Supreme Court of India
Attorney General For India vs Amratlal Prajivandas on 12 May, 1994
Author: J B.P. Reddy
Bench: A.M.Ahmadi, P.B.Sawant, K.Ramaswamy, Jayachandra K.Reddy, S.C.Agrawal

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                CASE NO.:
Transfer Petition (civil)  17 of 1978

PETITIONER:
ATTORNEY  GENERAL FOR INDIA

RESPONDENT:
AMRATLAL PRAJIVANDAS

DATE OF JUDGMENT: 12/05/1994

BENCH:
A.M.AHMADI & P.B.SAWANT & K.RAMASWAMY & JAYACHANDRA K.REDDY & S.C.AGRAWAL & S.MOHAN & B.

JUDGMENT:
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JUDGMENT Delivered by B.P. Jeevan Reddy,J B.P. JEEVAN REDDY, J.

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 11 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.

2. On 25-6-1975, the President of India proclaimed an emergency under Article 352(1) of the Constitution of India on the ground that "the security of India is threatened by internal disturbance". A proclamation of emergency dated 3- 12-1971 issued under Article 352(1) on the ground that "the security of India is threatened by external aggression" was already in force. These declarations had the effect of 'suspending' to use a popular though not strictly accurate expression Article 19 as provided by Article 358 of the Constitution. On 27-6-1975 the President of India made

an order under Article 359(1) of the Constitution declaring "[T]hat the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamation of emergency made under clause (1) of Article 352 of the Constitution on 3-12-1971 and on 25-6- 1975 are both in force."

3. With effect from 1-7-1975, COFEPOSA was amended in certain respects. Inter alia, it introduced Section 12-A containing special provisions for dealing with emergency. By virtue of Section 12-A, the requirements of supply of grounds [Section 3(3)] and consultation with Advisory Board (Section 8) were practically done away with.

4. In the year 1976, no doubt, during the continuance of emergency, Parliament enacted the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). It replaced an Ordinance to the same effect and was brought into force from the date of the Ordinance, viz., 5-11-1975. This Act applies to persons convicted under the Sea Customs Act, 1878/Customs Act, 1962/FERA, 1947/FERA, 1973 and to those detained under the COFEPOSA, whose detention order was neither set aside nor revoked in the circumstances mentioned therein. Besides the persons so convicted/detained, the Act applies to their relatives and associates as well. The main purpose of the Act is to forfeit the illegally acquired properties of such smugglers and foreign exchange manipulators in whosoever's name they may have been kept.

5. During the period the emergency proclaimed on 25-6-1975 was in force, several orders of detention were made under Section 3 of COFEPOSA. In view of the provisions of Section 12-A, the said detenus were neither supplied with the grounds of detention nor were their cases refer-red to the Advisory Board. The detenus, however, had no remedy. Because of the order under Article 359(1) and the operation of Article 358 as interpreted by this Court in A.D.M., Jabalpur v. Shivakant Shuklal they could not approach the High Court or this Court for relief. The 1 (1976) 2 SCC 521 emergency was revoked on 21-3-1977 and the detenus released. Subsequently notices were issued under Section 6 of the SAFEMA to the said detenus, their relatives and associates calling upon them to show cause why the properties mentioned in the notices be not declared as illegally acquired properties and forfeited. SAFEMA was being invoked against them because of the orders of detention made against the detenus under COFEPOSA during the period of emergency. The said orders of detention were the connecting link, the foundation for the action being taken against the detenus, their friends and relatives under SAFEMA. .[The orders of detention, it is not in dispute, were not revoked or set aside as contemplated by clause (b) of sub-section (2) of Section 2 of SAFEMA]. It is then that the said persons approached the High Courts under Article 226 and this Court under Article 32 for quashing the said notices. In these writ petitions, the constitutional validity of the COFEPOSA, SAFEMA and of the 39th, 40th and 42nd Amendments to the Constitution of India were questioned. (In a few cases, it appears, final orders were also passed but that circumstance does not make any difference to the principle involved herein). In most of the cases further proceedings were stayed.

6. The Attorney General of India applied for transfer of the writ petitions pending in various High Courts to this Court to be heard along with the petitions preferred directly in this Court in view of the important constitutional questions raised therein. The prayer for transfer is granted in all the transfer petitions. Leave granted in the SLP.

7. It may be mentioned that COFEPOSA was placed in the Ninth Schedule at SI. No. 104 by the Constitution (39th Amendment) Act, 1975 while the SAFEMA and the COFEPOSA (Amendment) Acts, 1976 (Central Acts 13 and 20 of 1976 respectively) were placed in the Ninth Schedule at Serial Nos. 127 and 129 by the Constitution (40th Amendment) Act, 1976.

8. The counsel appearing for the petitioners urged several contentions all of which have been contested by Shri Altaf Ahmed, learned Additional Solicitor General. The issues arising from the rival contentions urged at the bar may be formulated in the shape of questions. They are to the following effect:

(1) Whether Parliament was not competent to enact COFEPOSA and SAFEMA?

(2) Whether an order of detention under Section 3 read with Section 12-A of COFEPOSA made during the period of emergency proclaimed under Article 352(1) of the Constitution of India, with the consequent ,suspension' of Article 19 and during which period the right to move the court to enforce the rights conferred by Articles 14, 21 and 22 was suspended can form the foundation for taking action under Section 6 of SAFEMA against the detenu, his relatives and associates? And if it does can the validity of such order of detention be challenged by the detenu and/or his relatives and associates, when proceedings are taken against him/them under SAFEMA, even though the said order of detention has ceased to be operative and was not either challenged or not successfully challenged during its operation? (3) If the answer to Question 1 is in the affirmative, should the validity of the order of detention be tested with reference to the position of law obtaining at the time of making the said order and during its period of operation o r with reference to the position of law obtaining on the date of issuance of the show- cause notice under Section 6 of SAFEMA?

(4) Whether the definition of "illegally acquired property" in clause (c) of Section 3(1) of SAFEMA is violative of the fundamental in rights of the petitioners guaranteed by Articles 14, 19 and 21 and whether the inclusion of SAFEMA in the Ninth Schedule to the Constitution cures such violation, if any? (5) Whether the application of SAFEMA to the relatives and associates of detenus is violative of Articles 14, 19 and 21? Whether the inclusion of the said Act in the Ninth Schedule cures such violation, if any?

(6) Whether Section 5-A of COFEPOSA is violative of clause (5) of Article 22?

For a proper appreciation of the aforesaid questions, it is necessary to briefly refer to the relevant provisions of both the enactments.

9. COFEPOSA: The preamble to the Act explains the reasons for which and the objectives to achieve which the Act was made. It reads:

> "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; Be it enacted by Parliament in the Twenty- fifth Year of the Republic of India as follows:"

10. The expression "smuggling" is defined in clause (e) of Section 2. It says that the said expression shall have the same meaning as in clause (39) of Section 2 of the Customs Act, 1962 and that all its grammatical variations and cognate expressions shall be construed accordingly.

11. Clause (39) of Section 2 of the Customs Act defines "smuggling" in the following words-

> "smuggling in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113."

12. Section 3 provides that where the Central Government, the State Government or any officer empowered in that behalf is satisfied with respect to any person including a foreigner, that (1) with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or (2) 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 to detain him, he can do so. Sub-section (3) provides for service of grounds of detention within five days of the detention. (In "exceptional circumstances and for reasons to be recorded in writing", the grounds of detention are allowed to be served within fifteen days).

13. Section 5-A which was inserted by the Amendment Act 35 of 1975 reads thus:

> "5-A. Grounds of detention severable.- Where a person has been detained in pursuance of an order of detention under sub-section (1) of Section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly-

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are-

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub- section (1) of Section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds."

More about this section later.

14. Section 8 provides for constitution of an Advisory Board as- required by clause (4) of Article 22 and for reference of each detenu's case to it. The opinion of the Advisory Board is binding upon the Government. Section 9 provides certain classes of cases, where the reference to Advisory Board can be made within an extended period. This section is relatable to clause (7) of Article 22. Section 12-A containing special provisions for dealing with emergency was introduced by COFEPOSA (Amendment) Act, 1976 (Act 19 of 1976). In view of its crucial relevance, the section may be set out in full. It reads:

" 12-A. Special provisions for dealing with emergency.- (1) Notwithstanding anything contained in this Act or any rules for natural justice, the provisions of this section shall have effect during the period of operation of the proclamation of emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, or the proclamation of emergency issued under that clause on the 25th day of June, 1975, or a period of twenty-four months from the 25th day of June, 1975, whichever period is the shortest.

(2) When making an order of detention under this Act against any person after the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the proclamations referred to in sub-section (1) have been issued (hereinafter in this section referred to as the emergency) and

if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the perso n concerned:

Provided that where such declaration is made by an officer, it shall be reviewed by the appropriate Government within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by that Government, after such review, within the said period of fifteen days.

