

Reportable

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

WP (Crl.) No.1787 of 2009

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Reserved On: 04th February, 2010

Date of Decision: 18th March, 2010

DROPTI DEVI

... Petitioner

through :

Mr. Vikram Chaudhri with Mr.
Nikhil Jain, Advocates.

VERSUS

UNION OF INDIA AND OTHERS

... Respondents

through:

Mr. A.S. Chandhiok, ASG with
Mr. Atul Nanda, Ms. Rameeza
Hakeem and Mr. Gaurav Gupta,
Advocates.

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The petitioner, by means of this writ petition, has challenged the detention order dated 23.09.2009 whereby Sh. Raj Kumar Aggarwal, who is the son of the petitioner, is sought to be detained under Section 3(1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (hereinafter referred to as 'COFEPOSA'). The detention order has not been executed so far and thus, Sh. Raj Kumar Aggarwal (hereinafter referred to as 'the detenu') has not been taken into custody. This petition has been filed at pre-detention stage. For this reason, the detenu has not

been served with the grounds of detention/speaking order so far, as the requirement of serving copy of grounds of detention arises after the detenu is taken into custody. The petitioner has, therefore, filed a copy of the order dated 23.09.2009 only, which is issued by Joint Secretary, Government of India stating that the detenu be detained and kept in custody in the Central Jail, Tihar, New Delhi. However, some indications of the circumstances under which this order came to be passed, can be gathered from the counter affidavit filed by the respondents to this writ petition to which we shall advert to at the appropriate stage. Before that, we deem it proper to take note of the averments made in the writ petition, which formed the basis of challenging the detention order.

2. One Ambika Electronics, engaged in the business of mobile phones, belongs to Anil Kumar Aggarwal, who is detenu's brother. On 17.02.2009, premises of the said firm at 136, M.C.D. Market, Karol Bagh, New Delhi and other premises, *viz.*, residence of Anil Kumar Aggarwal, that of detenu at Pitam Pura, New Delhi, shop premises of M/s. Bhagwati Electronics situated at 135, Municipal Market, Karol Bagh, New Delhi belonging to Kapil Jindal were raided by the office of the Directorate of Enforcement, New Delhi. Indian currency amounting to Rs.8,00,000/- approximately was recovered and some documents were also seized by the Enforcement Authorities, who took into custody the detenu's passport as well. The detenu was also taken away by the official to their office at Jamnagar House, Akbar Road, New Delhi in the intervening night between 17.02.2009 and 18.02.2009 where he was interrogated. His

statements were obtained, though it is claimed that it was done by exercising threat, pressure and coercion and that on the very next day, i.e., 19.02.2009, the detenu made retraction of the said statement. Thereafter, he was summoned on various occasions. However, because of his illness, he was unable to travel much. The detenu ultimately appeared on 15.05.2009 when his signatures were purportedly taken on certain blank papers. On 18.05.2009, he moved an application for release of the Indian currency seized on 17.02.2009. By this application, he categorically averred that the amount in question was duly accounted for in the books of accounts and he is not involved in any contravention or violation under the FEMA. On 25.05.2009, he also moved the application for release of passport seized by the officials of the Directorate of Enforcement. Reply dated 08.09.2009 was received by him stating that the matter regarding seized currency/documents would be decided after completion of investigation against the detenu.

3. It so happened that on 17.02.2009, residential premises of Sh. Anil Kumar Aggarwal at Pitam Pura, New Delhi were also searched and Indian currency amounting to Rs.8,00,000/- along with certain documents were taken into possession by the Enforcement Directorate. He was also issued summons under Section 37 of FEMA pursuant to which he attended the office on 20.04.2009. On 18.05.2009, Anil Kumar Aggarwal moved the application for release of his Indian currency with the averments that the said amount is duly accounted for in his books of accounts and there is no violation or contravention under FEMA. He was also given reply dated

08.09.2009 that the matter regarding seized currency would be decided after completion of investigation into the matter. The petitioner maintains that the detenu has nothing to do with the affairs of Anil Kumar Aggarwal. In the premises of M/s. Bhagwati Electronics, searched by the Directorate, Indian Currency, this letter was recovered. Kapil Jindal was also taken to the office around 1.00 a.m. in the intervening night of 17.02.2009 and 18.02.2009 and his statement was recorded. However, he also retracted his statement on 19.02.2009 alleging that it was involuntarily statement and was obtained under threat and coercion. He also asked for return of his currency and was given the same reply, viz., the matter regarding seized currency would be decided after the completion of investigation.

4. Upon coming to know of the proposal to detain the detenu, a number of representations were made categorically highlighting that he is not engaged in any transaction which may attract contravention under the provisions of FEMA and the Indian currency/amount seized is duly accounted for in the books of accounts. The detenu also categorically averred that he is merely engaged in the business of sale and purchase of mobile phones in India and is not engaged in import of any products. The competent authority still went ahead and passed the impugned detention order on 23.09.2009. The petitioner came to know of this order when certain officers came to the residence of the detenu at Sonapat, Haryana where the detenu is presently residing and asked about the

whereabouts of the detenu. Upon asking, those persons handed over the photocopy of the detention order.

