of a person from committing the prejudicial act which is not an offence is impermissible. In this regard, he sought to draw support from decisions of this Court in State of Bombay v. Atma Ram Sridhar Vaidya[6]; Bhut Nath Mete v. The State of West Bengal[7]; Haradhan Saha v. The State of West Bengal and others[8]; Kanchanlal Maneklal Chokshi v. State of Gujarat and others[9]; Smt. Hemlata Kantilal Shah v. State of Maharashtra and another[10]; State of Punjab v. Sukhpal Singh[11] and Rekha v. State of Tamil Nadu Through Secretary to Government and Another[12].

19. As regards the decision of this Court in Venkateshan S.1, learned counsel submitted that in that case the events which led to the detention of the detenue therein had taken place when FERA was in place and FEMA had not come into force and in view of the sunset clause the prosecution for violation of FERA could continue for next two years and, therefore, the said decision was clearly distinguishable. He further submitted that constitutionality of Conservation of Foreign Exchange (COFE) part of COFEPOSA was not in issue. The Court proceeded on the assumption that the past act which was made basis for preventive detention invited punishment by way of prosecution and decided the matter accordingly. He thus, argued that Venkateshan S.1 did not come in the way of the petitioners in assailing the constitutional validity of part of Section 3 of COFEPOSA.

20. Learned counsel vehemently contended that since FEMA did not regard its violation a criminal offence, the whole idea, spirit, intent and object behind the enactment of preventive detention had ceased to exist and the continuation of such provision was violative of Article 21 read with Articles 14 and 19 of the Constitution. He, thus, submitted that the provision for preventive detention under COFEPOSA was wholly unsustainable and untenable.

21. Mr. Vikram Chaudhari in his written submissions has also dealt with legal position with regard to preventive detention existing in USA, England, Australia and Germany. He referred to the excerpts from “The Limits of Preventive Detention” by Rinat Kitai – Sangero 2009 (Pgs. 904-

932) and submitted that in USA and in England law regarding preventive detention does not exist except during war time. He, however, did submit that in United States v. Anthony Salerno and Vincent Cafaro[13] the constitutionality of pre-trial detention on the ground of dangerousness under the Bail Reform Act of 1984 was upheld and after Anthony Salerno and Vincent Cafaro 13 preventive detention laws were adopted in number of U.S. States but the said procedure has been used sparingly and in U.K. under the Prevention of Terrorism (Temporary Provisions) Act, 1984 a person may be detained upto 7 days. In Australia preventive detention orders and prohibited conduct orders are two mechanisms available under criminal law for addressing terrorism concerns and dangerous sex offenders. The preventive detention order permits detention of a person for a short period of time (upto 48 hours) subject to certain procedural rights. In Germany in 1998 law for the prevention of sexual offences and other dangerous criminal acts has been enacted.

22. Mr. P. P. Malhotra, learned Additional Solicitor General stoutly defended the constitutional validity of the part of Section 3(1) of COFEPOSA put in issue in the writ petition. He extensively referred to the provisions of FERA and FEMA and the preamble of COFEPOSA and submitted that dealings in foreign exchange by a person other than authorised persons/dealers have serious and

deleterious consequences. The foreign exchange is the most precious reserve for national economy and necessary for the economic security of the State and illegal and/or unaccounted transactions through hawala have vide ramifications and are definitely prejudicial to the conservation and augmentation of foreign exchange and since the need for conservation and augmentation of foreign exchange resources of the country continue to exist, preventive mechanism laid down in COFEPOSA warrants its continuance and there is nothing unconstitutional about it.

23. Learned Additional Solicitor General submitted that the legislative power of the Parliament to enact criminal laws and preventive detention laws was traceable from two distinct Entries appearing in Seventh Schedule (List III) of the Constitution, i.e., Entry nos. 1 and 3 respectively. Parliament is, thus, fully competent to enact a law of either type (criminal or preventive detention) or both the types (criminal laws and preventive detention) to deal with any prejudicial activity. He submitted that there was no constitutional prescription that the Legislature must enact a criminal law as well while making a detention law to curb any prejudicial activity. It is not imperative that detention law should co-exist with a criminal law or vice versa.

24. Mr. P.P. Malhotra submitted that the constitutional validity of COFEPOSA had already been upheld by a 9-Judge Bench of this Court in Attorney General for India and others v. Amratlal Prajivandas and others[14]. In Amratlal Prajivandas14 this Court has held that Parliament was competent to enact COFEPOSA. Once constitutional validity of COFEPOSA has been upheld by a 9-Judge Bench of this Court, learned Additional Solicitor General submitted that constitutionality of Section 3 was not open to challenge again. He submitted that in I.R. Coelho5 a 9- Judge Bench of this Court had observed that if the validity of a Ninth Schedule law had already been upheld by this Court, it would not be open to challenge such law again on the principles laid down in the case (i.e., I.R. Coelho5). However, if a law held to be violative of any rights in Part-III was subsequently incorporated in the Ninth Schedule after April 24, 1973, such a violation/infraction would be open to challenge on the ground that it was destructive of the basic structure of the Constitution. The present case is not covered by the exception carved out in I.R. Coelho5 and moreover, the petitioners have miserably failed to make out a case as to how COFEPOSA or impugned provision was destructive of the basic structure of the Constitution.