(3) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(4) In making any consideration, review or reconsideration under sub-section (2) or (3): the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned. (5) It shall not be necessary to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force and, accordingly, such period shall not be taken into account for the purposes of sub-section (3) of Section 3. (6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person in respect of whom a declaration has been made thereunder, the period during which such declaration is in force shall not be taken into account for the purpose of computing-

(i) the period specified in clauses (b) and

(c) of Section 8;

(ii) the period of 'one year' and 'five weeks' specified in subsection (1), the period of 'one year' specified in sub-section (2)(i) and the period of 'six months' specified in sub-section (3) of Section 9."

This provision was made during the period of emergency and is confined to the duration of emergency or such shorter period as may be specified. It contemplates making a declaration that the detention of person is necessary for dealing effectively with the emergency and if such a declaration is made, his case shall be governed by this section. The only safeguards if they can be called that are the provisions for review and reconsideration by the appropriate Government mentioned in the section itself. The constitutional safeguards in clauses (4) and (5) of Article 22 and the provisions in

the Act incorporating the said safeguards are dispensed with in the sense that they need not be complied with; the several time-limits prescribed in Sections 8 and 9 stand extended by the period of emergency.

15. SAFEMA: The preamble to the Act sets out the reasons and objects behind the enactment. It reads:

"An Act to provide for the forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators and for matters connected therewith or incidental thereto. Whereas for the effective prevention of smuggling activities and foreign exchange manipulations which are having a deleterious effect on the national economy it is necessary to deprive persons engaged in such activities and manipulations of their ill-gotten gains; And whereas such persons have been augmenting such gains by violations of wealth tax, income tax or other laws or by other means and have thereby been increasing their resources for operating in a clandestine manner;

And whereas such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants;

Be it enacted by Parliament in the Twenty- sixth Year of the Republic of India as follows:"

16. Section 2 specifies the persons to whom the Act applies. Sub-section (1) declares that the provisions of the Act shall apply "only to the persons specified in sub-section (2)". Sub- section (2) mentions five categories of persons to whom the provisions of the Act apply. The first category mentioned under clause (a) comprises persons convicted under Sea Customs Act, 1878 or the Customs Act, 1962 of an offence in relation to goods of a value exceeding one lakh rupees. The requirement of value exceeding Rupees one lakh does not apply in case of second or subsequent conviction. Persons convicted under FERA, 1947/1973 of an offence, the amount and value involved in which exceeds one lakh rupees are also included under clause (a). The requirement of value (above one lakh), however, does not apply in the case of second or subsequent conviction. The second category [clause (b)] comprises of persons in respect of whom an order of detention has been made under COFEPOSA, but which order was not revoked or set 'de in any of the situations set out in the four sub-clauses of the proviso. It as would be appropriate to set out clause (b) in full. It reads:

> "(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):
>
> Provided that-
>
> (i) such order of detention, being an order to which the provisions of Section 9 or Section 12-A of the said Act do not apply, has not been revoked on the report of the Advisory Board under Section 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or

(ii) such order of detention, being an order to which the provisions of Section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of Section 9, or on the report of the Advisory Board under Section 8, read with sub-section (2) of Section 9, of the said Act, or

(iii) such order of detention, being an order to which the provisions of Section 12-A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under Section 8, read with sub-section (6) of Section 12-A, of that Act, or

(iv) such order of detention has not been set aside by a court of competent jurisdiction;"

17. The third category to whom the act applies [mentioned in clause (c)] are the relatives of persons referred to in clauses (a) and (b). Fourth category [clause (d)] consists of the associates of the persons referred to in clauses (a) and (b). The fifth category mentioned under clause (e) comprises of holders of any property, which was at any time previously held by a person referred to in clauses (a) or

(b) unless such holder proves that he is a transferee in good faith for valuable consideration. Explanation (1) specifies the manner in which the value mentioned in clause

(a) has to be computed. Explanation (2) specifies the relatives covered by clause (c), while Explanation (3) specifies the associates included under clause (d).

18. Section 3 defines certain expressions occurring in the Act, including the expression " legally acquire property. It reads as follows:

"(c) 'illegally acquired property', in relation to any person to whom this Act applies means-

(i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or

(ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or

(iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or

(iv) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in subclauses (i) to (iii) or the income or earnings from such property; and includes- (A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration; (B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom;" More of this definition later.

19. Section 4 declares that after commencement of the said Act, it shall of be lawful for any person to whom the Act applies to hold any illegally acquired property either by himself or through any other person on his behalf. Any property so held is liable to be forfeited to Central Government in accordance with the provisions of the Act. Section 6 provides for issuance of show-cause notice of forfeiture, while Section 7 provides for passing of final orders in that behalf. Section 8 says that in proceedings under the Act, the burden of proving that any property specified in the notice served under Section 6 is not illegally acquired property shall be on the person affected. Section 11 declares transfers of properties specified in the notice issued under Section 6, effected after the issuance of the notice, null and void. Section 12 provides for constitution of the Appellate Tribunal for hearing the appeals against the orders made under Section 7. Section 24 gives an overriding effect to the Act over any other law for the time being in force.

20. Before entering upon discussion of the issues arising herein, it is necessary to make a few clarificatory observations. 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 Kerala2 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 Bharati2 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-Bharati2 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.

21. COFEPOSA is a law relating to preventive detention. It has, therefore, to conform to the provisions in clauses (4) to (7) of Article 22. Insofar as SAFEMA is concerned, it is, of course, not a

law relating to preventive detention though it is designed to achieve tile very same objective 2 (1973) 4 SCC 225 : 1973 Supp 1 SCR 1 by different means. While one seeks to deter them by means of preventive detention, the other seeks to punish them by depriving them of their ill-gotten gains. SAFEMA is thus a measure designed to protect the economy of the country as also a measure to discourage law-breaking in particular, economic violations. The principles relevant in judging the validity and relevant in the matter of interpreting the provisions of such economic measures are fairly well settled. It is held that in case of such enactments the legislature must be permitted a greater play in the joints. As pointed out by Bhagwati, J. in R. K. Garg v. Union of India3: (SCR p. 970: SCC- p. 69 1, para 8) "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.4 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 o r 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) 3 (1981) 4 SCC 675 : 1982 SCC (Tax) 30: (1982) 1 SCR 947 4 94 L Ed 381 : 338 US 604 (1950) To the same effect are the observations (SCC at p. 663) in Federation of Hotel and Restaurant Assn. of India v. Union of India 5, a decision of the Constitution Bench.

22. It is not necessary to multiply the authorities.

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 therefore 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. Dhillon6 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 5 (1989) 3 SCC 634 6 (1971) 2 SCC 779 :(1972) 2 SCR 33 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.

24. These questions arise this way. The orders of detention concerned herein were made on or after the date of the proclamation of emergency to which Section 12-A was applicable. None of them are, what may be called, ‚normal' orders of detention. For that reason, the detenus were neither supplied with the grounds of detention, nor were they given an opportunity to make a representation against their detention nor does it appear that their cases were referred to the Advisory Board not at any rate within the period prescribed by Section 8, or for that matter, Section

9. They were released on or within a day or two of the date on which the emergency was lifted. In this sense, the order of detention has worked itself out. But that order of detention is now being made the foundation, the basis for taking action under SAFEMA against the detenus, their relatives and their associates. SAFEMA is made applicable to them by virtue of Section 2(2)(b) read with clauses (c),

(d) and (e) of sub-section (2). The petitioners say that since the order of detention under COFEPOSA is made the basis for action under SAFEMA against them, they are entitled to challenge the validity of the order of detention. They may not have been able to question the validity of detention during their detention by virtue of Section 12-A of COFEPOSA (non-supply of grounds

and non- reference to Advisory Board) and also because their right to move the court for enforcement of the rights guaranteed to them by Articles 14, 21 and 22 was suspended during the period of emergency by an order made by the President of India under Article 359.(1) of the Constitution even Article 19 did not avail them by virtue of Article 358 but when the said orders of detention are sought to be made the basis of action under SAFEMA, after the lifting of emergency, they are now entitled to question them. They point out that by virtue of the order made under Article 359(1), the fundamental rights guaranteed to them by Articles 14, 21 and 22 were not suspended, but only the right to move for their enforcement was suspended. If so, they say, the detention orders made against them are invalid and illegal for violation of clauses (4) and (5) of Article

22. They may have been barred from enforcing their rights under Articles 22, 21 and 19 because of the said order of the President, but that did not render the orders of detention valid. Such invalid, indeed void orders, they say, cannot serve as the basis or as the foundation of action under SAFEMA. They also stress the drastic nature of the provisions of SAFEMA. On the other hand, the. learned Additional Solicitor General relies upon the provisions of clause (1-A) of Article 359 and submits that the validity of the said detention orders has to be judged with reference to the law then obtaining and not with reference to the law obtaining on the date of issuance of notice under Section 6 of SAFEMA. At any rate, he submits, clause (1-A) of Article 359 saves all such orders. Suspension of remedy, he says, is tantamount to suspension of the right itself since one cannot conceive of a right without a remedy. There is no distinction, he says, between Article 358 and an order under Article 359(1) in this regard. He places strong reliance upon the observations (SCR at p. 812) of the decision in Makhan Singh v. State of Punjab 7 .

