

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.T. SANKARAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P. JOSEPH

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

WP(C).No. 2161 of 2015 (U)

PETITIONER:

H. NAZARUDEEN AGED 37 YEARS
PRESENTLY RESIDING AT AL HABTHOOR BUILDING
KING FAISAL ROAD, SHARJAH
U.A.E. (PERMANENTLY RESIDING AT T.C 46/1013/1
VAHEEDA MANZIL, MANIKKAVILAKAM, POONTHURA P.O.
THIRUVANANTHAPURAM - 695 026)

BY ADVS. SRI. BECHU KURIAN THOMAS
SRI. ENOCH DAVID SIMON JOEL

RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY
DEPARTMENT OF HOME AFFAIRS, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM - 695 001.
2. COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS
ICE BHAVAN, PRESS CLUB ROAD
THIRUVANANTHAPURAM - 695 001.

R1 BY DIRECTOR GENERAL OF PROSECUTION SRI. ASAF ALI
R2 BY STANDING COUNSEL SRI. THOMAS MATHEW NELLIMOOTTIL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.2.2015, ALONG WITH WP(C). NO. 19740/2014, THE COURT ON 25-05-2015
DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT-P1: TRUE COPY OF THE SHOW CAUSE NOTICE DATED 13/06/2005
NUMBERED AS SCN05/2005-CUS ISSUED BY THE 2ND
RESPONDENT.
- EXHIBIT-P2: TRUE COPY OF THE ABSTRACT OF THE OBJECTION FILED BY THE
PETITIONER BEFORE THE 2ND RESPONDENT.
- EXHIBIT-P3: TRUE COPY OF THE ABSTRACT OF THE PASSPORT OF THE
PETITIONER.
- EXHIBIT-P4: TRUE COPY OF THE ORDER DATED 30/06/2005 AND NUMBERED AS
27936/SSAI/2005/HOME ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT-P5: TRUE COPY OF THE ORDER DATED 12/09/2014 ISSUED BY THE
REGIONAL PASSPORT OFFICE, THIRUVANANTHAPURAM.
- EXHIBIT-P6: TRUE COPY OF THE ORDER DATED 23/09/2014 ISSUED BY THE
REGIONAL PASSPORT OFFICE, THIRUVANANTHAPURAM.
- EXHIBIT-P7: TRUE COPY OF THE MARRIAGE INVITATION CARD OF THE
PETITIONER.
- EXHIBIT-P8: TRUE COPY OF THE MARRIAGE CERTIFICATE OF THE
PETITIONER.

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

AHZ/

“C.R.”

**K.T.SANKARAN &
BABU MATHEW P. JOSEPH, JJ.**

W.P.(C) No.2161 OF 2015 (U)
and
W.P.(C) No.19740 OF 2014 (N)

Dated this the 25th day of May, 2015

JUDGMENT

K.T.Sankaran, J.

H.Nazarudeen, the petitioner in W.P.(C) No.2161 of 2015, challenges Ext.P4 order of detention, No.27936/SSA1/2005/Home dated 30.6.2005, of the Government of Kerala, Home (SSA) Department, issued under Section 3(1)(i) and 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as “COFEPOSA Act”) at its pre-execution stage. Before Nazarudeen filed W.P.(C) No.2161 of 2015, his father-in-law Mohammed Iqbal filed W.P.(C) No.19740 of 2014 for the same purpose. An objection was raised by the respondents in W.P.(C) No.19740 of 2014 that an order under Section 3 of the COFEPOSA Act could not be challenged at its pre-execution stage by a person other than the person against whom the order of detention was issued. The question of maintainability of the

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Writ Petition filed by Mohamed Iqbal, the father-in-law of Nazarudeen, was argued in detail. Before the arguments concluded, W.P.(C) No.2161 of 2015 was filed by Nazarudeen himself. Therefore, W.P.(C)No.19740 of 2014 has become infructuous.