5. This writ petition is filed challenging the same at pre-detention stage raising the following grounds:

i) That the impugned order has been passed in violation of the Fundamental Rights of the detenu as guaranteed under Article 14, 19 and 21 of the Constitution of India. It is argued that FEMA makes it a civil compoundable offence and, therefore, exercising the draconian powers under Section 3(1) of COFEPOSA violates the fundamental right of the detenu.

ii) That the Detaining Authority has not been alive to the fact that there is absolutely no basis for inferring any act of omission or commission by the detenu which would be violative of any dealings in foreign exchange and that the Detaining Authority has also been oblivious to the drastic change in the intention of the legislature which has since repealed the erstwhile Foreign Exchange Regulation Act, 1973 and in its place has brought into force a much milder legislation in the form of Foreign Exchange Management Act, 1999.

iii) That the impugned order is also vitiated by inordinate delay in issuance thereof.

iv) That the impugned order has been rendered completely *nonest* on account of non-placement of vital and material documents before the Detaining Authority by the Sponsoring

Authority leading to non-consideration thereof , while passing the impugned order.

v) That the impugned order is passed on irrelevant, extraneous, vague and non-existent grounds.

6. In the counter affidavit filed on behalf of the Union of India, maintainability of this writ petition at pre-detention stage is challenged on the ground that the jurisdiction of this Court is very limited in view of the law laid down by the Supreme Court in the case of ***Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another*** [1992 (Suppl. 1) SCC 496]. According to the respondents, the grounds taken for challenging the detention order are not available at this Stage. It is also submitted that enactment of FEMA does not prevent the authorities to pass detention order under Section 3(1) of the COFEPOSA and such a contention has categorically been rejected by the Supreme Court in the case of ***Union of India Vs. Venkateshan*** (2002) 5 SCC 285. It is also denied that relevant material was not placed before the detaining authorities or that there was no material to pass the order of detention. The respondents have also stated that there is no delay in passing the order of detention, which would vitiate the said order. In support of the above submissions, the respondents also produced the original records for our perusal, which have been minutely scrutinized by us.
7. Since much of the time was consumed by the counsel for both the sides on the scope of challenge to the detention orders at pre-

detention stage and very detailed submissions were made in this behalf relying upon the various judgments of the Supreme Court as well as this Court, we deem it proper to address this issue in the first instance.

8. **Re: Scope of Challenge at Pre-detention Stage: The law revisited**

It is not in dispute that the Supreme Court in categorical terms delineated the parameters on which order of detention at pre-execution stage can be questioned in the case of *Alka Subhash Gadia and Another* (supra). In that case an order of detention was passed against the husband of the respondent No.1 under Section 3(1) of COFEPOSA. The order, however, could not be served on him as he was absconding. Hence a declaration was made that he fell within the category mentioned in Section 2(b) of the SAFEMA. Thereafter, a notice was issued under Section 6(1) of the SAFEMA to show cause as to why the properties mentioned in the schedule to the said notice should not be forfeited to the Central Government for reasons recorded in the accompaniment. A copy of the notice along with the schedule of the properties and the copy of the reasons for forfeiture of property were also sent to the respondent No.1. The Respondent No.1, thereafter, filed a writ petition under Article 226 before the High Court challenging the detention order as well as the show cause notice. The High Court by its impugned decision held that the writ petition was maintainable for challenging the detention order even though the detenu was not served with the order and he had thus not surrendered to the authorities. The High

Court further directed that the detention order, the grounds of detention, and the documents relied upon for passing the detention order be furnished to the detenu and that they should also be produced before the court. The High Court also directed the authorities to supply the said documents to the counsel for the respondent No.1. The Assistant Director of Enforcement filed an affidavit before the High Court stating that although they were willing to produce the order of detention and the grounds of detention for the perusal of the Court, they cannot furnish them to the respondent No.1, unless, as required by the Act, the detenu first submits to the impugned order. The High Court held that the officers were guilty of contempt of court and directed the matter to be listed to take appropriate action for contempt. It is at that stage that the special leave petitions, giving rise to the appeals, were filed before the Supreme Court.

9. Keeping in view the fact that the appeals involved questions of great public interest and importance, the matter was ultimately heard by a three Judges Bench, which allowed the appeals and set aside the order of the High Court. One of the grounds specifically taken by the respondent in that case was that since judicial review was a part of basic structure of the Constitution, the power of the High Court under Article 226 of the Constitution could not be circumscribed in any way by any law, including detention law. Therefore, the detention order could be challenged at any stage. It was argued that the artificial distinction between pre-decisional stage and post-decisional challenge is inconsistent with and alien to the wide

powers conferred under Articles 226 and 32 of the Constitution. The Court did not accept these submissions in the broader sense in which they were argued. The perusal of the judgment would bring the following principles laid down therein:

1) Despite the constitutional protection of Articles 14, 19 and 21, it is not mandatory that a detenu must be informed of the grounds of his detention prior to being detained under an order of detention (para 29). The Court rejected the argument that it would deprive the detenu of a right of judicial review of the order of detention (para 30).