25. Article 352 of the Constitution empowers the President, if he is satisfied that a grave emergency exists whereby the security of India or of any part thereof is threatened, whether by war or external aggression or internal disturbance*, to declare by a proclamation that an emergency exists. One of the consequences of such declaration is provided in Article 358. Article 358, as it stood prior to 44th Amendment, read thus:

> "358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would, but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

(By the Constitution 42nd Amendment Act, a proviso was added and by the 44th Amendment Act, some further amendments were made but it is not necessary to notice them for the purposes of these cases.)

26. Clause (1) of Article 359, as it stood prior to the 44th Amendment, provided that:

"Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

27. The purport and effect of Articles 358 and 359(1) and the distinction between them fell for consideration of this Court in Makhan Singh7. A Special Bench of seven Judges stated the effect of Article 358 in the following words:

> "It would be noticed that as soon as a Proclamation of Emergency has been issued under Article 352 and so long as it lasts, Article 19 is suspended and the power of the legislatures as well as the executive is to that extent made wider. The suspension of Article 19 during the pendency of the Proclamation of emergency removes the fetters created 7 (1964) 4 SCR 797 : AIR 1964 SC 381 : 1964 (1) Cri LJ 269 By the 44th Amendment Act, the words "armed rebellion" were substituted for the words "internal disturbance".
>
> on the legislative and executive powers by Article 19 and if the legislatures made laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19 because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to, operate.

Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Article 19 is complete during the period in question and legislative an d executive action which contravenes Article 19 cannot be questioned even after the emergency is over."

Next the Bench took up the meaning and purport of Article 359(1) and held:

"Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an order declaring that the right to move any court for enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Article 359(1) is to bar the remedy of the citizens to move any court for the enforcement of the specified rights. The rights are not expressly suspended, but the citizen is deprived of his right to move any court for their enforcement. That is one important distinction between the provisions of

Article 358 and Article 359(1)."

28. It was urged by the learned Attorney General that suspension of the citizens' right to move any court for the enforcement of a particular fundamental right amounts in law to suspension of the said right itself for the said period. The Bench, however, declined to go into the said question and proceeded on the assumption "that the said rights are in theory alive" even during the period of the Presidential Order. The Special Bench pointed out further:

" It would be noticed that the Presidential Order cannot widen the authority of the legislatures or the executive; it merely suspends the rights to move any court to obtain a relief on the ground that the rights conferred by Part III have been contravened if the said rights are specified in the Order. The inevitable consequence of this position is that as soon as the Order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a court of law and the same may have to be tried on the merits on the basis that the rights alleged to have been infringed were in operation even during the pendency o f the Presidential Order. If at the expiration of the Presidential Order, Parliament passes any legislation to protect executive action taken during the pendency of the Presidential Order and afford indemnity to the executive in that behalf, the validity and the effect of such legislative action may have to be carefully scrutinised.

Since the object of Article 359(1) is to suspend the rights of the citizens to move any court, the consequence of the Presidential Order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the Order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the Order has been issued, because the Order takes away the right to move any court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh proceeding falling within the mischief of Article 359(1) and the Presidential Order issued under it is instituted after the Order has been issued, it will have to be dismissed as being incompetent. In other words, Article 359(1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened, and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the Proclamation or for such shorter period as may be specified in the Order."

The law enunciated by the Special Bench is clear and explicit. It requires no elaboration at our hands.

29. After the said decision, however, clause (1-A) was introduced in Article 359 by the Constitution 38th (Amendment) Act, 1975. The clause was introduced with retrospective effect from the date of the Constitution. Clause (1-A), as introduced by the said Amendment Act read as follows:

> "1-A. While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competen t to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect:"

30.A proviso was added to this clause by the 42nd Amendment Act, 1976, to the following effect:

> "Provided that where a Proclamation of Emergency is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union Territory in which or in any part of which the Proclamation of Emergency is not in operation, if and insofar as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation."

[By the 44th Amendment Act, 1978, the words "except Articles 20 and 21" were added after the words "the rights conferred by Part 111" in clause (1-A) besides adding clause (1-B) but these amendments, not being retrospective in operation, are not relevant in the case of detentions governed by Section 12-A of COFEPOSA during the period of emergency.]

31. It is obvious that clause (1-A) was put in with a view to bring the effect of the Presidential Order under Article 359(1) on par with Article 358(1) insofar as the competence of the State to make a law inconsistent with the specified fundamental rights is concerned. Article 359(1-A) is broadly in the same terms as Article 358. Article 358 says that while a proclamation of emergency under Article 352 is in operation:

"... nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or. omitted to be done before the law so ceases to have effect."

Clause (1-A) of Article 359 says similarly that while the Presidential Order made under Article 359(1) is in operation "... nothing in that Part (Part III) conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of incompetency, cease to hav e effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

Of course, while Article 358 is confined only to Article 19, clause (1-A) extends to those rights whose enforcement may have been suspended by an order under Article 359(1). The other distinction is that while the " suspension"* of Article 19 under Article 358 is co-extensive with the duration of the proclamation of emergency, clause (1-A) is confined to the It should be noticed that only the heading of Article 358 speaks of "suspension of provisions of Article 19"; in the body of the article, there is no reference to suspension of the article.

period for which the Presidential Order remains in force. Yet another distinction is that while Article 358 enables the State to make any law or to take any executive action inconsistent with Article 19 during the period of emergency, clauses (1) and (1-A) of Article 359 read together provide for suspension (by means of a Presidential Order) of the enforcement of the fundamental rights specified in the order and simultaneously enable the State to make any law or to take any executive action inconsistent with such fundamental rights. It is evident that what is said in Makhan Singh7 with respect to Article 358 (competence of the State to make a law or to take executive action inconsistent with Article

19) does apply equally to Article 359 by virtue of the introduction of clause (1-A) with retrospective effect. In other words, during the period the Presidential Order under Article 359(1) is in force, the State is competent to make any law or take any executive action which it could not have taken but for the suspension of enforcement of the fundamental rights specified in the Presidential Order. In our opinion, the position under Article 358 is this: Article 358 enables the State it empowers the State to make any law or to take any executive action inconsistent with Article 19. This exceptional power is, however, confined to the period of emergency and is intended to facilitate the effective implementation of the objectives of emergency. The justification of this extraordinary provision is that individual liberties may have to be kept in abeyance temporarily if found necessary to meet the threat to the security of India or any part thereof within the meaning of Article 352(1). As soon as emergency ceases, the law so made shall to the extent of inconsistency with Article 19 cease to have effect, except with respect to things done or omitted to be done before the law so ceases to have effect. What it means is that the validity of the law made or the things done or omitted to be done by virtue of the said article during the period of emergency cannot be questioned either during or after the emergency on the ground of inconsistency with Article 19. Neither the law nor the executive action (to the extent of its inconsistency with Article 19) can continue even for a day beyond the cessation of emergency. Their validity and/or the competence of the State to make or take them during the period of emergency is, however, placed beyond question. By way of illustration a law may have been made or an executive action may have been taken unduly restricting the freedom of speech and the freedom of press. during the emergency. Such restriction insofar as it is not warranted by Article 19(2) ceases to operate or to have effect with the cessation of emergency. But the citizen whose right has been unreasonably curtailed cannot sue the State for damages or other relief nor can he take any other proceeding against the State for imposing such unreasonable restriction during the period of emergency. This is because of the protection provided to the State by Article 358. It should be remembered that Article 358 sanctions such a course because the Founding Fathers thought and not without justification that when the security of India or any part thereof is threatened as contemplated by Article 352, the State should be left free to make such law or to take such executive action as is necessary to safeguard the security of the country unfettered by the

provisions in Article 19. This subordination of Article 19, however, is only for the period the proclamation of emergency under Article 352 is in operation.