25. In support of his submissions, learned Additional Solicitor General heavily relied upon the observations made by this Court in Venkateshan S.1.

26. Mr. P.P. Malhotra submitted that the objects and reasons of COFEPOSA clearly showed that the purpose of the enactment was to prevent violation of foreign exchange regulation and smuggling activities which have increasingly deleterious serious effect on the security of the State. Section 3 of COFEPOSA has not been amended or repealed by Parliament. Section 3(1) of COFEPOSA that authorises detention with a view to prevent activities prejudicial to the conservation or augmentation of foreign exchange is valid from constitutional angle.

27. On 26th day of November, 1949, People of India resolved to constitute India into Sovereign Democratic Republic and in the Constituent Assembly adopted, enacted and gave to themselves an instrument of social contract – the Constitution of India – which became effective from January 26,

1950. The Constitution of India is fountainhead of all laws and provides the machinery by which laws are made. Any statutory law, in order to be valid, must be in conformity with the constitutional requirements. There cannot be any departure or deviation from this principle. For the purposes of the present matter, it is not necessary to deal with the diverse features of the Constitution elaborately, suffice, however, to state that Part III that provides for fundamental rights is the most important chapter insofar as individuals and citizens are concerned.

28. Article 12 for the purposes of Part III defines 'the State'.

29. Article 13(2) mandates that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this provision shall be void to the extent of the contravention.

30. Article 14 states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

31. Article 19 protects certain rights of the citizens. It provides that all citizens shall have the right – (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions or co-operative societies; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India and (g) to practice any profession or to carry on any occupation, trade or business. The above clauses (a), (b), (c), (d),

(e) and (g) are, however, subject to restrictions set out in Article 19(2)(3)(4)(5) and (6) respectively.

32. Article 21, which is the most sacrosanct and precious of all other Articles insofar as an individual is concerned, guarantees protection of life and personal liberty. It mandates that no person shall be deprived of his life or personal liberty, except according to procedure established by law.

33. Article 31B saves challenge to the Acts and Regulations specified in the Ninth Schedule on the ground of inconsistency with, taking away or abridging any fundamental right. It was brought into statute by the Constitution (First Amendment) Act, 1951. It reads as follows:

> "31B. Validation of certain Acts and Regulations.—Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes way or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court of tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

34. COFEPOSA is specified in the Ninth Schedule at Item No. 104. The amendment in COFEPOSA therein by Central Act 20 of 1976 is specified at Item No. 129 in the Ninth Schedule.

35. Article 22 is in two parts. First part that comprises of clauses 1 and 2 is applicable to those persons arrested or detained under a law otherwise than a preventive detention law. The second part that comprises of clauses 4 to 7 applies to persons arrested or detained under the preventive detention law.

36. In the backdrop of the above constitutional provisions and scheme, the issue with regard to constitutional validity of Section 3(1) of COFEPOSA to the extent it empowers the competent authority to make an order of detention against any person with a view to preventing him from acting in any manner prejudicial to the conservation and augmentation of foreign exchange has fallen for consideration.

37. There appears to be consistent line of cases of this Court beginning from 1950 itself which says that preventive detention can constitutionally operate. In A.K. Gopalan v. The State of Madras[15], which was decided by this Court within few months of coming into force of our Constitution, the Court upheld the constitutional validity of Section 3(1) of the Preventive Detention Act, 1950 on the touchstone of Articles 13, 14, 19, 21 and 22 of the Constitution.

38. In Atma Ram Sridhar Vaidya6 , Chief Justice Hari Lal Kania said that preventive detention was not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. He, however, clarified that this was, of course, subject to the limitations prescribed in clause (5) of Article 22. Echoing the same sentiment, Patanjali Sastri, J. stated, "the Constitution itself has authorised preventive detention and denied to the subject the right of trial before a court of law and of consulting or being defended by a legal practitioner of his choice, providing only certain procedural safeguards, the Court could do no more than construe the words used in that behalf in their natural sense consistently with the nature, purpose and scheme of the measure thus authorised, to ascertain what powers are still left to the court in the matter".

39. A Constitution Bench of this Court in Haradhan Saha8 was concerned with constitutional validity of Maintenance of Internal Security Act, 1971 (for short, 'MISA') which enabled the State and its delegated authority to order preventive detention of a person. The Court articulated the concept of preventive detention in contra- distinction to punitive action in the following words :

> "19. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished to prove his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent." With regard to the rights guaranteed to a detenue under Article 22(5), the Court said, "Article 22(5)

shows that law as to detention is necessary. The requirements of that law are to be found in Article 22. Article 22 gives the mandate as to what will happen in such circumstances". 39.1. The Court in para 32 (pg. 208 of the Report) drew distinction between the power of preventive detention and punitive detention thus :

"32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution."