2. Hereinafter H.Nazarudeen is referred to as the petitioner.

3. The petitioner has produced the order of detention as Ext.P4. According to him, he obtained Ext.P4 order under the Right to Information Act. This is disputed by the learned counsel appearing for the respondents. It is not known how the petitioner got a copy of the order of detention before he was arrested. In **SubhashPopatlal Dave v. Union of India and another ((2012) 7 SCC 533)**), the Supreme Court held that since clause (5) of Article 22 of the Constitution provides that the grounds for detention are to be served on a detenu after his detention, the provisions of Section 3 of the Right to Information Act, 2005 cannot be applied to cases relating to preventive detention at the pre-execution stage. The Supreme Court held that Section 3 of the Right to Information Act has to give way to the provisions of clause (5) of Article 22 of the

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Constitution. Even the provisions relating to production of an arrested or detained person, contained in clauses (1) and (2) of Article 22 of the Constitution, have in their application been excluded in respect of a person detained under any preventive detention law.

4. In **Mariamman Antony v State of Kerala (2014 (1) KLT Suppl. 100 (Ker.) = ILR 2014(1) Ker. 90)**, a Division Bench of this Court (in which Justice K.T.Sankaran was a party) held that a person against whom an order of detention is passed under Section 3 of the Kerala Anti Social Activities (Prevention) Act, 2007 (hereinafter referred to as “KAAPA”), is not entitled to get a copy of the order of detention, grounds of detention or document relied on by the detaining authority, before execution of the order of detention. The Division Bench held thus:

“Sub Section (1) of Section 7 of the KAAPA is clear and explicit that the officer arresting a person in pursuance of a detention order shall read out the detention order to the person concerned and shall give him a copy of such order. Nowhere in the Act any provision is made to furnish a copy of the order of detention, the grounds of detention or the supporting documents to the person against whom the order

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of detention has been made, at any point of time before execution of the order of detention. The sponsoring authority or the detaining authority is not bound to disclose to the person concerned any information in respect of the detention order, at any time before his arrest. No duty is cast on either the sponsoring authority or the detaining authority to furnish copy of any document to the person against whom an order of detention has been made, otherwise than as provided in the KAAPA and under Article 22(5) of the Constitution of India.”

5. A person against whom an order of detention is issued under Section 3 of COFEPOSA Act is not entitled to get a copy of the order of detention, grounds of detention or any document relied upon by the detaining authority, before the order of detention is executed. It is true that in **Additional Secretary to the Government of India v. Alka Subhash Gadia** (1992 Supp (1) SCC 496) and in **Subhash Popatlal Dave v. Union of India and another** ((2012) 7 SCC 533) the Supreme Court held that an order of detention can be challenged at its pre-execution stage. In **SubhashPopatlal Dave v. Union of India and another** ((2012) 7 SCC 533)), the Supreme Court held that a person against whom an order of detention is passed is not entitled to get the grounds of detention before execution of the order

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of detention. On the same principle, we are of the view that a person against whom an order of detention is passed is not entitled to get a copy of the order of detention under the Right to Information Act or otherwise. Section 4 of the COFEPOSA Act provides that a detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973. Clause (1) of Article 22 of the Constitution of India mandates that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest. In view of clause (3) of Article 22 of the Constitution, this mandate shall not apply to any person who is arrested or detained under any law providing for preventive detention. Clause (5) of Article 22 of the Constitution provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him an earliest opportunity of making a representation against the order. There is no mandate under the Constitution that a person against whom an order of detention has been passed under the preventive

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detention laws should be supplied with a copy of the order of detention before the order is executed. In the nature of the scheme of the preventive detention laws and in the nature of the object sought to be achieved by such preventive detention, it cannot be assumed that a person against whom an order of detention is passed is entitled to get a copy of the order of detention before he is arrested. The Right to Information Act does not enable the person concerned to get copy of the order of detention at its pre-execution stage.