32. Now coming to clauses (1) and (1-A) of Article 359 the position is this:While clause (1) empowers the President to suspend the enforcement of the fundamental rights named in such notification (and any and all proceedings in that behalf in any court), it does not empower the President to suspend the fundamental rights. Evidently, the Founding Fathers did not think it necessary to clothe the President with such a power. The words in clause (1) are clear and unambiguous. They only speak of suspending the enforcement of the rights in Part III and not suspending the rights themselves. We see no warrant, no justification and no basis for holding that the suspension of enforcement of the rights means in effect the suspension of the rights themselves. If that were the intention of the Founding Fathers, they would have said so expressly. Indeed, they have stated what they meant in explicit language. In view of the fact that the fundamental rights in Part III are allowed to be affected by a Presidential Order, we think, we ought not to read anything more than what the clause expressly says and its language leaves no room for any doubt. This is the view taken in Makhan Singh7 [as well as by Bhagwati, J. in A.D.M., Jabalpur v. Shivakant Shuklal] and we agree with them respectfully. Then came clause (1- A), introduced by the 38th Amendment Act with retrospective effect from the date of the Constitution. It says that while a Presidential Order suspending particular fundamental rights is in operation, the State shall be entitled to make any law or to take any executive action which it would not have been entitled to make or to take but for the suspension of the enforcement of the said rights. At the same time, the clause says that any law so made shall, to the extent of incompetency, cease to have effect as soon as the Presidential Order ceases to operate "except as respects things done or omitted to be done before the law so ceases to have effect". The effect of these words ("except as respects "... effect") is evidently the same as that obtaining under Article 358 (which too employs identical words) which we have explained hereinbefore at some length. It is true that clause (1) of Article 359 does not provide for the suspension of any of the fundamental rights but only their enforcement and it is equally true that those fundamental rights (whose enforcement is suspended) continue in theory to be alive, yet we must also give effect to clause (1-A), which is equally a part of Article 359 now and must be deemed to be such a part at all points of time commencing from 26-1-1950. The conclusion is, therefore, inescapable that during the period the Presidential Order under Article 359(1) suspending enforcement of certain rights conferred by Part III is in operation, the State is empowered to make any law or to take any executive action inconsistent with such rights. All this is so because the emergency proclaimed to meet the threat to the security of India has to be effectively implemented. The requirements of emergency constitute both the foundation as well as an implied limitation upon the power. What is warranted is what is necessary for effective implementation of emergency.

33. It may be appropriate at this juncture to refer to a few decisions of this Court relevant in this behalf. In Jaichand Lall Sethia v. State of W.B.8 it is held by a Constitution Bench:

> "But the appellant can challenge the validity of the order on a ground other than those covered by Article 358, or the Presidential Order issued under Article 359(1). Such a challenge is outside the purview of the Presidential Order. For instance, a citizen will not be deprived of the right to move an appropriate court for a writ of

habeas corpus on the ground that his detention has been ordered mala fide. Similarly, it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the legislature has in view. It may be stated in this context that a mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. In other words, the power conferred by the statute has been utilised for some indirect purpose not connected with the object of the statute or th e mischief it seeks to remedy."

34. To the same effect is the decision of another Constitution Bench in K. Anandan Nambiar v. Chief Secretary, Govt. of Madras9. The majority opinion in A.D.M., Jabalpur1, however, appears to take a view contrary to the one expressed in Jaichand Lall8 and Anandan Nambiar9 but for the purposes of this case, it is not necessary to go into the correctness of the reasoning in A.D.M., Jabalpur1, since it has not been debated before us. Indeed, a three-Judge Bench in Union of India v. Bhanudas Krishna Gawde10 has taken the extreme view, purporting to follow A.D.M., Jabalpur1, that even the restrictions placed and facilities denied cannot be questioned in a court during the period the order under Article 359(1) is in operation!

35. The next issue that arises is whether it can be said in the caseof detention orders passed during the emergency (i.e. orders of detentionto which Section 12-A of COFEPOSA applies) that they are void or non est,so that they cannot be treated as orders of detention within the meaningof Section 2(2)(b) of SAFEMA? It is submitted by the learned Additional Solicitor General that the said orders cannot be said to be void ab initio or non est. The orders were good and valid when they were made under Section 3 of COFEPOSA. May be, he says, the said orders ceased to be operative with the cessation of the Presidential Order and cannot be continued beyond the said cessation, but they were certainly competent, legal 8 1966 Supp SCR 464: AIR 1967 SC 483 : 1967 Cri LJ 520 9 (1966) 2 SCR 406: AIR 1966 SC 657 : 1966 Cri LJ 586 10 (1977) 1 SCC 834: 1977 SCC (Cri) 208 : (1977) 2 SCR 719 and effective when they were made and continued to be so until the cessation of the Presidential Order. They can, therefore, certainly be treated as orders of detention under COFEPOSA for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA.

36. On the other hand, the learned counsel for the petitioners contend that the order of detention made under Section 3 read with Section 12-A of COFEPOSA is void for being inconsistent with the provisions in Article 22 which were not suspended. The mere suspension of enforcement of the said article does not amount to suspension of the right. The orders of detention were, therefore, void and they remained in operation only because the detenus were barred from questioning the validity of the said orders on account of the ban imposed by the Presidential Order under Article 359(1). They submit that the detention orders governed by Section 12-A of COFEPOSA are inherently arbitrary and unjust. An order of preventive detention is made without even telling the detenu of the grounds of his detention and without giving him an opportunity to make a representation. Even the protection of consideration of his case by an independent body (Advisory Board) is taken away. The detenu is rendered totally helpless. He is left with no remedy. He cannot prove his innocence. Such

an order of detention is opposed to all concepts of fairness, civilised conduct and democratic norms. They submit that such orders cannot form the foundation or the basis for applying SAFEMA to them. Their argument is evocative of what Justice Cardozo once said:

> "We must always take care to safeguard the law against the assaults of opportunism, the expediency of the passing hour, the erosion of the small encroachments, and the scorn and derision of those who have no patience with general principles."

37. The contending viewpoints aforesaid give rise to two strands of thought. One line of thought runs thus: By virtue of clause (1-A) of Article 359, inserted by the Constitution 38th (Amendment) Act with retrospective effect, Section 12-A must be deemed to have been competently enacted, no doubt for the duration of and limited to the period of the Presidential Order. If so, the detention thereunder cannot be said to be invalid. While the order of detention cannot certainly subsist beyond the cessation of the Presidential Order because Section 12-A cannot itself subsist beyond each cessation, neither Section 12-A nor the order of detention governed by it can be characterised as illegal or invalid during the period the Presidential Order was in force. Once this is so, such order of detention does undoubtedly represent an order of detention within the meaning and contemplation of Section 2(2)(b) of SAFEMA. That it was not open to challenge during the period of the Presidential Order, or that it was not subject to the constitutional safeguards provided by Article 22 does not affect its validity or legality. It was a valid order of detention when made. It is not being enforced or acted upon beyond the period of Presidential Order. Since it is an existing fact, it is merely being taken notice of and that is enough to attract SAFEMA to such detenu, his relatives and associates. Section 2(1) of SAFEMA says, "the provisions of this Act shall apply only to the persons specified in sub-section (2)" and sub-section (2) speaks inter alia of a person "in respect of whom an order of detention has been made under the COFEPOSA Act, 1974". Indeed, provisos (i), (ii) and (iii) to clause (b) of sub-section (2) of Section 2 of SAFEMA expressly refer to the order of detention made under Section 12-A and expressly affirm that such an order of detention is an order of detention for the purposes of the said clause. The fact remains that provisions of SAFEMA were enacted in the first instance as an Ordinance issued on 5-11-1975, i.e., during the period of emergency and later enacted into an Act and given effect from the date of the Ordinance. An order of detention governed by Section 12-A of COFEPOSA must, therefore, be held to be an order of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA. The other line of reasoning goes along the following lines: An order of detention governed by Section 12-A is a special type of order made for the limited purpose of dealing effectively with the emergency. It has no existence, relevance or effect except for the said limited purpose. Outside such purpose, it is non est. It does not exist. If so, such an order of detention cannot furnish the foundation, the connecting link, or the basis for applying SAFEMA. A normal order of preventive detention is itself an uncivilised action. An order of detention governed by Section 12-A of COFEPOSA denying as it does even the minimum safeguards provided by clauses (4) and (5) of Article 22 is an abhorrent action. It may be tolerated as a cruel necessity when the very life of the Nation is threatened but it cannot certainly be recognised or taken note of for any other purpose much less made the basis of applying an extremely drastic enactment like SAFEMA. Treating such order of detention as an order of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA amounts to enforcing or giving effect to the said order of detention beyond and outside the period of emergency

and for purposes foreign to emergency. This is totally impermissible. Section 12-A does not sanction this though it sanctions a lot many things.