40. In Khudiram Das v. The State of West Bengal and others[16], a four-Judge Bench of this Court held that although a preventive detention law may pass the test of Article 22 yet it has to satisfy the requirements of other fundamental rights such as Articles 14 and 19. 40.1. While dealing with the constitutional validity of MISA, the four-Judge Bench in Khudiram Das16 stated in para 12 (pgs. 93-95 of the Report) as follows :

"12. The next question which then arises for consideration is whether Section 3 of the Act insofar as it empowers the detaining authority to exercise the power of detention on the basis of its subjective satisfaction imposes unreasonable restrictions on the fundamental rights of the petitioner under clauses (a) to (d) and (g) of Article 19, and is, therefore, ultra vires and void. The view taken by the majority in A.K. Gopalan v. State of Madras, (1950) SCR 88, was that Article 22 is a self-contained code, and therefore, a law of preventive detention does not have to satisfy the requirements of Articles 14, 19 and 21. This view came to be considered by this Court in three subsequent decisions to all of which one of us (P. Jaganmohan, Reddy, J.) was a party. In Rustom Cavasjee Cooper v. Union of India ((1970) 3 SCR 530) it was held by a majority of Judges, only Ray, J., as he then was, dissenting, that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in R.C. Cooper's case was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven Judges in Shambhu Nath Sarkar v. State of West Bengal (1973) 1 SCC 856 . The learned Judge said : [SCC p. 879 : SCC (Cri) p. 641, para 39) "In Gopalan case the majority court had held that Article 22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and

21. The view of Fazl Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(a)(d) and that a law providing for

> preventive detention had to be subject to such judicial review as is obtainable under clause (5) of that Article. In R.C. Cooper v.

Union of India the aforesaid premise of the majority in Gopalan's case was disapproved and therefore it no longer holds the field. Though Cooper's case dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan's case to be incorrect." Subsequently in Haradhan Saha v. State of West Bengal, (1975) 3 SCC 198, a Bench of five Judges, after referring to the decisions in A.K. Gopalan's case and R.C. Cooper's case and pointing out the context in which R.C. Cooper's case held that the acquisition of property directly impinged the right of the bank to carry on business, other than banking, guaranteed under Article 19 and Article 31(2) was not a protection against the infringement of that guaranteed right, proceeded on the assumption that the Act which is for preventive detention has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in Shambhu Nath Sarkar's case as well as R.C. Cooper case to both of which Ray, C.J., was a party. This question, thus, stands concluded and a final seal is put on this controversy and in view of these decisions, it is not open to any one now to contend that a law of preventive detention, which falls within Article 22, does not have to meet the requirement of Article 14 or Article 19. Indeed, in Haradhan Saha's case this Court proceeded to consider the challenge of Article 19 to the validity of the Act and held that the Act did not violate any of the constitutional guarantees embodied in Article 19 and was valid. Since this Court negatived the challenge to the validity of the Act on the ground of infraction of Article 19 and upheld it as a valid piece of legislation in Haradhan Saha's case, the petitioner cannot be permitted to reagitate the same question merely on the ground that some argument directed against the constitutional validity of the Act under Article 19 was not advanced or considered by the Court in that case. The decision in Haradhan Saha's case must be regarded as having finally laid at rest any question as to the constitutional validity of the Act on the ground of challenge under Article 19."

41. In Smt. Hemlata Kantilal Shah10 while dealing with detention of the petitioner's husband under Section 3(1) of COFEPOSA and the diverse submissions made on behalf of the petitioner, the Court held that prosecution or the absence of it was not an absolute bar to an order of preventive detention. It was further held: "but, if there be a law of preventive detention empowering the authority to detain a particular offender in order to disable him to repeat his offences, it can do so, but it will be obligatory on the part of the detaining authority to formally comply with the provisions of Article 22(5) of the Constitution".

42. The necessity of preventive detention was succinctly explained by a two-Judge Bench of this Court in Sukhpal Singh11. In that case, the Court was concerned with detention of the respondent's father under Section 3(2) of the National Security Act, 1980 read with Section 14A as inserted by National Security (Amendment) Act, 1987. In paragraphs 8 and 9 (pgs. 42 - 44 of the Report) this Court held :

> "8.....A clear distinction has to be drawn between preventive detention in which anticipatory and precautionary action is taken to prevent the recurrence of

apprehended events, and punitive detention under which the action is taken after the event has already happened. It is true that the ordinary criminal process of trial is not to be circumvented and short-circuited by apparently handy and easier resort to preventive detention..... .....To apply what was said in Rex v. Halliday, ex parte Zadig (1917 AC

260), one of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to commit what is enumerated in Section 3 of the Act. No crime is charged. The question is whether a particular person is disposed to commit the prejudicial acts. The duty of deciding this question is thrown upon the State. The justification is suspicion or reasonable probability and not criminal charge which can only be warranted by legal evidence. It is true that in a case in which the liberty of such person is concerned we cannot go beyond natural construction of the statute. It is the duty of this Court to see that a law depriving the person of his liberty without the safeguards available even to a person charged with crime is strictly complied with. We have, however, to remember that individual liberty is allowed to be curtailed by an anticipatory action only in interest of what is enumerated in the statute."