6. When an order of detention is challenged at its pre-execution stage, the Court can consider that challenge and, for that purpose, can direct production of a copy of the order of detention by the respondent concerned. That is for the purpose of satisfying whether the challenge against the order of detention at the pre-execution stage can be entertained. A party against whom an order of detention is passed cannot insist that he should get a copy of the order of detention before he is arrested, in order to enable him to challenge the same under Article 226 of the Constitution of India and for the purpose of production of the same before Court. There is no

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such right vested in the person against whom an order of detention is passed.

7. In Ext.P1 show cause notice dated 13.6.2005 issued to the petitioner under Section 124 of the Customs Act, the following facts are stated: On getting information that certain baggages were lying uncleared in the K.S.I.E.Godown, Air Cargo Complex, Shangumugham, Thiruvananthapuram, the customs officers visited the godown on 16.12.2004 and found that the baggage came in September 2004 in the name of one Jose Antony. Jose Antony did not turn up for clearance of the goods in spite of intimation. Jose Antony disowned the goods. He also denied of having given his passport to anybody. He surrendered his passport. Enquiry revealed that one Shamnad was involved in the incident. In the statement given by Shamnad, he stated that copy of the passport of Jose Antony was handed over to one Nazar of Beemappally for the purpose of importing goods from abroad using the copy of the said passport. Shamnad also stated that on an earlier occasion also, goods were smuggled in the unaccompanied passenger baggage of one Sukumaran Rajeev. He stated that Nazar is involved in the

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business of importing goods from abroad using passport of Gulf returned passengers. It was found that Nazar is none other than the petitioner Nazarudeen. The petitioner was involved in smuggling activities earlier. Ext.P1 further reveals that a summons dated 10.1.2005 was sent by the Superintendent of CP&IU, Thiruvananthapuram to the petitioner to appear before him. The petitioner sent a telegram stating that he was held up and requested for ten days' time for his appearance. He never appeared thereafter. On 17.1.2005, the petitioner sent a letter to the Superintendent CP & IU, Thiruvananthapuram, in which he stated that he had no connection with the goods seized by Customs. Another summons dated 25.2.2005 was issued to the petitioner by registered post. But the said summons was returned by the postal authorities with an endorsement "addressee had left India". Frequent enquiries made in the locality and the residence of the petitioner revealed that he left India for abroad. It is alleged in Ext.P1 that the petitioner is a "professional smuggling gang leader and a repeat offender". In Ext.P1, the CIF value of the smuggled goods is shown as ₹16,23,330/- and the market value of the same is shown as ₹40,58,325/-.

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8. Ext.P4 order of detention was issued on 30.6.2005 in the circumstances mentioned above.

9. The petitioner challenges Ext.P4 order of detention mainly on the ground that there is a long delay of ten years in executing the order of detention. It is contended that Ext.P4 order “has become invalid and is rendered otiose by lapse of time” and that “the purpose of Ext.P4 order has also been lost by lapse of time”. The petitioner himself states in ground (E) of the Writ Petition thus: “The situation would have been different had petitioner been an absconder who was evading the execution of the warrant.” In the Writ Petition, the petitioner contends, inter alia, as follows: The petitioner hails from Thiruvananthapuram District. He is presently employed in Dubai and he is residing along with his wife and daughter aged six years. In the year 2004, the petitioner was implicated in two cases of smuggling as O.S.No.34 of 2004 and O.S.No.746 of 2004 by the Customs Authorities. Though the cases were falsely levelled against the petitioner, he was advised to pay the penalty. The petitioner was served with Ext.P1 show cause notice dated 13.6.2005. The show cause notice was issued only based on the statement of Shamnad.