2) The detenu does not even have the right to the order of detention or the grounds thereof before the order of detention is executed even to verify whether it can be challenged at its pre-execution stage on the limited grounds available (para 32).

3) Though the courts have the power to interfere with the detention orders at the pre-execution stage, but they are not obliged to do so nor will it be proper for them to do so, save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right (para 32).

4) Such exceptional cases are where the court is prima facie satisfied:

(i) that the impugned order is not passed under the Act under which it is purported to have been passed.

(ii) that it is sought to be executed against a wrong person,

(iii) that it is passed for a wrong purpose

(iv) that it is passed on vague, extraneous and irrelevant grounds or

(v) that the authority which passed it had no authority to do so (para 30).

10. Following rationale is provided by the Apex Court in conferring the jurisdiction at pre-detention stage:

“19. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well-merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question place any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences.”

11. At the same time limitation in the exercise of powers at the pre-execution stage are explained in the following words:-

“However, the Courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary, extraordinary, and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibbal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of

the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution.”

12. At that stage the Court spelled out the circumstances in which interference would be called for:-

“The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary power of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.”

13. It is clear that the Court was also of the opinion that in some genuine and exceptional cases, power can be exercised by the Courts to interfere with the detention order even at pre-execution stage. However, the detenu cannot claim such exercise of power as a matter of ‘right’ and it is purely a discretion of the Court, which has to be exercised judicially on well settled principles. This is so stated in the following words:

“32...Thirdly, in the rare cases where the detenu, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the very limited grounds

stated above. The Court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each case. The decisions and the orders cited above show that in some genuine cases, the Courts have exercised their powers at the pre- execution stage, though such cases have been rare. This only emphasises the fact that the courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so. It will be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well-settled principles.”

14. There is no quarrel about the aforesaid dicta laid down by the Supreme Court in *Alka Subhash Gadia and Others* (supra).

However, the parties differ in their perceptions on two aspects, *viz.*:

a) Whether five grounds mentioned in *Alka Subhash Gadia and Others* (supra) are exhaustive and not illustrative.

b) What would be the impact and scope of these grounds, particularly, ground 3 and 4.

15. Insofar as dispute about the exhaustive nature of the five grounds stated in *Alka Subhash Gadia and Others* (supra), learned counsel for the petitioner relies upon the judgment of the Supreme Court in *Deepak Bajaj Vs. State of Maharashtra* [AIR 2009 SC 628] wherein following observations were made by the Court:

“6. We have carefully perused the above observations in Smt. Alka Subhash Gadia's case (supra) and we are of the opinion that the five grounds mentioned therein on which the Court can set aside the detention order at the pre execution stage are only illustrative not exhaustive.”

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24. If a person against whom a preventive detention order has been passed comes to Court at the pre execution stage

and satisfies the Court that the detention order is clearly illegal, there is no reason why the Court should stay its hands and compel the petitioner to go to jail even though he is bound to be released subsequently (since the detention order was illegal). As already mentioned above, the liberty of a person is a precious fundamental right under Article 21 of the Constitution and should not be likely transgressed. Hence in our opinion Smt. Alka Subhash Gadia's case (supra) cannot be construed to mean that the five grounds mentioned therein for quashing the detention order at the pre execution stage are exhaustive.”

16. Mr. Chandhiok, learned ASG appearing on behalf of the Union of India, submitted that these observations made by two Judge Bench were clearly *per incurium* as, in various cases decided by the Supreme Court following ***Alka Subhash Gadia and Others*** (supra), the Apex Court had categorically clarified that these grounds were exhaustive and not illustrative. A reference was made to the decision in the case of ***Subhash Muljimal Gandhi Vs. L. Himingliana*** [(1194) 6 SCC 14] in the following terms:

“9. Mr. Jethmalani first contended that the five contingencies referred to in the above quoted passage were not exhaustive but illustrative as there might well be other contingencies in which pre-execution challenge to the order of detention would be permitted. In elaborating his contention Mr. Jethmalani submitted that in the case in hand there were sufficient materials to prove that the Customs Officers concocted a false case of smuggling against the appellant after beating him, keeping him in illegal custody for three days and coercing him to make a confessional statement. In support of this submission, Mr. Jethmalani first drew our attention to the report of the doctor of the Jail Hospital submitted on June 2, 1990 to the Chief Metropolitan Magistrate regarding medical examination of the appellant which indicate that the doctor found some bruises and abrasions on his person and he complained of pain on his body. Mr. Jethmalani then drew our attention to the fact that though the appellant was apprehended in the early hours of May 22, 1990 and was thus constitutionally and statutorily required to be produced before the nearest Magistrate latest by May 23, 1990 he was kept unlawfully detained till May 25, 1990 when the Customs authorities produced him in Court. Mr.

Jethmalani submitted that as these facts unmistakably demonstrated the misuse and abuse of extraordinary constitutional powers by the State machinery this Court would not allow the liberty of a victim of exercise of such powers to be taken away even if the parameters mentioned in *Alka Subhash Gadia* did not apply in this case. Even otherwise, Mr. Jethmalani urged, the facts herein clearly made out a case for interference by this Court under category (iii) mentioned in the above quoted passage in *Alka Subhash Gadia*, namely that the impugned order was passed for a wrong purpose.