38. While we are attracted by the logic as well as the emotional appeal of the second line of thought it would appeal to any lover of liberty we find ourselves constrained to reject it in the light of the language of Section 2(2)(b) of SAFEMA coupled with the fact that SAFEMA is armed with the protective umbrella of Article 31-B read with Ninth Schedule. We proceed to elaborate. Section 2(2)(b) of SAFEMA expressly includes an order of detention to which the provisions of Section 12-A apply within the purview of an order of detention under COFEPOSA. For the sake of facility of reference, we may reproduce the clause. It reads:

> "(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):
>
> Provided that-

(i) such order of detention, being an order to which the provisions of Section 9 or Section 12-A of the said Act do not apply, has not been revoked on the report of the Advisory Board under Section 8 of the said Act or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board; or

(ii) such order of detention, being an order to which the provisions of Section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of Sectio n 9, or on the report of the Advisory Board under Section 8, read with sub-section (2) of Section 9, of the said Act; or

(iii) such order of detention, being an order to which the provision of Section 12-A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under Section 8, read with sub-section(6) of Section 12-A, of that Act; or

(iv) such order of detention has not been set aside by a court of competent jurisdiction."

39. Proviso (iii) expressly treats "an order (of detention) to which the provisions of Section 12-A of the said Act apply" and which "has not been revoked before the expiry of time for, or on the basis of, the first review under sub- section (3) of that section (Section 12-A) or on the basis of the report of the Advisory Board under Section 8, read with sub-section (6) of Section 12-A, of that Act", as an order of detention for the purpose of and within the meaning of clause (b) of Section 2(2) of SAFEMA. In view of the fact that SAFEMA as well as COFEPOSA are included in the Ninth Schedule by the 39th and 40th (Amendment) Acts to the Constitution, clause (b) of Section 2(2) of SAFEMA [including proviso (iii) appended to it] are beyond constitutional reproach. One has to take the said provisions as they stand and they stand solidly against the petitioners' contentions. On this single ground, we hold, as we must, that an order of detention made under COFEPOSA, to which the

provisions in Section 12-A applied, is an order of detention within the meaning of and for the purposes of Section 2(2)(b) of SAFEMA and can, therefore, constitute the basis for applying SAFEMA to such person.

40. At this juncture, it would be appropriate to deal with two decisions of this Court brought to our notice. The first one is in Union of India v. Haji Mastan Mirza11 rendered by a Bench of three Judges. The respondent therein was first detained under Maintenance of Internal Security Act (MISA) under an order dated 17-9-1974. On 19-12-1974 the said order was revoked but simultaneously an order of detention was made under Section 3(1) of COFEPOSA. The grounds of detention were served on him on 23-12-1974. 11 (1984) 2 SCC 427 : 1984 SCC (Cri) 271 : (1984) 3 SCR 1 On 25-6-1975, emergency was proclaimed under Article 352(1) on the ground of internal disturbance, which continued to be in force up to 21-3-1977. The respondent was released on 23-3-1977. Notice under Section 6(1) of SAFEMA was issued to him, his relatives and associates whereupon he filed a writ petition in the Bombay High Court challenging the validity of the order of detention dated 19-12-1974 on the ground inter alia that he was not supplied with the documents clearly and unmistakably relied upon for arriving at the requisite satisfaction and which documents were also referred to in the grounds of detention served upon him. The Bombay High Court allowed the writ petition, against which the Union of India appealed to this Court. Varadarajan, J. speaking for the Bench referred to the provisions of Sections 2, 6 and 7 of SAFEMA and observed thus: (SCC p. 432, para 10) "Therefore, a valid order of detention under COFEPOSA is a condition precedent to proceedings being taken under Sections 6 and 7 of SAFEMA. If the impugned order of detention dated 19-12-1974 is set aside for any reason, the proceedings taken under Sections 6 and 7 of SAFEMA cannot stand. Therefore, we have to consider whether the impugned order of detention dated 19-12-1974 under COFEPOSA is void and has to be quashed."

41. From the facts stated above, it is clear that the order of detention was made long prior to the proclamation of emergency on 25-6-1975. He was served with the grounds of detention but not the documents relied upon therein. It does not appear from the judgment whether a declaration under Section 12-A of COFEPOSA was made with respect to the said respondent, though it can be so presumed from the fact that his detention was continued up to 23-3-1977. In the above circumstances, this Court said that it was open to the respondent-detenu to question the validity of the order of detention when proceedings are taken against him under Sections 6 and 7 of SAFEMA. It is not possible to agree with the reasoning of the decision. There are two ways of looking at the issue. If it is a normal order of detention [not governed by Section 12-A nor protected by an order under Article 359(1) suspending the enforcement of Article 22] and if the detenu does not challenge it when he was deprived of his liberty, or challenges it unsuccessfully, there is no reason why he should be allowed to challenge it when action under SAFEMA is taken against him for action under SAFEMA is not automatic upon the fact of detention but only the starting point. On the other hand, if it is an order of detention governed by Section 12-A [or by a Presidential Order under Article 359(1) suspending Article 22], it perhaps could still be challenged even during the period of emergency on grounds not barred by the said provisions. Secondly, even if such an order is allowed to be challenged when action under SAFEMA is taken, the challenge must be confined to grounds which were open or available during the period of emergency; otherwise there would be no meaning behind the concluding words in Article 358(1) and Article 359(1 A). Hence, we say that a person who

did not choose to challenge such an order of detention during the emergency when he was detained, or challenged it unsuccessfully, cannot be allowed to challenge it when it is sought to be made the basis for applying SAFEMA to him. In either of the two situations mentioned above, i.e., whether the challenge is made during the period of detention or later when proceedings under SAFEMA are taken against him, the grounds of challenge and scope of judicial scrutiny would be the same. Failure to challenge the detention directly when he was detained, precludes him from challenging it after the cessation of detention, where it is made the basis for initiating action under SAFEMA.

42. The other case brought to our notice is in Union of India v. Manoharlal Narang12, a decision rendered by a Bench comprising Khalid and Oza, JJ. The facts of this case are rather involved. Respondent, Manohar Lal Narang and one Ram Lal Narang were brothers. An order of detention under Section 3(1) of COFEPOSA was made against Ram Lat Narang on 19-12-1974. He challenged the same before the Delhi High Court in Writ Petition No. 10 of 1975 which was allowed on 30-4-1975 and the order of detention quashed. The Union of India preferred an appeal against the said order of the High Court to this Court along with an application for stay. On 1-5-1975, this Court declined stay but imposed certain conditions on the movement of Ram Lal Narang (later, the said appeal was dismissed for non-prosecution). After the proclamation of emergency on the ground of internal disturbance on 25-6-1975, a fresh order of detention was made on 1-7-1975 against Ram Lal on the very same facts and grounds on which he was detained earlier. The said order of detention was challenged in Delhi Court in Writ Petition No. 115 of 1975 filed by a relative of Ram Lal but was dismissed on 25-11-1975. An appeal was preferred against the said order to this Court being Appeal No. 399 of 1977. At this stage, notice under Sections 6 and 7 of SAFEMA was issued against Ram Lal which he questioned in Delhi High Court in Writ Petition No. 720 of 1975. While the said writ petition was pending in Delhi High Court, Appeal No. 399 of 1975 pending in this Court came up for hearing and was disposed of saying that it would be open to Ram Lal to raise all such contentions as are available to him in Writ Petition No. 720 of 1975, notwithstanding the fact that those grounds were raised in Writ Petition No. 115 of 1975 (from which the said appeal No. 399 of 1975 arose). Writ Petition No. 720 of 1975 was heard and dismissed by the Delhi High Court against which Ram Lal filed SLP No. 9361 of 1982 wherein leave was granted and the appeal was numbered as CA No. 2790 of 1985 which was said to be pending on the date of the said judgment. An order of detention under Section 3 of COFEPOSA was made against the respondent, Manohar Lal Narang, as well on 31-1-1975. He was then in England. He was brought to India and detained. He challenged the same by way of WP No. 2752 of 1975 in the Bombay High Court which was allowed and the detention quashed on 8-7-1980. An appeal preferred to this Court against the said order was also dismissed. Thereafter, a show-cause notice was issued to Manohar Lal Narang on the ground that he is the brother 12 (1987) 2 SCC 241 1987 SCC (Cri) 311 relative) of Ram Lal Narang, who was detained under Section 3(1) of COFEPOSA. It may be remembered that a writ petition questioning Ram Lal's detention under the order dated 1-7- 1975 [evidently, an order of detention to which Section 12-A of COFEPOSA applied] was dismissed by the Delhi High Court (WP No. 115 of 1975) and even Writ Petition No. 720 of 1975 (in which he was allowed to raise all the available grounds against his detention) was also dismissed. From the facts stated above, it is clear that the basis of action under SAFEMA against Manohar Lal Narang was his brother Ram Lal's detention during the period of emergency, which detention was governed by Section 12-A of COFEPOSA. According to our opinion indicated hereinbefore, such an order can constitute a basis for taking action under SAFEMA. So far

as the reasoning of the said decision is concerned, it is to the effect that the validity of such an order of detention can be questioned by the detenu or his relative, as and when such an order is sought to be made the foundation for taking action against them under SAFEMA. On that basis, the Court proceeded to examine the validity of the order of detention of Ram Lal and found that the said order is bad for non- application of mind to certain highly relevant and material circumstances. We must, however, say that the validity of an order of detention to which Section 12-A of COFEPOSA applied, could yet be examined even during the emergency on the touchstone of the law as it obtained during the operation of the Presidential Order under Article 359(1) say on the ground that the provisions of Section 12-A were not complied with, or on other grounds, as may not have barred during the said period. But a person who could have so challenged the order of detention and yet chose not to do, cannot be allowed to do so when such an order of detention is made the basis for applying SAFEMA to him this is for the reason that even if he is allowed to challenge the said order when he is served with the notice under Section 6 of SAFEMA, the challenge has to be examined with reference to the position of law as was obtaining at the time the said order was made and the law in force during the period the said order of detention was in operation. Same would be the position in the case of a person who challenged the order but failed in his challenge. Even in the case of a normal order of detention under COFEPOSA, the position would be the same, A person who did not challenge, (either by himself or through his next friend) the order of detention or challenged it but failed, cannot be allowed to challenge the order of detention when action is taken against him under SAFEMA.