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There was nothing to connect the petitioner with the alleged seizure of goods. The petitioner filed an objection to Ext.P1 show cause notice denying the allegations. Since the objection was submitted almost ten years back, the petitioner does not have a copy of the objection submitted by him. An abstract of the objection is produced as Ext.P2. The petitioner was called for a hearing before the second respondent. During the hearing, the petitioner was informed that the proceedings were dropped as there was nothing to connect him with the seizure of the goods. He was also informed that there was no hindrance for him to secure an employment abroad. The petitioner was under the bona fide impression that no proceedings were pending against him in relation to any smuggling activity and, therefore, he went abroad. His passport was being renewed from time to time. He was frequently visiting his hometown at Thiruvananthapuram. Copy of the relevant pages of the passport was produced as Ext.P3. Only when the police came to his house recently, he came to know about the proceedings and the issuance of Ext.P4 order. The passport of the petitioner was renewed on 12.8.2002 and 14.3.2007 by the Passport Officer, Thiruvananthapuram. On 16.4.2014, the passport of the petitioner

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was renewed from the Consulate General of India, Dubai. He came to India on several occasions as revealed from Ext.P3. The marriage of the petitioner was solemnized on 7.9.2006 at an auditorium at Beemappally, situated about 500 metres away from Poonthura Police Station. Several persons participated in the wedding. The live link for executing Ext.P4 has been snapped, thus rendering Ext.P4 otiose.

10. Counter affidavits were filed in W.P.(C) No.19740 of 2014 and those counter affidavits were allowed to be adopted in W.P.(C) No.2161 of 2015. Apart from stating the facts which led to the initiation of the proceedings, in the counter affidavit filed by the second respondent it is stated thus:

“11. It is relevant to submit that before the issuance of the Show Cause notice enough opportunity was given to him to present his case before the investigating officers but he chose to stay away from the reach of law. Then, a summons was issued to him requiring his appearance before the Superintendent Customs Preventive & Intelligence Unit, Trivandrum on 10.01.2005. The petitioner responded through a telegram stating that he could not make himself available on that day and asked for an extension by 10 days. On

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17.01.2005, a letter was received under his name by the Superintendent, Customs Preventive & Intelligence, Trivandrum that he had no connection to the smuggling of electronic balances through the baggage of Sukumaran Rajeev. Then, another summons was issued to him on 25.02.2005 by registered post which came back with the endorsement 'addressee left India'."

In the counter affidavit filed by the second respondent, it is also stated that several attempts were made to locate the petitioner and to get a statement from him under Section 108 of the Customs Act. But all those attempts failed. To the show cause notice, the petitioner did not offer any reply. The averments that the petitioner appeared for a personal hearing and he was informed that the proceedings were dropped etc. are false. The summons issued to the petitioner on two occasions were returned stating that he was out of India. It is also stated thus:

"... This Department was not at all aware of the Sri.Nazarudeen's visits to India, if at all it happened. If he had been frequently visiting India, then he must have been making his residence at some place other than his actual home...."

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11. In the counter affidavit dated 19.1.2015 filed on behalf of respondents 1 and 2, it is stated thus:

“12. The order of detention against the detenu could not be executed since he had been absconding or concealing himself. Therefore in exercise of the powers conferred by clause (b) of sub-section (1) of section (7) of the COFEPOSA Act, Government have notified an order dated 04.10.2005 in the official gazette directing the said person to appear before the District Police Chief, Thiruvananthapuram at his office within 30 days from the date of publication of the order. However, the warrantee had not surrendered/appeared before the authority as stipulated in the order. Therefore Government have initiated action under section 7(1)(a) of the Act and a report in writing was made on 29.11.2005 to the Chief Judicial Magistrate, Thiruvananthapuram for applying the provisions of section 82, 83, 84 and 85 (proclamations in respect of persons absconding and attachment of property) of the Criminal Procedure Code...”