10. Having given our anxious consideration to the above contention of Mr. Jethmalani, we are unable to accept the same. In the passage, earlier quoted from *Alka Subhash Gadia*, this Court has expressly laid down that the interference with detention orders at pre-execution stage has to be limited in scope and number as mentioned therein. The Court has reiterated the same view as will be evident from the following further observations made in that case:

“...in the rare cases where the detenue, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the *very limited grounds stated above*.” (Emphasis supplied)

11. The above principles laid down in *Alka Subhash Gadia* have been quoted with approval by another three-Judge Bench in *N.K. Bapna v. Union of India*, 1992(60)ELT13(SC). Bound as we are by the above judgments, we must hold that the other contingencies, if any, must be of the same species as of the five contingencies referred to therein.”

17. He also submitted that to the similar effect is the judgment of the Supreme Court in *Admn. Of the National Capital of Delhi Vs. Prem Singh* [1995 Supp (4) SCC 252] where the Apex Court held as under:

“5. We have carefully considered the above arguments. It is needless to state that the law in relation to pre-detention is fully covered by the ruling of this Court reported in *Alka Subhash Gadia* case. In that decision the following grounds are catalogued:

The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz. where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary power of judicial review into interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

6. Unless and until any one of the grounds has been established, the court is powerless to interfere. In other words no interference at the pre detention stage is permitted on any other grounds; otherwise the very object to preventive detention is thwarted. In this connection we also note a stay of detention also had been granted. On a proper occasion we may have to consider the correctness of such orders granting stay. This aspect of the matter need not detain us.”

18. Again in the case of ***Sayed Taher Bawamiya Vs. Jt. Secy to the Govt.of India*** [(2000) 8 SCC 630], the Supreme Court clarified that the exceptions carved out by ***Alka Gadia's*** case were only exhaustive and not illustrative in the following manner:

“7. As we see it, the present case does not fall under any of the aforesaid five exceptions for the court to interfere. It was contended that these exceptions are not exhaustive. We are unable to agree with this submission. Alka Subhash Gadia case shows that it is only in these five types of instances that the court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage. The petitioner had sought to contend that the order which was passed was vague, extraneous and on irrelevant grounds but there is no material for making such an averment for the simple reason that the order of detention and the grounds on which the said order is passed has not been placed on record inasmuch as the order has not yet been executed. The petitioner does not have a copy of the same and therefore it is not open to the petitioner to contend that the non-existent

order was passed on vague, extraneous or on irrelevant grounds.”

19. To the same effect are the judgments of the Supreme Court in the cases of ***Union of India Vs. Muneesh Suneja*** [(2001) 3 SCC 92] and ***Naresh Kumar Goyal Vs. Union of India*** [(2005) 8 SCC 276] reiterating this legal position. Even after ***Deepak Bajaj*** (supra), the Supreme Court in ***Union of India (UOI) and Ors. v. Atam Parkash and Anr.*** [(2009) 1 SCC 585] allowed the appeal of the UOI against the judgment of Punjab & Haryana High Court following ***Alka Gadia's*** case was explained held that five grounds mentioned therein are exhaustive and not illustrative.
20. It is clear from the above that ***Alka Gadia*** (supra) is explained and clarified by the Supreme Court itself in a number of cases. It is not only three-Judges Bench of ***Alka Gadia*** (supra), but also the interpretation/clarification of the said judgment given by the Supreme Court in subsequent cases that would be binding on the High Court. As against specific pronouncement that five grounds in the case of that ***Alka Gadia*** (supra) are exhaustive, observations to the contrary in ***Deepak Bajaj*** (supra) by two-Judges Bench have been made without taking note of the aforesaid judgment of the larger Bench. The reason given in ***Deepak Bajaj*** (supra) in support of the view that the five grounds are illustrative is Article 21 of the Constitution. Significantly this very basis was specifically rejected by the Supreme Court in ***Alka Gadia*** (supra). The Supreme Court

also held that the following remedy was available to take care of such a situation:

“...Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the limited grounds on which they can be successfully challenged, the courts, as pointed out earlier, have power even to grant bail to the detenu pending the final hearing of his petition. Alternatively, as stated earlier, the Court can and does hear such petition expeditiously to give the necessary relief to the detenu.”

21. In these circumstances, bound as we are on the principles of *stare decisis* to follow the dicta laid down by the larger Bench, we hold that the detention order at pre-execution stage can be challenged only on the five grounds mentioned in ***Alka Gadia*** (supra) or other contingencies of the same species.
22. It would be fruitful to refer to a Division Bench judgment of this Court in WP (Crl.) No.2444/2006 entitled ***Smt. Gopa Manish Vora v. Union of India and Anr.*** decided on 10.2.2009. In that case, the Court was confronted with the same dilemma, namely, two lines of decision: one indicating that an order of detention can be interfered with at the pre-execution stage only if any of the five circumstances mentioned in ***Alka Gadia*** (supra) exist and other line of decisions (as noted by us as well) holding that circumstances mentioned in ***Alka Gadia*** (supra) were not exhaustive but illustrative in nature. The Division Bench was of the opinion that the decision in ***Deepak Bajaj*** (supra) stating that five situations mentioned in ***Alka Gadia*** (supra) were illustrative and not exhaustive laid down the law correctly. However, it may not be necessary to go into this aspect. The reason is simple. Even in

those decisions where it is held that five contingencies mentioned in ***Alka Gadia*** (supra) were exhaustive, other contingencies of the special species are allowed to be raised. The grounds on which the petitioner wants to challenge the detention order would fall in those species as would be noticed hereafter. Therefore, it may not be necessary to refer the matter to a larger Bench.