43. The definition of "illegally acquired properties" in clause (c) of Section 3(1) of SAFEMA is undoubtedly quite wide. It means and includes any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws" [vide sub-clause (i)]. Sub-clauses (ii), (iii) and (iv) of clause

(c) further widen and elaborate its ambit. The definition thus takes in not only the property acquired after the Act but also the property acquired before the Act, whatever. be the length of time. Secondly, it takes in property which may have been acquired partly from out of illegal activity in which case, of course, the provision in Section 9 would be attracted. Illegal activity is not confined to violation of the laws mentioned in Section 2 but all laws which Parliament has power to make. To give an illustration, if a smuggler has acquired some properties by evading tax laws or by committing theft, robbery, dacoity, misappropriation or any other illegal activity prohibited by the Indian Penal Code or any other law in force (which Parliament has the power to make) all that would be liable to be forfeited. It is submitted by the petitioners that this is a case of excessive and disproportionate response by Parliament. The argument is that the Act is penal in nature and spreading its net as wide as is done by the definition of "illegally acquired properties" brings it in conflict with Articles 14, 19 and 21. Alternatively, it is submitted that if the said definition is unassailable on account of its inclusion in the Ninth Schedule, the definition may be read down so as to confine it only to the properties acquired by violating the prohibitions contained in the Acts mentioned in Section 2(a) of SAFEMA. We do not find it possible to give effect to either of these submissions. Both the enactments being placed in the Ninth Schedule, they enjoy the immunity conferred by Article 31-B.

We have observed hereinbefore that the petitioners have not been able to substantiate their submission that the 39th (Amendment) Act and 40th (Amendment) Act, placing the said enactments in the Ninth Schedule are unconstitutional. It is not necessary to repeat the reasons for the said opinion here over again. In this view of the matter, the attack upon the validity of the said definition on grounds of unreasonableness, arbitrariness or for that matter on any of the grounds relatable to Part III is of no avail. Even apart from the protection of Article 31-B, we see no substance in the submission that the definition is arbitrary or discriminatory nor do we see any reason for reading down the said definition to confine it to the violation of the acts referred to in Section 2(2)(a) of SAFEMA. We can take note of the fact that persons engaged in smuggling and foreign exchange manipulations do not keep regular and proper accounts with respect to such activity or its income or of the assets acquired therefrom. If such person indulges in other illegal activity, the position would be no different. The violation of foreign exchange laws and laws relating to export and import necessarily involves violation of tax laws. Indeed, it is a well-known fact that over the last few decades, smuggling, foreign exchange violations, tax evasion, drugs and crime have all got mixed-up. Evasion of taxes is integral to such activity. It would be difficult for any authority to say, in the absence of any accounts or other relevant material that among the properties acquired by a smuggler, which of them or which portions of them are attributable to smuggling and foreign exchange violations and which properties or which portions thereof are attributable to violation of other laws (which Parliament has the power to make). It is probably for this reason that the burden of proving that the properties specified in the show-cause notice are not illegally acquired properties is placed upon the person concerned. May be this is a case where a dangerous disease requires a radical treatment. Bitter medicine is not bad medicine. In law it is not possible to say that the definition is arbitrary or is couched in unreasonably wide terms. Further, in view of clear and unambiguous language employed in clause (c) of Section 3, it is not possible or permissible to resort to the device of reading down. The said device is usually resorted to save a provision from being declared unconstitutional, competent and ultra vires. We are, therefore, of the opinion that neither the constitutional validity of the said definition can be questioned nor is there my warrant for reading down the clear and unambiguous words in the clause. So far as justification of such a provision is concerned, there is enough and more. After all, all these illegally acquired properties are earned and acquired in ways illegal and corrupt at the cost of the people and the State. The State is deprived of its legitimate revenue to that extent. These properties must justly go back where they belong to the State. What we are saying is nothing new or heretical. Witness the facts and ratio of a recent decision of the Privy Council in Attomey General for Hong Kong v. Reid13 The respondent, Reid, was a Crown-prosecutor in Hong Kong. He took bribes as an inducement to suppress certain criminal prosecutions and with those monies, acquired properties in New Zealand, two of which were held in the name of himself and his wife and the third in the name of his solicitor. He was found guilty of the offence of bribe-taking and sentenced by a criminal court. The Administration of Hong Kong claimed that the said properties in New Zealand were held by the owners thereof as constructive trustees for the Crown and must be made over to the Crown. The Privy Council upheld this claim overruling the New Zealand Court of Appeals. Lord Templeman, delivering the opinion of the Judicial Committee, based his conclusion on the simple ground that any benefit obtained by a fiduciary through a breach of duty belongs in equity to the beneficiary. It is held that a gift accepted by a person in a fiduciary position as an incentive for his breach of duty constituted a bribe and, although in law it belonged to the fiduciary, in equity he not only became a debtor for the amount of

the bribe to the person to whom the duty was owed but he also held the bribe and any property acquired therewith on constructive trust for that person. It is held further that if the value of the property representing the bribe depreciated the fiduciary had to pay to the injured person the difference between that value and the initial amount of the bribe, and if the property increased in value the fiduciary was not entitled to retain the excess since equity would not allow him to make any profit from his breach of duty. Accordingly, it is held that to the extent that they represented bribes received by the first respondent, the New Zealand properties were held in trust for the Crown, and the Crown had an equitable interest therein. The learned Law Lord observed further that if the theory of constructive trust is not applied and properties interdicted when 13 (1993) 3 WLR 1 143: (1994) 1 All ER 1 available, the properties "can be sold and the proceeds whisked away to, some Shangri La which hides bribes and other corrupt moneys in numbered bank accounts" to which we are tempted to add one can understand the immorality of the Bankers who maintained numbered accounts but it is difficult to understand the amorality of the Governments and their laws which sanction such practices in effect encouraging them. The ratio of this decision applies equally where a person acquires properties by violating the law and at the expense of and to the detriment of the State and its revenues where an enactment provides for such a course, even if the fiduciary relationship referred to in Reid13 is not present. It may be seen that the concept employed in Reid" was a common law concept, whereas here is a case of an express statutory provision providing for such forfeiture. May we say in conclusion that "the interests of society are paramount to individual interests and the two must be brought into just and harmonious relation. A mere property career is not the final destiny of mankind, if progress is to be the law of the future as it has been of the past". (Lewis Henry Morgan: Ancient Society).