9. ..... As we have already seen the power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is precautionary power exercised reasonably in anticipation and may or may not relate to an offence. It cannot be considered to be a parallel proceeding. The anticipated behaviour of a person based on his past conduct in the light of surrounding circumstances may provide sufficient ground for detention....".

43. A three-Judge Bench of this Court in Additional Secretary to the Government of India and others v. Smt. Alka Subhash Gadia and another[17], was concerned with a criminal appeal preferred by Government of India and its authorities against the judgment of the Bombay High Court which quashed the detention order of the husband of the first respondent issued under Section 3(1) of COFEPOSA. The Court framed the principle question of law: 'whether the detenue or anyone on his behalf is entitled to challenge the detention order without the detenue submitting or surrendering to it'. It was held that the provisions of Articles 21 and 22 read together make it clear that a person can be deprived of his life or personal liberty according to procedure established by law, and if the law made for the purpose is valid, the person who is deprived of his life or liberty has to challenge his arrest or detention, as the case may be, according to the provisions of the law under which he is arrested or detained. The Court further observed: "what is necessary to remember for our purpose is that the Constitution permits both punitive and preventive detention provided it is according to procedure established by law made for the purpose and if both the law and the procedure laid down by it, are valid".

44. A nine-Judge Bench of this Court in Amratlal Prajivandas14 was directly concerned with constitutional validity of COFEPOSA. One of the issues before the Court was whether Parliament

was not competent to enact that Act. We shall refer to this judgment a little later as it has substantial bearing on the matter under consideration and requires detailed reference.

45. In Sunil Fulchand Shah v. Union of India and others[18], the view of this Court on the question of law under consideration was not unanimous. Chief Justice Dr. A.S. Anand speaking for majority noted:

> "personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty. Since, preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of the State or public order, it has been recognised as "a necessary evil" and is tolerated in a free society in the larger interest of security of the State and maintenance of public order. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by the rule of law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. This Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation".
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> 45.1. In the minority opinion, G.T. Nanavati, J. although differed with the view of majority on the question of law but he also noted: "the distinction between preventive detention and punitive detention has now been well recognised. Preventive detention is qualitatively different from punitive detention/sentence. A person is preventively detained without a trial but punitive detention is after a regular trial and when he is found guilty of having committed an offence. The basis of preventive detention is suspicion and its justification is necessity. The basis of a sentence is the verdict of the court after a regular trial. When a person is preventively detained his detention can be justified only so long as it is found necessary".
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> 46. In the case of Venkateshan S.1 , a two-Judge Bench of this Court was concerned with the judgment and order of the Karnataka High Court whereby it quashed and set aside the detention order passed by the Joint Secretary, Ministry of Finance, Department of Revenue, Government of India under Section 3(1) of COFEPOSA on the ground that what was considered to be a criminal violation of FERA has ceased to be so on the repeal of FERA which is replaced by FEMA. The Court considered the two situations of preventive detention contemplated by COFEPOSA, the objectives of FEMA and the repeal of FERA and discussed the matter thus:

"8. Hence, the limited question would be — whether a person who violates the provisions of FEMA to a large extent can be detained under the preventive detention Act, namely, the COFEPOSA Act. As stated above, the object of FEMA is also promotion of orderly development and maintenance of foreign exchange market in India. Dealing in foreign exchange is regulated by the Act. For violation of foreign exchange regulations, penalty can be levied and such activity is certainly an illegal activity, which is prejudicial to conservation or augmentation of foreign exchange. From the objects and reasons of the COFEPOSA Act, it is apparent that the purpose of the Act is to prevent violation of foreign exchange regulations or smuggling activities which are having increasingly deleterious effect on the national economy and thereby serious effect on the security of the State. Section 3 of the COFEPOSA Act, which is not amended or repealed, empowers the authority to exercise its power of detention with a view to preventing any person inter alia from acting in any manner prejudicial to the conservation or augmentation of foreign exchange. If the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence.

9. The COFEPOSA Act contemplates two situations for exercise of power of preventive detention — (a) to prevent violation of foreign exchange regulations; and (b) to prevent smuggling activities. Under Section 2(e) of the COFEPOSA Act, "smuggling" is to be understood as defined under clause (39) of Section 2 of the Customs Act, 1962 which provides that "smuggling" in relation to any act or omission will render such goods liable to confiscation under Section 111 or Section 113. Section 111 contemplates confiscation of improperly imported goods and Section 113 contemplates confiscation of goods attempted to be improperly exported. This has nothing to do with the penal provisions i.e. Sections 135 and 135-A of the Customs Act which provide for punishment of an offence relating to smuggling activities. Hence, to contend that for exercising power under the COFEPOSA Act for detaining a person, he must be involved in criminal offence is not borne out by the said provisions.