23. Next question would be to determine the scope of these grounds. We have to bear in mind that at pre-execution stage, the grounds of detention are not served upon the detenu. ***Alka Gadia*** (supra) specifically rules that detenu is not entitled to the order of detention prior to its execution. Thus, in the absence of copy of the order of detention, the detenu cannot challenge the said order on merits. Such a challenge is permitted, as per ***Alka Gadia*** (supra), only after the order is executed. At the same time while holding that at pre-execution stage also interference by the courts is possible, *albeit* on limited grounds, the nature of five grounds stipulated therein would manifest that these ground are of jurisdictional nature and go to the root of the matter. When any of these grounds are established, obviously the detention order itself is rendered without jurisdiction and *void ab initio*. It is in this backdrop we have to keep in mind that other contingencies (i.e. the grounds of challenge) must be of the same species as of the five contingencies referred in ***Alka Gadia*** (supra).
24. As noted above, the petitioner intends to challenge the detention order, at pre-execution stage, on the following grounds:-

- i) That the impugned order is also vitiated by inordinate delay in issuance thereof.
- ii) That the impugned order has been rendered completely *nonest* on account of non-placement of vital and material documents before the Detaining Authority by the Sponsoring Authority leading to non-consideration thereof, while passing the impugned order.
- iii) And that the impugned order is passed on irrelevant, extraneous, vague and non-existent grounds.

25. Whether these are the species of the five contingencies, is the question. Discussion of some of the judgments cited at the bar would be apt to answer the question.
26. In ***Rajinder Arora Vs. Union of India (UOI) and Ors.*** [2006 (4) SCC 796], the Supreme Court set aside the detention order at pre-execution stage when it found that although the raid was conducted on 26.05.2004 no material had been brought on record far even launching the prosecution against the detenu and even despite that, the detention order had been issued after a long time. The delay caused in issuing the detention order had not been explained and status report called for from the Custom Department had also not been taken into consideration by the Competent Authority. On this basis, the court opined that circumstances mentioned at serial Nos. 3 & 4 of ***Alka Gadia*** (supra) stood attracted.

27. Because of the aforesaid reasons, we intend to go into the arguments advanced by the learned counsel for the petitioner challenging the detention order.

28. **Re: Delay**

Submission of learned counsel for the petitioner, on this aspect was that a bare clause of record still reveals that there has been abnormal delay in passing the impugned detention order. Highlighting the fact that the raid and search of the premises of the detenu was conducted way back on 17.02.2009, learned counsel for the petitioner pointed out that the detention order was ultimately passed on 23.09.2009 i.e. after a gap of about seven months, which according to the learned counsel is vital and raises a serious question on the necessity to detain the person. He argued that it reflects lack of any subjective satisfaction in passing the impugned order and the live-link between the prejudicial activities and passing of the detention order has been snapped leading to the vitiation of the order. Learned counsel for the petitioner took support from the averments made by the respondent in the counter affidavit where delay is sought to be explained. He specifically drew our attention to paras 29 and 30, which are as under:

“29. In the present case, it is submitted that a search of the petitioner’s premises was conducted on 17.02.09. The statement of the detenu was recorded on 17/2/2009, 15/5/2009, 18/5/2009, 20/5/2009 and 28/5/2009. The petitioner and others retracted from their statement on 19.02.09 which was, as stated earlier was placed before the detaining authority. Another search was conducted at the premises of one Murli on 24/4/2009. Evidence gathered at this premises and in the follow up action reveal that Shri Raj Kumar @ Munna got US \$100,000/- arranged from Murli. Thus it is clear that Rajkumar @ Munna was indulging in hawala activities as late as 24/4/2009.

30. The proposal for detention of the petitioner was sent by the sponsoring authority i.e. Enforcement Directorate, New Delhi and the proposal was considered and approved by the Central Screening Committee on 03.07.2009 for preventive detention. Afterwards several meetings/telephonic discussions took place on 14.07.09, 24.07.09, 30.07.07, 06.08.09, 12.08.09, 19.08.09, 26.08.09, 28.08.09, 01.09.09, 15.09.09, 17.09.09 and 29.09.09 between officials of Sponsoring Authority and Director (CP). Looking into the gravity of the case, a meeting was also called by JS (CP) on 12.08.09 in her Chamber where Spl. Director, ED and other officials of Sponsoring Authority along with Director (CP) attended the meeting. Based on the above meetings and discussion between Director (CP) and officials of the Sponsoring Authority that several letters dated 30.07.09, 12.08.09, 19.08.09, 28.08.09 and 01.09.09 were issued by Director (Cofeposa) for seeking various information from the Sponsoring Authority in respect of relied upon documents as well as details of calls made by the proposed detainee from his mobile. Based on the above references the Sponsoring Authority provided required documents to COFEPOSA Division vide their letters dated 03.08.09, 02.09.09 and 15.09.09 and final modified relied upon documents on 22.09.09. It was after the above processes, meetings and calling for further material and information, which was placed before the detaining authority that the order of detention dated 23.09.09 came to be passed. Hence it is submitted that the 'delay' between the commission of the offence/search of the premises of the Petitioner on 17.02.09 and the date of the order of detention in the present case is justified and explained and hence is no ground for challenge to the order of detention."