44. It is contended by the counsel for the petitioners that extending the provisions of SAFEMA to the relatives, associates and other 'holders' is again a case of overreaching or of over-breadth, as it may be called a case of excessive regulation. It is submitted that the relatives or associates of a person falling under clause (a) or clause

(b) of Section 2(2) of SAFEMA may have acquired properties of their own, may be by illegal means but there is no reason why those properties be forfeited under SAFEMA just because they are related to or are associates of the detenu or convict, as the case may be. It is pointed out that the definition of 'relative' in Explanation (2) and of ,associates' in Explanation (3) are so wide as to bring in a person even distantly related or associated with the convict/detenu, within the net of SAFEMA, and once he comes within the net, all his illegally acquired properties can be forfeited under the Act. In our opinion, the said contention is based upon a misconception. SAFEMA is directed towards forfeiture of "illegally acquired properties" of a person falling under clause (a) or clause

(b) of Section 2(2). The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. In fact, it is immaterial how such relative or associate holds the properties of convict/detenu whether as a benami or as a mere name-lender or as a bona fide transferee for value

or in any other manner. He cannot claim those properties and must surrender them to the State under the Act. Since he is a relative or associate, as defined by the Act, he cannot put forward any defence once it is proved that that property was acquired by the detenu whether in his own name or in the name of his relatives and associates. It is to counteract the several devices that are or may be adopted by persons mentioned in clauses (a) and (b) of Section 2(2) that their relatives and associates mentioned in clauses (c) and (d) of the said sub-section are also brought within the purview of the Act. The fact of their holding or possessing the properties of convict/detenu furnishes the link between the convict/detenu and his relatives and associates. Only the properties of the convict/detenu are sought to be forfeited, wherever they are. The idea is to reach his properties in whosoever's name they are kept or by whosoever they are held. The independent properties of relatives and friends, which are not traceable to the convict/detenu, are not sought to be forfeited nor are they within the purview of SAFEMA**. We may proceed to explain what we say. Clause

(c) speaks of a relative of a person referred to in clause

(a) or clause (b) (which speak of a convict or a detenu). Similarly, clause (d) speaks of associates of such convict or detenu. If we look to Explanation (3) which specifies who the associates referred to in clause (d) are,, the matter becomes clearer. 'Associates' means (i) any individual who had been or is residing in the residential premises (including outhouses) of such person [such person' refers to the convict or detenu, as the case may be, referred to in clause (a) or clause (b)]; (ii) any individual who had been or is managing the affairs or keeping the accounts of such convict/detenu; (iii) any association of persons, body of individuals, partnership firm or private company of which such convict/detenu had been or is a member, partner or director; (iv) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm or private company referred to in clause

(iii) at any time when such person had been or is a member, partner or director of such association of persons, body of individuals, partnership firm or private company;. (v) any person who had been or is managing the affairs or keeping the accounts of any association of persons, body of individuals, partnership firm or private company referred to in clause (iii); (vi) the trustee of any trust where (a) the trust has been created by such convict/detenu; or (b) the value of the assets contributed by such convict/detenu to the trust amounts, on the date of contribution not less than 20% of the value of the assets of the trust on that date; and (vii) where the competent authority, for reasons to be recorded in writing, considers that any properties of such convict/detenu are held on his behalf by any other person, such other person. It would thus be clear that the connecting link or the nexus, as it may be called, is the holding of property or assets of the convict/detenu or traceable to such detenu/convict. Section 4 is equally relevant in this context. It declares that "as from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold That this was the object of the Act is evident from para 4 of the preamble which states: "And whereas such persons have in many cases been holding the properties acquired by them through such gains in the names of their relatives, associates and confidants." We are not saying that the preamble can be utilised for restricting the scope of the Act, we are only referring to it to ascertain the object of the enactment and to reassure ourselves that the construction placed by us accords with the said object.

any illegally acquired property either by himself or through any other person on his behalf". All such property is liable to be forfeited. The language of this section is indicative of the ambit of the Act. Clauses (c) and (d) in Section 2(2) and the Explanations (2) and (3) occurring therein shall have to be construed and understood in the light of the overall scheme and purpose of the enactment. The idea is to forfeit the illegally acquired properties of the convict/detenu irrespective of the fact that such properties are held by or kept in the name of or screened in the name of any relative or associate as defined in the said two Explanations. The idea is not to forfeit the independent properties of such relatives or associates which they may have acquired illegally but only to reach the properties of the convict/detenu or properties traceable to him, wherever they are, ignoring all the transactions with respect to those properties. By way of illustration, take a case where a convict/detenu purchases a property in the name of his relative or associate it does not matter whether he intends such a person to be a mere name lender or whether he really intends that such person shall be the real owner and/or possessor thereof or gifts away or otherwise transfers his properties in favour of any of his relatives or associates, or purports to sell them to any of his relatives or associates in all such cases, all the said transactions will be ignored and the properties forfeited unless the convict/detenu or his relative/associate, as the case may be, establishes that such property or properties are not "illegally acquired properties" within the meaning of Section 3(c). In this view of the matter, there is no basis for the apprehension that the independently acquired properties of such relatives and associates will also be forfeited even if they are in no way connected with the convict/detenu. So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property even though purchased from a convict/detenu is not liable to be forfeited. It is equally necessary to reiterate that the burden of establishing that the properties mentioned in the show-cause notice issued under Section 6, and which are held on that date by a relative or an associate of the convict/detenu, are not the illegally acquired properties of the convict/detenu, lies upon such relative/associate. He must establish that the said property has not been acquired with the monies or assets provided by the detenu/convict or that they in fact did not or do not belong to such detenu/convict. We do not think that Parliament ever intended to say that the properties of all the relatives and associates, may be illegally acquired, will be forfeited just because they happen to be the relatives or associates of the convict/detenu. There ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, as mentioned above, is upon the relative/associate. In this view of the matter, the apprehension and contention of the petitioners in this behalf must be held to be based upon a mistaken premise. The bringing in of the relatives and associates or of the persons mentioned in clause (e) of Section 2(2) is thus neither discriminatory nor incompetent apart from the protection of Article 31-B.

45. Petitioners challenged the validity of Section 5-A of COFEPOSA on the ground of it being violative of the twin safeguards provided by clause (5) of Article 22. It is submitted that the said clause gives two rights to the detenu, viz., (i) to have the grounds on which the order of detention is based communicated to him as soon as possible and (ii) to be afforded the earliest opportunity of making representation against the order of detention (see State of Bombay v. Atma Ram Sridhar Vaidya14). If the grounds included irrelevant or non-existent grounds, it is submitted, the first right is violated and if the grounds included vague grounds, the second right is violated. According to the

teamed counsel, Article 22(5), as interpretated by this Court over the last more than four decades, means this: An order of preventive detention is based upon the subjective satisfaction of the authority and where such satisfaction has been arrived at on grounds some of which are relevant and definite grounds and some irrelevant, vague and nonexistent, it is not possible or permissible for the court to predicate which grounds have influenced the formation of his satisfaction which means that the order of detention must fall to the ground; if this is what Article 22(5) means and says, it is not open to Parliament to make a law saying that where the grounds upon which the requisite satisfaction has been formed are partly good and partly bad, yet the order must be held to be good with reference to and on the basis of good grounds, eschewing the bad grounds. Such a law, it is submitted, would be in direct conflict with Article 22(5). Let us examine this submission rather closely.

46. Section 5-A of COFEPOSA may be reproduced here for ready reference. It reads:

> "5-A. Grounds of detention severable.- Where a person has been detained in pursuance of an order of detention under sub-section (1) of Section 3 which has been made on two or more grounds, such order of detention shall b e deemed to have been made separately on each of such grounds and accordingly-
>
> (a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are-
>
> (i) vague,
>
> (ii) non-existent,
>
> (iii) not relevant,
>
> (iv) not connected or not proximately connected with such person, or
>
> (v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub- section 14 1951 SCR 167 : AIR 1951 SC 157 :52 Cri LJ (1) of Section 3 with reference to the remaining ground or grounds and made the order of detention;
>
> (b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds."

47. The section is in two parts. The first part says that where an order of detention is made on two or more grounds, "such order of detention shall be deemed to have been made separately on each of such grounds", while the second part says that such order shall not be deemed to be invalid or inoperative merely for the reason that one or some of the grounds are either vague, non-existent, irrelevant or unconnected. That the second part is merely a continuation of and consequential to the

first part is evident from the connecting words "and accordingly". The second part goes further and says that the order of detention must be deemed to have been made on being satisfied with the remaining good ground or grounds, as the case may be. Both the parts are joined by the word "and".

48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. In Debu Mahato v. State of W.B.15 it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in Anil Dey v. State of W. B. 16 It was a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in Israil SK v. District Magistrate of West Dinajpur17 and Dharua Kanu v. State of W.B.18 single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In Saraswathi Seshagiri v. State of Kerala19, a case arising under COFEPOSA, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial 15 (1974) 4 SCC 1351974 SCC (Cri) 274 16 (1974) 4 SCC 5141974 SCC (Cri) 550 17 (1975) 3 SCC 292:1974 SCC (Cri) 900 18 (1975) 3 SCC 527 :1975 SCC (Cri) 117 19 (1982)2SCC310:1982 SCC (Cri) 423 activity. That is the reason why single acts of wagon- breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish- plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and Organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.