12. In **1992 Supp (1) SCC 496 (Alka Subhash Gadia's case)**, dealing with the question as to the challenge against the order of detention at its pre-execution stage, the Supreme Court held thus:

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

13. In **Subhash Popatlal Dave v. Union of India and another** ((2012) 7 SCC 533) (Subhash Popatlal Dave's case I, for convenience), a three Judges Bench of the Supreme Court held:

“48. In such circumstances, while rejecting Mr. Rohatgi's contention regarding the right of a detenu to be

provided with the grounds of detention prior to his arrest, we are of the view that the right of a detenu to challenge his detention at the pre-execution stage on grounds other than those set out in para 30 of the judgment in *Alka Subhash Gadia case (1992 Supp (1) SCC 496)*, requires further examination. There are various pronouncements of the law by this Court, wherein detention orders have been struck down, even without the apprehension of the detenu, on the ground of absence of any live link between the incident for which the detenu was being sought to be detained and the detention order and also on grounds of staleness. These are issues which were not before the Hon'ble Judges deciding *Alka Subhash Gadia case (1992 Supp (1) SCC 496)*.”

14. Accordingly, the Special Leave Petition and the Writ Petitions were listed for final hearing before the Supreme Court. After final hearing, the Supreme Court disposed of the Special Leave Petitions and the Writ Petitions as per the judgment dated 16.7.2013, reported in **(2014)1 SCC 280 (Subhash Popatlal Dave's case II, for convenience)**. In the majority judgment, the Supreme Court held that the Writ Petitions and the Special Leave Petitions are liable to be dismissed. The main question considered by the Supreme Court in **Subhash Popatlal Dave's case II** was whether

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the proposed detenu, having absconded or evaded the execution of the detention order, could challenge the detention order at the pre-execution stage and take advantage of the delay. The Supreme Court held thus:

“16. Thus, if it is held that howsoever the grounds of detention might be weighty and sustainable which persuaded the authorities to pass the order of detention, the same is fit to be quashed merely due to long lapse of time specially when the detenu is allowed to challenge the order of detention even before the order of detention is served on him, he would clearly be offered with a double-edged weapon to use to his advantage circumventing the order of detention. On the one hand, he can challenge the order of detention at the pre-execution stage on any ground, evade the detention in the process and subsequently would be allowed to raise the plea of long pendency of the detention order which could not be served and finally seek its quashing on the plea that it has lost its live link with the order of detention. This, in my view, would render the very purpose of preventive detention laws as redundant and nugatory which cannot be permitted.”

In the separate judgment rendered by Justice J.Chelameswar, concurring with Justice Gyan Sudh Misra, it was held:

“43. If a preventive detention order is to be quashed or declared illegal merely on the ground that the order remained unexecuted for a long period without examining the reasons for such non-execution, I am afraid that the legislative intention contained in the provisions such as Section 7(1)(b) of the COFEPOSA Act would be rendered wholly nugatory. Parliament declared by such provision that an (recalcitrant) individual against whom an order of preventive detention is issued is under legal obligation to appear before the notified authority once a notification contemplated under Section 7(1) (b) of the COFEPOSA Act is issued. We have already noticed that failure to appear without a reasonable excuse would be an offence and render the defaulter liable for a punishment of imprisonment. Holding that the preventive detention orders are themselves rendered illegal, on the basis of the live nexus theory (which, in my opinion, is valid only for examining the legality of the order, vis-a-vis the date on which the order is passed) would not only exonerate the person from the preventive detention order but also result in granting impunity to such person from the subsequent offence committed by him under the provisions such as Section 7(1)(b) of the COFEPOSA Act.

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.....

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

15. The Supreme Court relied on the decisions in **Bhawarlal Ganeshmalji v. State of Tamil Nadu (1979) 1 SCC 465** and **Union of India v. Arvind Shergill (2000) 7 SCC 601**, where it was held that by passage of time alone the nexus between the object for which the person concerned is sought to be detained and the circumstances in which he was ordered to be detained would not be snapped and if the delay was found to be the result of the recalcitrant or refractory conduct of the person concerned in evading arrest, there is warrant to consider the link “not snapped but strengthened”.