10. The other important aspect is that the COFEPOSA Act and FEMA occupy different fields. The COFEPOSA Act deals with preventive detention for violation of foreign exchange regulations and FEMA is for regulation and management of foreign exchange through authorised person and provides for penalty for contravention of the said provisions. The object as stated above is for promoting orderly development and maintenance of foreign exchange market in India. Preventive detention law is for effectively keeping out of circulation the detenu during a prescribed period by means of preventive detention (Poonam Lata v. M.L. Wadhawan, (1987) 3 SCC 347). 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 (Khudiram Das v. State of W.B., (1975) 2 SCC 81). The Constitution Bench while dealing with the constitutional validity of the Maintenance of Internal

Security Act, 1971 (MISA), in Haradhan Saha v. State of W.B., (1975) 3 SCC 198, held: (SCC pp. 208-09, paras 32-

33) "32. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution.

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu." In light of the above reasoning, the Court while setting aside the order of the High Court held, "in our view the order passed by the High Court holding that what was considered to be the criminal violation of FERA has ceased to be criminal offence under FEMA, the detention order cannot be continued after 1-6-2000, cannot be justified".

47. The Constitution recognizes preventive detention though it takes away the liberty of a person without any enquiry or trial. Preventive detention results in negation of personal liberty of an individual; it deprives an individual freedom and is not seen as compatible with rule of law, yet the framers of the Constitution placed the same in Part III of the Constitution. While giving to an individual the most valuable right – personal liberty – and also providing for its safeguard, the Constitution has perceived preventive detention as a potential solution to prevent the danger to the state security. The security of the State being the legitimate goal, this Court has upheld the power of the Parliament and State Legislatures to enact laws of preventive detention. The Court has time and again given the expression 'personal liberty' its full significance and asserted how valuable, cherished, sacrosanct and important the right of liberty given to an individual in the Constitution was and yet legislative power to enact preventive detention laws has been upheld in the larger interest of state security.

48. The power of Parliament to enact a law of preventive detention for reasons connected with (a) defence, (b) foreign affairs, (c) security of India; (d) security of State, (e) maintenance of public order or (f) the maintenance of supplies and services essential to the community, is clearly traceable to Article 22, Article 246 and Schedule Seven, List I Entry 9 and List III Entry 3. With specific reference to COFEPOSA, a nine-Judge Bench of this Court in Amratlal Prajivandas14 has held that the enactment was relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I. In the words of this Court (para 23 pg. 73 of the Report):

> "...COFEPOSA is clearly relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I....."

49. In Amratlal Prajivandas14 constitutionality of COFEPOSA was directly in issue. The Court made the following weighty prefatory remarks in paragraph 1 (pg. 62 of the Report) highlighting the importance of regulation and control of foreign exchange:

> "Till the wind of liberalisation started blowing across the Indian economic landscape over the last year or two, the Indian economy was a sheltered one. At the time of Independence, India did not have an industrial base worth the name. A firm industrial base had to be laid. Heavy industry was the crying need. All this required foreign exchange. The sterling balances built up during World War II were fast dissipating. Foreign exchange had to be conserved, which meant prohibition of import of several unessential items and close regulation of other imports. It was also found necessary to raise protective walls to nurture and encourage the nascent industries. These controls had, however, an unfortunate fall-out. They gave rise to a class of smugglers and foreign exchange manipulators who were out to frustrate the regulations and restrictions — profit being their sole motive, and success in life the sole earthly judge of right and wrong. As early as 1947, the Central Legislature found it necessary to enact the Foreign Exchange Regulation Act, 1947 and Imports and Exports (Control) Act, 1947. Then came the Import (Control) Order, 1955 to place the policy regarding imports on a surer footing. In the year 1962, a new Customs Act replaced the antiquated Sea Customs Act, 1878. The menace of smuggling and foreign exchange violations, however, continued to rise unabated. Parliament then came forward with the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). It provided for preventive detention of these antisocial elements".
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> The Court in paragraphs 3 to 7 referred to COFEPOSA, SAFEMA and FERA, the amendments carried out in these Acts, and the constitutional protection given to COFEPOSA and SAFEMA. The preamble and the provisions of COFEPOSA were noted in paragraphs 9 to 14. The provisions of SAFEMA were noted in paragraphs 15 to 19. In paragraph 20 (pg. 71 of the Report) , the Court made following clarificatory observations:
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> ".....Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was levelled in the writ petitions on the ground that the said Amendments — effected after the decision in Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225) — infringe the basic structure of the Constitution, no serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the

basic structure. This simplistic argument overlooks the raison d'etre of Article 31-B — at any rate, its continuance and relevance after Bharati — and of the 39th and 40th Amendments placing the said enactments in the Ninth Schedule. Acceptance of the petitioners' argument would mean that in case of post-Bharati constitutional amendments placing Acts in the Ninth Schedule, the protection of Article 31-B would not be available against Article 14. Indeed, it was suggested that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31-B. Be that as it may, in the absence of any effort to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said Amendments. We take them as they are, i.e., we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish in what manner the said Amendment Acts violate Article 14." Then, in paragraph 21, the Court observed that COFEPOSA was a law relating to preventive detention and it has, therefore, to conform to the provisions in clauses (4) to (7) of Article 22. The Court quoted following observations in R.K. Garg v. Union of India & Ors.[19]:

"The court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaptation of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Roig Refining Co., 94 L.Ed. 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues." (emphasis added) In the above backdrop, the Court considered the question, whether Parliament was not competent to enact COFEPOSA and SAFEMA

in paragraph 23 (pgs. 73-74 of the Report) as follows:

"23. It is argued for the petitioners that COFEPOSA is not relatable to Entry 9 of List I of the Seventh Schedule to the Constitution inasmuch as the preventive detention provided therefor is not for reasons connected with defence, foreign affairs or security of India. Even Entry 3 of List III, it is submitted, does not warrant the said enactment. So far as SAFEMA is concerned, it is argued, it is not relatable to any of the Entries 1 to 96 in List I or to any of the Entries in List III. We are not prepared to agree. COFEPOSA is clearly relatable to Entry 3 of List III inasmuch as it provides for preventive detention for reasons connected with the security of the State as well as the maintenance of supplies and services essential to the community besides Entry 9 of List I. While Entry 3 of List III speaks of "security of a State", Entry 9 of List I speaks of "security of India". Evidently, they are two distinct and different expressions. "Security of a State" is a much wider expression. A State with a weak and vulnerable economy cannot guard its security well. It will be an easy prey to economic colonisers. We know of countries where the economic policies are not dictated by the interest of that State but by the interest of multinationals and/or other powerful countries. A country with a weak economy is very often obliged to borrow from International Financial Institutions who in turn seek to dictate the economic priorities of the borrowing State — it is immaterial whether they do so in the interest of powerful countries who contribute substantially to their fund or in the interest of their loan. In the modern world, the security of a State is ensured not so much by physical might but by economic strength — at any rate, by economic strength as much as by armed might. It is, therefore, idle to contend that COFEPOSA is unrelated to the security of the State. Indeed in the very preamble to the Act, Parliament states that the violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy thereby casting serious adverse effect on the security of the State. Be that as it may, it is not necessary to pursue this line of reasoning since we are in total agreement with the approach evolved in Union of India v. H.S. Dhillon, (1971) 2 SCC 779 — a decision by a Constitution Bench of seven Judges. The test evolved in the said decision is this in short: Where the legislative competence of Parliament to enact a particular statute is questioned, one must look at the several entries in List II to find out (applying the well-known principles in this behalf) whether the said statute is relatable to any of those entries. If the statute does not relate to any of the entries in List II, no further inquiry is necessary. It must be held that Parliament is competent to enact that statute whether by virtue of the entries in List I and List III or by virtue of Article 248 read with Entry 97 of List I. In this case, it is not even suggested that either of the two enactments in question are relatable to any of the entries in List II. If so, we need not go further and enquire to which entry or entries do these Acts relate. It should be held that Parliament did have the competence to enact them." The Court concluded that Parliament did have the competence to enact COFEPOSA and SAFEMA.

50. The constitutionality of COFEPOSA has been already upheld by a nine-Judge Bench of this Court. Its constitutionality is again sought to be assailed by the petitioners in the present matter on the ground that with the change of legal regime by repeal of FERA and enactment of FEMA (the provisions contained in FEMA did not regard its violation a criminal offence) the intent and object behind the enactment of preventive detention in COFEPOSA had ceased to exist and continuation of impugned provision in COFEPOSA was violative of Article 21 read with Articles 14 and 19 of the Constitution.

51. In I.R. Coelho5, this Court had an occasion to consider the power of judicial review in relation to the Acts falling under the Ninth Schedule. After discussing His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr. [20], Indira Nehru Gandhi v. Shri Raj Narain[21], Minerva Mills Limited and others v. Union of India and others[22], Waman Rao and others v. Union of India and others[23] and Maharao Sahib Shri Bhim Singhji v. Union of India and others[24] and relevant Articles of the Constitution, particularly, Article 31B and 368, in paragraph 131, the Court referred to the decision in Amratlal Prajivandas14 . With regard to decision in Amratlal Prajivandas14 in paragraph 132, the Court held : "It is evident from the aforenoted passage that the question of violation of Articles 14, 19 or 21 was not gone into. The Bench did not express any opinion on those issues. No attempt was made to establish violation of these provisions. In para 56, while summarising the conclusion, the Bench did not express any opinion on the validity of the Thirty-ninth and Fortieth Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. These Acts were assumed to be good and valid. No arguments were also addressed with respect to the validity of the Forty- second Amendment Act".

51.1. The Court affirmed the view taken in Waman Rao24 that the Acts inserted in the Ninth Schedule after April 24, 1973 would not receive full protection.