Referring to the averments to the above paras of the counter affidavit, learned counsel argued that as per the respondent's own showing, the proposal was sent by the sponsoring authority i.e. Enforcement Directorate, New Delhi and approved by the Central Screening Committee on 03.07.2009. He further pointed out that various meetings allegedly took place with long gaps and it was not even stated that as to what kind of information was required from the sponsoring authority which led to delay in passing the orders. Following judgments were cited in support of the contention that delay in passing the detention order would vitiate the said order:-

1. ***Pooja*** Batra Vs. ***Union of India & Others*** [2009, SCC 296]
2. ***Kishore Sukan Raj Jain*** Vs. ***State of Rajasthan*** [1995, SCC (CrL.) 847]
3. ***Union of India & Another*** Vs. ***Chaya Ghoshal (Smt.) & Another*** [2005, 10 SCC 97]
4. ***M.L. Jose*** Vs. ***Union of India & Others*** [1992 (supple.) 2 SCC 168]

29. Learned ASG, on the other hand, on the basis of same pleadings contained in the counter affidavit, submitted that there was no delay in passing the impugned order. He argued that the authorities did not want to pass any such order in haste and without sufficient material in their possession. The events would indicate that, no doubt, premises were raided on 17.02.2009. However, statement of detenu was recorded on different dates starting from 17.02.2009 and lastly on 28.05.2009. However, since petitioner and others retracted from the statements, necessary evidence was to be gathered. Premises of other detenu, viz., Murali were also searched on 24.04.2009 and evidence was gathered at that premises. It was also necessary to examine the material in order to find out the complicity/connectivity of all these persons and to arrive at a conclusion as to whether the material was sufficient to show that the detenu had indulged in *hawala* activities. After collecting all these materials by the end of May, 2009 and examination thereof, which took some time, proposal for detention was submitted on 03.07.2009, which cannot be treated as belated action. Further details of discussion taken place between the sponsoring authority

and Director (CP) and other officials would support the version of the respondents that there was due application of mind and all the aspects of the matter to consider whether detention order was required to be passed or not. Thus, the time taken in passing the order, according to the learned ASG, was fully explained and it cannot be treated as a case where there was snapping of link between the incident and the alleged potentiality of detenu in indulging him in such activities.

30. After going through the records, we find ourselves in agreement with the aforesaid submission made by the learned ASG. It shows that after receipt of the proposal, JS (COFEPOSA) looked into the matter and processed the case vide note dated 13.07.2009. It was placed before the Director (CP) on the same day who after examining the same thought it proper to call concerned officers in order to clarify/rectify documents sent by them, who attended the meeting on 14.07.2009. On the basis of the discussion which took place, these officials were asked to forward relevant material within 10 days. On 24.07.2009 ED officials again attended the office of Director (CP) when there was in-depth discussion regarding this case. Since Director (CP) had certain queries based on the discussion which were to be replied by the ED officials, the ED officials were asked to provide the information sought by the Director (CP) within one week. He apprised JS (CP) on 27.07.2009 about the information which was required by him. The ED officials visited the office of Director (CP) again on 30.07.2009 and had discussion with him on various points. Further time was sought by

the ED officials to provide required information. Similar meetings took place on subsequent dates as mentioned in the counter affidavit. Record further reveals that on 12.08.2009 Director (CP) had made up his mind to issue the detention order. However, since it was necessary to have the translation of relied upon documents as well as detention order and grounds of detention in Hindi as all of the proposed three detenu knew Hindi, he directed the ED officials to get the documents translated in Hindi. This process started and thereafter some clarifications were needed regarding translation of documents on which clarification was given by Director (CP) on 19.08.2009, 26.08.2009 and 28.08.2009. It so happened that in the meantime, Rajiv Kumar Singh, s/o Kamar Pal Singh made a representation to the Minister of State (Finance) retracting his statement. It became necessary for the Director (CP) to consider the same and he wanted to find out the reply given by the ED officials in this behalf. Further developments also took place as on 03.09.2009 search was conducted in the premises of Sh. Pooran Chand Sharma and the seized documents contained entry of *hawala* payment purportedly made to Gautam Jain. Director (CP) perceived as important the development showing that Gautam Jain was still indulged in *hawala* activities. Mr. Pooran Chand Sharma also retracted his statement, which was placed before the Director (CP) as well. All these aspects were considered by the Director (CP). Translation of necessary documents was also carried out, which was received and thereafter impugned order was passed on 23.09.2009.