16. The learned counsel for the petitioner relied on the decisions of the Supreme Court in Sunil Fulchand Shah v. Union of India and others ((2000) 3 SCC 409); Naresh Kumar Goyal v. Union of India and others ((2005) 8 SCC 276); Shobha Jayaprakash v. Union of India and others (2007 (4) KHC 206 (DB)); Maqsood Yusuf Merchant v. Union of India and another ((2008) 16 SCC 31); Saeed Zakir Hussain Malik v. State of Maharashtra and others ((2012) 8 SCC 233); A.Mohammed Farook v. Jt. Secretary to G.O.I. and others ((2000) 2 SCC 360); Abdul Rahman v. State of Kerala (1990 (1) KLT 440(SC)) and Sushma Bharadwaj v. Addl. Chief Secretary to Government and another (2012 (2) KLJ 441). In most of these cases, the Writ Petitions were filed after the execution of the order of detention. We are also of the view that the facts and circumstances in the present case are different from the facts of the case involved in the other cases cited by the learned counsel for the petitioner.

17. In the present case, it is clear that the petitioner

deliberately evaded arrest and absconded after getting summons issued by the Superintendent, CP & IU, Thiruvananthapuram on 10.1.2005 and 25.2.2005. The original of Ext.P3 passport produced for our perusal by the petitioner shows that on most of the occasions when the petitioner came to India, he arrived at Bangalore, Mumbai and Chennai airports. The learned counsel for the petitioner submitted that the question is not whether the petitioner was available at his native place but whether he was available in India. The learned counsel submitted that even if the petitioner arrived at Calcutta or Srinagar or any other place in India, it should be taken that the petitioner was available in India and, therefore, non-execution of the order of detention on those occasions would be a ground for challenging the order of detention at its pre-execution stage. The learned counsel also submitted that the freedom of the citizen is paramount and his freedom cannot be denied on the mere fact that he had gone abroad.

18. We are not inclined to accept the submission made by the learned counsel for the petitioner in the facts and circumstances of the case. As held by the Supreme Court in **(2014) 1 SCC 280**

(Subhash Popatlal Dave's case II), an individual against whom an order of preventive detention is issued is under legal obligation to appear before the notified authority once a notification contemplated under Section 7(1)(b) of the COFEPOSA Act is issued. Failure to appear without reasonable excuse would be an offence which would render the defaulter liable for punishment of imprisonment. A citizen who has evaded the process of law shall not be heard to say that his fundamental rights are in jeopardy. The law-breaker is not entitled to take advantage of his own contumacious conduct and claim protection of the freedom. The submission made by the learned counsel for the petitioner that even if the person concerned arrives at any part of India, it should be taken that he was available at the place, cannot be taken as a ground for challenging the order of detention at its pre-execution stage. That is a matter to be considered after the order of detention is executed and the facts are analysed and considered on the basis of the documentary and other material evidence. The individual liberty of a citizen when pitted against the economic security of the country, we have no doubt that the latter shall prevail. As noticed by the Supreme Court in **(2014) 1 SCC 280 (Subhash Popatlal Dave's case II)**, many of the decisions

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of the Supreme Court where the Courts have quashed the orders of preventive detention on the theory of “live nexus” are cases where the detention orders were executed. The challenge to the order of detention at its pre-execution stage can be entertained only in exceptional circumstances and for cogent reasons and not on the grounds which probably the detenu may be able to sustain while considering the challenge to the order of detention after its execution. We are of the view that the petitioner has not made out any exceptional reason to justify the challenge against Ext.P4 order of detention at its pre-execution stage.

The Writ Petitions lack merit and they are, accordingly, dismissed.

(K.T.SANKARAN)
Judge

(BABU MATHEW P. JOSEPH)
Judge

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