49. Now, take a case, where three orders of detention are made against the same person under COFEPOSA. Each of the orders is based upon only one ground which is supplied to the detenu. It is found that the ground of detention in support of two of such orders is either vague or irrelevant. But the ground in support of the third order is relevant, definite and proximate. In such a case, while the first two orders would be quashed, the third order would stand. This is precisely what the first part (the main part) of Section 5-A seeks to do. Where the order of detention is based on more than one ground, the section creates a legal fiction, viz., it must be deemed that there are as many orders of

detention as there are grounds which means that each of such orders is an independent order. The result is the same as the one in the illustration given by us hereinabove. The second part of it is merely clarificatory and explanatory, which is evident from the fact that it begins with the word "accordingly" apart from the fact that it is joined to the first part by the word "and". In such a situation, we are unable to see how can the section be characterised as inconsistent with Article 22(5). Had there been no first part, and had the section consisted only of the second part, one can understand the contention that the section is in the teeth of Article 22(5) as interpreted by this Court this was indeed the situation in K. Yadigiri Reddy v. Commissioner of Police20 as we shall presently indicate. It is difficult to conceive any inconsistency or conflict between Article 22(5) and the first the main part of Section 5-A. Parliament is competent to create a legal fiction and it did so in this case. Article 22(5) does not in terms or otherwise prohibit making of more than one order simultaneously against the same person, on different grounds. No decision saying so has been 20 ILR 1972 AP 1025 brought to our notice. Be that as it may, we do not see why Parliament is not competent to say, by creating a legal fiction, that where an order of detention is made on more than one ground, it must be deemed that there are as many orders of detention as there are grounds. If this creation of a legal fiction is competent, then no question of any inconsistency between the section and Article 22(5) can arise.

50. It is true that validity of Section 5-A or for that matter, of Section 5-A of National Security Act, 1980, which is in identical terms does not appear to have been questioned in this Court so far, though it has been applied in several decisions. Three of the reported decisions are brought to our notice, viz., State of Gujarat v. Chaman Lal Manjibhai Soni21, Prakash Chandra Mehta v. Commissioner and Secretary, Govt. of Kerala22 and N. Meera Rani v. Govt. of T.N.23 Actually, in the last-mentioned decision, there are observations affirming its validity, though no final opinion has been expressed on the question because it was not canvassed in that case. It is also brought to our notice that a Bench of Gujarat High Court has affirmed and applied the said provision in a case arising under COFEPOSA.

51. Now, coming to the decision of the Andhra Pradesh High Court in K. Yadigiri Reddy20 Section 6(a) of the A.P. Detention Act, 1970 read as follows:

> "No detention order shall be invalid or inoperative merely by reason that one or more of the grounds on which the order is made is or are vague or irrelevant, when the other ground or grounds does not or do not suffer from any such infirmity."

52. The Andhra Pradesh provision thus contained a provision approximating to the second part of Section 5-A but did not contain any provision corresponding to or approximating to the first (the main) part of Section 5-A. It is the first part of Section 5-A that creates the deeming fiction; the second part merely elaborates the effect and consequence of the legal fiction in the first part. The second part, had it stood alone, could perhaps have been characterised as being in the teeth of Article 22(5), as understood and construed by this Court and that is what the Andhra Pradesh High Court says but that is not the situation herein as explained hereinabove. The said decision, therefore, does not advance the case of the petitioners in any manner herein. Having said this, we must reiterate the admonition of Gajendragadkar, J. regarding the exercise of the power of

detention under the various detention laws in force. Speaking for the Constitution Bench in G. Sadanandan v. State of Kerala 24, the learned Judge observed: 21 (1981) 2 SCC 24:19.81 SCC (Cri) 311 22 1985 Supp SCC 144: 1985 SCC (Cri) 332 23 (1989) 4 SCC 418 : 1989 SCC (Cri) 732 24 AIR 1966 SC 1925 :(1966) 3 SCR 590 : 1966 Cri LJ 1533 "... we feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make the conscience of the said authorities insensitive, if not blunt, to the paramount requirement of the Constitution that even during Emergency, the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded."

53. In matters touching liberty, greater care is called for on the part of the authorities exercising powers of detention.

An additional question

54. Dr Ghatate, appearing for one of the petitioners raised an interesting submission to the following effect: By Constitution 44th (Amendment) Act, Parliament, acting in its constituent power, has substituted clause (4) as well as clause (7) of Article 22 leaving it to the Central Government to specify the date from which the said amendment shall come into force. Sub-section (2) of Section 1 of the (Amendment) Act empowers the Central Government to fix different dates for coming into force of different provisions of the said Act. Though the Central Government has specified the date of coming into force in respect of several other provisions of the Amendment Act, it has not chosen to specify the date from which the Amendments to substitution of clauses (4) and (7) of Article 22 shall come into force. The 44th (Amendment) Act was enacted as far back as April 1979 and even though more than fourteen years have passed by, the Central Government has not thought it fit to enforce the said Amendments. This failure on the part of the Central Government has the effect of virtually nullifying the said Amendments. While enacting the said Amendments, Parliament could never have contemplated that the Central Government would sit on them for more than fourteen years. The Central Government must act in accordance with the spirit of the Amendment Act. It must act reasonably. It cannot undo a Constitution Amendment just by refusing to specify a date from which it shall come into operation. Even if the power given to the Central Government is characterised as a conditional legislation still the fact remains that such power too must have to be exercised reasonably and within reasonable time. Can the Central Government wait for few more years and would the Court be powerless to command the Central Government to bring into force the said Amendment? If no such command can be given, would it not mean that Parliament was, in the year 1979, amending the Constitution, not for that generation but for the next generation? Section 1(2) of the 44th (Amendment) Act is indeed an instance of abdication of or delegation of essential constituent power and, therefore, bad. Such a thing has never happened and cannot be allowed to happen; the Central Government ought not to be allowed to play with a constitutional amendment an amendment which, in particular, tends to strengthen the safeguard contained in clause (4) of Article 22, says the counsel.

55. We do not, however, think it necessary for the purposes of these cases to express any opinion on Dr Ghatate's submission, for the reason that acceptance of his contention assuming we do makes no difference to the result of these petitions. We have already held that the orders of detention made under Section 3 of COFEPOSA, which were governed by Section 12-A do yet represent orders of detention for the purpose of and within the meaning of Section 2(2)(b) read with Section 2(1) of SAFEMA. Even if we assume that the amendments to clauses (4) and (7) effected by the 44th (Amendment) Act have come into force on the day the Amendment Act received assent of the President, the result would be no different. In this view of the matter, it is also not necessary to express any opinion on the respondent's submission based upon A.K. Roy v. Union of India25, Viz., whether the opinion in the said decision can be validly applied even after a lapse of fourteen years.

56. To summarise:

(1) Parliament was perfectly competent to enact both the COFEPOSA and the SAFEMA. (2) For the reasons given in the body of this judgment, we do not express any opinion on the validity of the 39th and 40th Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. We assume them to be good and valid. No arguments have also been addressed with respect to the validity of 42nd Amendment Act to the Constitution either. (3) (a) An order of detention made under Section 3 of COFEPOSA, which was governed by Section 12-A thereof is yet an order of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA. Since the President had issued an order under Article 359(1) suspending Articles 14, 21 and 22, it became competent for Parliament, by virtue of clause (]-A) of Article 359 to enact Section 12-A of COFEPOSA for the duration of and limited to the period for which the Presidential Order was in force. It was meant to achieve the purposes of emergency. Once Section 12-A 'Is held to be a competent piece of legislation, orders of detention made thereunder (i.e. orders of detention to which the said provision applied) cannot be held to be not amounting to orders of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA, particularly In view of the express language of Section 2(2)(b) [including proviso (iii) thereto] and the 25 (1982) 1 SCC 271 : 1982 SCC (Cri) 152: (1982) 2 SCR 272 protection enjoyed by both the enactments by virtue of their inclusion in the Ninth Schedule to the Constitution.

(b) An order of detention to which Section 12-A is applicable as well as an order of detention to which Section 12-A was not applicable can serve as the foundation, as the basis, for applying SAFEMA to such detenu and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b). If such detenu did not choose to question the said detention (either by himself or through his next friend) before the Court during the period when such order of detention was in force, or is unsuccessful in his attack thereon he, or his relatives and associates cannot attack or question its validity when it is made the basis for applying SAFEMA to him or to his relatives or associates. (4) The definition of "illegally acquired properties" in clause (c) of Section 3 of SAFEMA

is not invalid or ineffective. (5) The application of SAFEMA to the relatives and associates [in clauses (c) and

(d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment. The position of 'holders' dealt with by clause (e) of Section 2(2) is different as explained in the body of the judgment.

(6) Section 5-A of COFEPOSA is not invalid or void. It is not violative of clause (5) of Article 22.

(7) Petitioners have failed to establish that any of the provisions of SAFEMA are violative of Articles 14, 19 or 21 apart from the protection they enjoy by virtue of the inclusion of the Act in the Ninth Schedule to the Constitution.

57. All the writ petitions, transferred cases and appeals are disposed of accordingly. The court and authorities before whom proceedings are pending under SAFEMA shall proceed to dispose them of in accordance with law and in the light of this judgment. It is in the interest of all concerned that the proceedings are concluded with all deliberate speed.

58. Civil Appeal No. 1418 of 1981 dismissed as withdrawn.

59. No orders are called for on IA No. 1 of 1993 in TP (C) No. 17 of 1978.