31. It is clear from the above that there is no delay in passing the impugned order and the time taken in passing the order is duly explained as borne out from the records.

32. In view thereof, the principle laid down in the judgments cited by the learned counsel for the petitioner would not be applicable in this case.

33. **Re: Non-placement of Relevant Documents**

According to Mr. Vikram Chaudhari, Advocate, following documents which were very material and relevant were placed before the detaining authority, which has prejudiced the case of the petitioner:

- (i) Letter of retraction of the detenu and Mr. Kapil Jindal.
- (ii) Representation dated 25.06.2009 of the detenu.
- (iii) Copy of letter dated 08.09.2009 written by the Dy. Director, Enforcement informing the detenu that the matter was yet under investigation.

It was argued that non-placement of vital piece of evidence, which is likely to influence the subjective satisfaction of the detaining authority, would vitiate the detention order on the vice of non application of mind. In this context, he referred the following cases:

- (i) ***Asha Devi* Vs. *K. Shivraj*** [AIR 1979 SC 447];
- (ii) ***State of U.P.* Vs. *Kamal Kishore Saini*** [AIR 1988 SC 208] and
- (iii) ***Ayya alias Ayub* Vs. *State of U.P.*** [AIR 1989 SC 364].

34. As far as letters of retraction by detenu and Kapil Jindal are concerned, they are considered by the detaining authority. Record demonstrates it clearly. Obviously, since the detention order has not been executed so far and the petitioner is not provided with the grounds of detention as well as relied upon documents, this argument is based on conjectures.
35. Insofar as representation dated 25.06.2009 is concerned, the same was addressed to Member (Customs) and in the counter affidavit, it is stated that it had neither been received by the sponsoring authority nor detaining authority. It is also pleaded that representation sent to Member (Customs), who had no locus in the matter. Learned counsel for the petitioner, on the other hand, contended, on the basis of case law, that it was the responsibility of the sponsoring authority/detaining authority to find out whether any representation was made out to any authority and consider the same.
36. When we look into this representation, we find that it raises certain issues, which were taken up by the detenu in his earlier representation as well and those representations were duly examined by the detaining authority. Learned counsel for the petitioner, however, submitted that the following aspects were taken for the first time in this representation, which were not brought to the notice of the detaining authority:

- a) The amount of cash seized from the detenu was duly accounted for in the books of accounts and the same was not involved in any contravention or violation under FEMA. All the relevant vouchers had been submitted.
- b) The detenu was doing the business of mobile phones in India and was not importing any phones and question of involvement in any foreign currency did not arise.
- c) Premises of the detenu were raided on 17.02.2009, i.e., four months ago and Enforcement Directorate should be called upon to show as to whether the detenu had committed any offence during this period to establish continuity. The department was trying to tag the detenu with 'Gautam', although he had no connection whatsoever with him. Therefore, all the statements of the detenu be looked into before considering detention under COFEPOSA.

37. Insofar as plea nos. (c) and (d) are concerned, at this stage it is not even necessary to comment upon the same in the absence of service of grounds of detention upon the petitioner. Whether detention order can be justified on the basis of material/evidence in possession of the sponsoring authority/detaining authority is a question, which can be determined after supply of grounds of detention along with relied upon documents are furnished to the petitioner giving him liberty to make representation there against on such aspects. Obviously, the factum of there being commission of no such further act was within the knowledge of detaining authority. Detaining

opinion as to whether circumstances exist to connect the petitioner with 'Gautam' or not. We may only point out at this state that as per the record placed before the detaining authority, nexus between Gautam Jain and the detenu is pointed out.

38. Another plea of the petitioner is that the amount seized is duly accounted for in the books of accounts and is not involved in any contravention and violation under the FEMA. This plea is not taken up for the first time in representation dated 25.06.2009. We find that this very aspect is highlighted by the detenu even in his application dated 18.05.2009 whereby he has requested for release of Indian currency seized from him. This representation as well as reply thereto was placed before the detaining authority. Thereafter this aspect is taken note of and not ignored as contended by the learned Counsel for the petitioner.

39. Submission of the petitioner that the detenu had also taken the plea that he was trading in mobile phones in India only and was not involved in any export or import, on the presumption that the detention order is passed on the premises that the petitioner is involved in illegal activity of export or import. However, records reveal that the detenu had in his statement on 17.02.2009 *inter alia* stated that he is importing mobile phones from China and further as per the record he had retracted his statement as well which would imply that he denied that he was indulged in importing mobile phones from China. Therefore, it cannot be said that the detaining authority was oblivious of this stand taken by the detenu.

detaining authority or not, cannot be commented at this stage, inasmuch as grounds of detention are yet to be served upon the detenu. Suffice is to state that allegations against the detenu is that he is indulging in *hawala* transaction. It would always be open to the detenu to question the basis of his detention after the service of grounds upon him.