51.2. In paragraph 151 (pg. 111 of the Report), the Court recorded its conclusions. Clauses (iii) and (v) thereof are relevant for the present purposes which read as follows:

> "(iii) All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.
>
> (v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24-4-1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19

and the principles underlying thereunder."

52. Para 151(v) in I.R. Coelho5 leaves no manner of doubt that where the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by the judgment. The constitutional validity of COFEPOSA has already been upheld by this Court in Amratlal Prajivandas14 and, therefore, it is not open for challenge again. On this ground alone the challenge to the constitutional validity of the impugned provision must fail. Despite this, we intend to consider the forceful submission made by the learned counsel for the petitioners that on repeal of FERA and enactment of FEMA (FEMA did not regard its violation of criminal offence) an act where no punitive detention (arrest and prosecution) is even contemplated or provided under law, such an act cannot be made the basis for preventive detention and any law declaring it to be prejudicial to the interest of the State so as to invoke the power of preventive detention is violative of Articles 14, 19 and 21 of the Constitution and must be struckdown.

53. FERA was enacted to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency for the conservation of the foreign exchange resources of the country and the proper utilization thereof in the interest of the economic development of the country. Section 2(b) defined 'authorised dealer'. Section 6 provided, inter alia, for authorisation of any person by the Reserve Bank of India (RBI) to deal in foreign exchange. The restrictions on dealing in foreign exchange were provided in Section 8. Sub-sections (1) and (2) of Section 8 read as follows :

> "8. Restrictions on dealing in foreign exchange.—(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:
>
> Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.
>
> Explanation.—For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.
>
> (2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorised dealer or a money-

changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank".

FERA contained penal provisions. Section 50 provided for imposition of fiscal penalties while Section 56 made provision for prosecution and punishment. FERA stood repealed by FEMA in 1999.

54. Before we refer to FEMA, a brief look at the COFEPOSA may be appropriate. COFEPOSA came into force on December 19, 1974. Its preamble reads as under:

> "An Act to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith.
>
> WHEREAS violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State;
>
> AND WHEREAS having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith;"

55. Section 3 of COFEPOSA provides for power to make orders detaining certain persons. Sub-section (1) thereof to the extent it is relevant, it reads as follows :

> "S.3 - Power to make orders detaining certain persons
>
> 1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of the State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from--
>
> (i) smuggling goods, or
>
> (ii) abetting the smuggling of goods, or
>
> (iii) engaging in transporting or concealing or keeping smuggled goods, or
>
> (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods, it is necessary so to do, make an order directing that such person be detained:" Sub-section (3) mandates compliance set out therein as required in Article 22(5). Certain other safeguards as required under Article 22, particularly, sub-clause (a) to Clause (4) and sub-clause (c) to Clause (7) of Article 22 of the Constitution have been provided in Sections 8 and 9. Maximum period of detention is provided in Section 10. Notwithstanding the provision contained in Section 10, Section 10A provides for extension of period of detention in the situations contemplated therein and to the extent provided. Section 11 empowers the Central Government or the State Government, as the case may be, to revoke any detention order.

56. As noted above, FERA has been repealed by FEMA. FEMA was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating the external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. Section 2(c) of FEMA defines 'authorised person' which means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of Section 10 to deal in foreign exchange or foreign securities. RBI may authorise any person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. Section 10 provides for the complete procedure for authorisation of any person to deal in foreign exchange. Section 13 provides for fiscal penalty to the extent of thrice the sum involved in such contravention where such amount is quantifiable or upto two lac rupees where the amount is not quantifiable and where such contravention is a continuing one, further penalty which may extend to Rs. 5000/- for every day after the first day during which the contravention continues. On failure of a person to make full payment of the penalty imposed on him, Section 14 is an enforcement provision. If a person remains in default in discharge of the penalty awarded to him, he is liable to civil imprisonment. Section 15 provides for compounding of contravention. By Section 49, FERA has been repealed and sub-section (3) thereof provides : "Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under Section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act."

57. It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.

58. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continues to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind COFEPOSA is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on the national economy. In today's world the physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. The smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA – by their misdeeds and misdemeanours – directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. We must remember : the person who violates foreign exchange regulations or indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventative detention of the anti-social elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.

59. The menace of smuggling and foreign exchange violations has to be curbed. Notwithstanding the many disadvantages of preventive detention, particularly in a country like ours where right to personal liberty has been placed on a very high pedestal, the Constitution has adopted preventive detention to prevent the greater evil of elements imperiling the security, the safety of State and the welfare of the Nation.

60. On the touchstone of constitutional jurisprudence, as reflected by Article 22 read with Articles 14, 19 and 21, we do not think that the impugned provision is rendered unconstitutional. There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the state security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State. Strictly speaking, preventive detention is not regulation (many people call it that way), it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventative detention arms the State with precautionary action and must be seen as such. Of course, the safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the Court is called upon to examine the legality and validity of an order of preventive detention.