40. **Re: Absence of Material – Order of Detention:**

This argument is again a matter of surmises, as the detention order and the documents relied upon which would constitute the material on the basis of which impugned order is passed, have not been served upon the petitioner so far. However, submission of the learned counsel for the petitioner was that investigation into the case is still pending and, therefore, when the investigation was not concluded, there could not have been complete material before the authority to pass the order of detention. To put it differently, the learned counsel argued that the detention order could not have been passed during the pendency of the investigation, i.e., till the conclusion of the inquiry and collection of the entire material. He referred to the judgment of the Supreme Court in the case of ***Madhu Garg Vs. Union of India*** [(2004) 7 SCC 625] and particularly the following passage from the said judgment:

“17. A bare perusal of the aforementioned averments in the said notice do not leave any manner of doubt whatsoever that upon chemical analysis of materials, it was found that the samples were made up of alloy steel. It has not been disputed before us that the alleged goods which are subject matter of the export were seized in presence of the detenu and were sent for chemical analysis before CRCL. Upon obtaining a report dated 23.10.2003, it appears, that the samples were made up of alloy steel although the test report could not throw any light as to

whether the goods were alloy steel forging (machined), as declared by the exporter. The subject matter of the consignment, therefore, was not scrap metal. Had the detaining authority waited for the results of the said chemical analysis before issuing the impugned order of detention, the first ground stated therein could not have been made a basis therefor.

18. The order of detention, therefore, in our considered opinion was passed in haste without there being adequate materials.

19. Mr. Doabia, however, contended that the allegation against the detenu as regard over invoicing of the goods is the subject matter of the adjudication proceedings. That may be so but it is now well-settled that when one of the grounds of detention is found to be based on irrelevant materials not germane for passing the order of detention, the entire order of detention shall stand vitiated in law.”

41. A reading of the aforesaid judgment would clearly demonstrate that the very first ground for detention passed in that case was that the goods seized, the subject matter of export, were scrapped metal and not the alloy steel as declared by the exporter, though the seized goods were sent for chemical test before CRCL without awaiting the report. Order of detention was passed on the aforesaid ground, which turned out to be erroneous after the report of CRCL was received. It was in this backdrop that the Apex Court held that the detention order was passed in haste without there being an adequate material/irrelevant materials not germane for passing the order of detention. The authority is not for the proposition that merely because investigation is pending, order of detention cannot at all be passed. In the present case, record reveals that sponsoring authority/detaining authority, based on the material collected by it, recommended the case for passing the detention order. Whether that material is sufficient or not cannot be considered at this stage.

The argument that there was no relevant material on the basis of

which order could be passed, can be available to the petitioner only when such a material is supplied. We would not like to make any observation in this behalf, lest it may prejudice either of the parties.

42. **Re: Effect of Repeal of FERA and Enactment of FEMA:**

Learned counsel for the petitioner had conceded that there is no absolute bar in passing the detention order on repeal of FERA and enactment of FEMA. Having regard to the judgment of the Supreme Court in *Union of India Vs. Venkateshan S. and Another* [(2002) 5 SCC 285] wherein the Court laid down the principle that if the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person in the following words:

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

43. The attempt on the part of the learned counsel for the petitioner was to demonstrate that facts of this case with solitary act imputed upon the petitioner would not justify passing of the detention order. He submitted that whereas FERA had dealt with the violation of provision of the said Act as a criminal offence and the onus was upon the accused to prove that he was innocent, the FEMA, on the other hand, is concerned with regulation of foreign trade, investment, etc. and liberalized after amendments therein by the legislature. This act deals with penalties, which are of severe nature and, therefore, a single act would not constitute sufficient ground to pass detention order.
44. Again, at the cost of repetition, we may observe that whether these circumstances justified the passing of the detention order or not would be known from the grounds of detention and the material relied upon in support thereof. Suffice is to state that as per the detaining authority, the petitioner is indulged in *hawala* transaction, which is required to be curbed. Whether this opinion of detaining authority is justified in the facts and circumstances of the case or not has to be gone into at an appropriate stage. At this stage, it can only be remarked that the order is not without jurisdiction in having regard to the law laid down in ***Venkateshan*** (supra).
45. We thus do not find any merit in all the contentions raised by the petitioner. Before we part with, we may add that entire matter is examined on the touchstone of limited jurisdiction, with which we are vested with at pre-execution stage. No doubt, the respondents

placed before us the relevant records. However, we were supposed to go through the records for limited purpose to find out as to whether submissions of the learned counsel for the petitioner, available at the pre-execution stage, are substantiated or not. Deeper and further scrutiny into the merits of the grounds of detention had to be eschewed at this stage. Reason is simple, when we find that case for intervention at this stage is not made out, it would not be proper for us to go into other aspects at this stage when the petitioner has yet to exercise his right to make representation against the detention order, after the service of grounds of detention and relied upon documents as well as remedy of approaching the COFEPOSA Board.

46. Therefore, we also make it clear that any observations made by us in this judgment would not come in the way of the petitioner when the petitioner challenges the detention order appropriately after its execution. With these clarifications, this writ petition is dismissed as devoid of any merits.

No costs.

(A.K. SIKRI)
JUDGE

(AJIT BHARIHOKE)
JUDGE

MARCH 18, 2010.
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