61. The following features, (i) detention order was issued on February 8, 2000 and the detenue was served with the same on February 15, 2000; (ii) the events had taken place when FERA was in place as FEMA had come into force only with effect from June 1, 2000; in view of the sunset clause in FEMA the prosecution for violation of FERA could continue for next two years; (iii) High Court had

held the continued detention after coming into force of FEMA to be bad; (iv) the constitutionality of Conservation of Foreign Exchange (COFE) part of COFEPOSA was not in issue and the facts brought the prejudicial act within the mischief of FERA inviting penal consequences, were highlighted by the learned counsel for the petitioners to distinguish Venkateshan S.1 . We are afraid, the above features hardly render Venkateshan S.1 inapplicable to the issue raised before us. We are in complete agreement with the position stated in Venkateshan S.1: "if the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence".

62. It is too naïve to suggest that in today's economic scenario of abundant foreign exchange and booming foreign trade, contravention of foreign exchange laws does not pose any threat to the national interest for which a person has to be detained.

63. In view of the above, we do not find any merit in challenge to the constitutional validity of impugned part of Section 3(1) of COFEPOSA.

64. Then comes the question upon the prayer made by means of criminal miscellaneous application for permitting the petitioners to make an additional prayer: "This Hon'ble Court may be pleased to quash the detention order bearing No. 673/02/2009 – CUS/VIII dated September 23, 2009".

65. The prayer made in the criminal miscellaneous application by the petitioners cannot be granted for more than one reason. For, petitioners initially filed a writ petition (Crl. No. 97/2009) under Article 32 of the Constitution before this Court challenging the detention order dated September 23, 2009. The said writ petition was dismissed by this Court as withdrawn on December 4, 2009. The petitioners have not stated the above fact in the present writ petition.

66. The petitioners then filed a writ petition before Delhi High Court. That writ petition was dismissed by the High Court on March 18, 2010 on the ground that the petition was filed at pre-execution stage. The petitioners filed special leave petition (Crl. No. 2698 of 2010) before this Court challenging the judgment of the Delhi High Court. During the pendency of special leave petition, the petitioners filed the present writ petition wherein the only prayer made is that impugned part of Section 3(1) of COFEPOSA be declared unconstitutional. Presumably, the detention order was not challenged because special leave petition was already pending. Later on, the special leave petition was withdrawn by the petitioners. While dismissing the special leave petition as withdrawn, this Court granted liberty to the petitioners to avail such remedy as may be available in law in challenging the order of detention and the grounds on which detention order has been passed after its execution (emphasis supplied). The order of detention in question has not been executed so far in view of the contumacious conduct of the second petitioner. He is alleged to have absconded initially. Then on December 14, 2009 Delhi High Court, by an interim order directed that the detenue shall not be arrested till the next date of hearing, i.e. December 22, 2009. The said interim order was continued until the disposal of writ petition by the High Court and thereafter that interim order was continued by this Court in the special leave petition. In the writ petition also an interim order has been in operation. In view of the order dated July 13, 2010 passed by this Court,

the petitioners cannot be permitted to challenge the order of detention until its execution.

67. In view of the above, the leave to make additional prayer for quashing the detention order dated September 23, 2009 by means of criminal miscellaneous application does not deserve to be granted and is rejected. However, it is clarified that after the execution of the detention order, the petitioners shall be at liberty to challenge the detention order in accordance with law.

68. Since we have rejected the criminal miscellaneous application, the argument of the learned counsel for the petitioners that the impugned order of detention was passed way back on September 23, 2009; the impugned order was preventive in nature and the maximum period of detention as per law is one year, which would have lapsed by now and, therefore, no purpose for the execution of the detention order survives is noted to be rejected. The detention order could not be executed because of the contumacious conduct of the second petitioner and, therefore, he cannot take advantage of his own wrong.

69. Writ petition and criminal miscellaneous application, for the reasons indicated above, are liable to be rejected and are rejected.

.....J. (R. M.Lodha) .....J. (H. L. Gokhale) July 2, 2012 New Delhi.

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[1] (2002) 5 SCC 285
[2] (1984) 1 SCC 222
[3] (2003) 6 SCC 611
[4] (2008) 5 SCC 287
[5] (2007) 2 SCC 1
[6] 1951 SCR 167
[7] (1974) 1 SCC 645
[8] (1975) 3 SCC 198
[9] (1979) 4 SCC 14
[10] (1981) 4 SCC 647
[11] (1990) 1 SCC 35
[12] (2011) 5 SCC 244
[13] 481 US 739
[14] (1994) 5 SCC 54
[15] 1950 SCR 88
[16] (1975) 2 SCC 81
[17] 1992 Suppl (1) SCC 496
[18] (2000) 3 SCC 409
[19] (1981) 4 SCC 675
[20] (1973) 4 SCC 225
[21] (1975) Supp SCC 1
[22] (1980) 3 SCC 625
[23] (1981) 2 SCC 362
[24] (1981) 1 SCC 166
