

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2915 OF 2017

Tushar s/o Kishore Trivedi
Age: 55 years, Occu: business,
R/o B-504, Shiv Kessar CHS Ltd.
St. Xavier's School Road,
Vile Parle Road, Mumbai.

... Petitioner

Vs.

1. Union of India
Through Secretary,
Ministry of Finance
Department of Revenue,
Central B-wing, 6th Floor
2. The State of Maharashtra
Through its Secretary,
Home Department,
Mantralaya, Mumbai.
3. Principal Secretary,
Government of Maharashtra
Home Department & Detaining
Authority, Mantralaya, Mumbai,
Maharashtra – 400032.
4. Commissioner of Customs (A.P.)
Air Intelligence Unit AVAS
Corporate Point, Makhawana Lane,
Marol, Andheri-Kurla Road,
Mumbai-400099.

... Respondents

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Mr. S. B. Talekar a/w Mr. Vinod Sangvikar and Ms. Madhuri
Ayyapam i/b. M/s. Talekar and Associates for the Petitioner.
Mr. J. P. Yagnik, APP for Respondent-State.

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**CORAM : S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATE : OCTOBER 10, 2017.

ORAL JUDGMENT (PER S. C. DHARMADHIKARI, J.) :

1. By this Petition under Article 226 of the Constitution of India, the petitioner challenges a detention order dated 11th February, 2011 issued by the first respondent under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "COFEPOSA").

2. The other relief sought is to issue a writ of certiorari or any other writ or direction calling for the records relating to the order dated 13th June, 2017 passed by the Principal Secretary (Appeals and Security) and the Detaining Authority refusing to revoke the detention order.

3. Few facts would have to be noted so as to consider the two-fold objection to the maintainability of the Writ Petition.

4. The petitioner before us is an Indian citizen and residing at the address mentioned in the cause title. The petitioner has set out

at page 4 of the Petition, the events and developments leading to the issuance of the detention order.

5. It would be better if we refer to the detention order itself. A copy of the order of detention dated 11th February, 2011 has not been annexed to the memo of the present Petition, but we have called for the record of the two Petitions prior to this Petition filed by this very petitioner. The order of detention states that the Detaining Authority is satisfied that the petitioner residing at the above address should be detained with a view to preventing him in future from smuggling goods. In exercise of powers conferred by Section 3(1) of the COFEPOSA, the order directs that the petitioner be detained. That order reads as under:-

DETENTION ORDER

*No. PSA-1211/CR-2/SPL-3(A)- Whereas I, Nandkumar Jantre, Secretary (Appeals & Security) to the Government of Maharashtra, Home Department, Specially empowered under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) vide Government Order, Home Department (Special) No. MIS2011/CR-1/SPL-3(A), dated the 12th January 2011, am satisfied with respect to the person known as **Shri Tushar Kishor Trivedi** (Age 50 years) residing at **Shiv Kesar, 5th floor, Flat No. 504, Opp. BMC Market, Baptista Road, Vile Parle (W), Mumbai 400 056**, that with a view to preventing him in future from smuggling goods, it is necessary to make the following order.*

*In exercise of the powers conferred by section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974), I hereby direct that the said **Shri Tushar Kishor Trivedi** be detained under the COFEPOSA Act, 1974.*

*2. In pursuance of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 read with Government Order, Home Department No. SB.III/ISA-3974(V), dated the 18th December 1974, I hereby further direct that said **Shri Tushar Kishor Trivedi** shall be detained in the **Nashik Road Central Prison, Nashik**, and shall be subject to the conditions laid down in the said Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974.*

6. The material before the detaining authority and the grounds of detention were also made available to the petitioner. They recite that on 11th June, 2010, the Courier Cell at the Chhatrapati Shivaji International Airport, Mumbai found some irregularity in an import package which had arrived from Hong Kong by Jet Airways flight, details of which are mentioned in paragraph 2 of the grounds of detention. The goods in respect of which the bill of entry was filed were grossly mis-declared as mobile accessories. It was found to contain 34,000 pieces of mobile memory cards. The name and address of the consignee was shown as J.J. Enterprises at Vile Parle (W), Mumbai and the

address of the sender-a party in Hong Kong. The Air Intelligence Unit was intimated immediately about such irregularity. On detailed examination of the said package in the presence of independent witnesses and the representatives of the agent M/s. TNT (I) Limited , a total of 34,500 pieces of foreign origin mobile memory cards were recovered. The same were valued at Rs.86,25,000/-(CIF) and Rs.1,29,37,500/-(LMV) and were subsequently seized under panchanama dated 11th June, 2010. A statement was recorded of the Courier Officer of M/s. TNT (I) Limited. The Courier Assistant of that entity was also summoned and he gave a statement. Then, a team of officers, under search warrant, was sent to search the business premises of the consignee. However, the premises were found to be locked. They were sealed for being searched at a later date. Then, it is stated that the premises were owned by one Ritesh Manohar Lanjewar. His statement was also recorded. He stated that the business premises were being used by the above entity/consignee on friendship basis. The said Ritesh Lanjewar, in his statement, stated that he knew the petitioner since last three years and he furnished the residential address and mobile number of the petitioner.

7. On the basis of the statement of the said Lanjewar, the Custom Officer visited the residential address of the petitioner and enquired about the keys of the shop from his wife. This was done because the petitioner was not available. The statement of the wife was also recorded. She stated that the petitioner was doing business of medicines and that she did not have any idea about the shop and keys of the shop. She also stated that the petitioner left for Baroda by road for some religious ceremony and he would return on 14th June, 2010.

8. Thereafter the petitioner was summoned to appear and the grounds recited as to how the petitioner expressed his inability to appear by addressing a letter on 14th June, 2010. Thus, he gave some explanation about this consignment. It is clear that the authorities were satisfied that there was a specific procedure for import of the goods and if re-export has to be permitted, then as well, the compliance has to be made with the Customs Act, 1962 and the Rules made thereunder.

9. The petitioner was repeatedly summoned to appear and pursuant to the search carried at the business premises of the consignee M/s. J.J. Enterprises, the grounds of detention record as to how he was summoned on 29th June, 2010 but he failed to appear. There were discrepancies noted in the commercial invoice and letter addressed to the Commissioner and all this led the petitioner to move the Anticipatory Bail Application No. 837 of 2010 in the Sessions Court, Mumbai. He was granted interim bail on 1st July, 2010. However, the Sessions Court directed him to attend the office of the Customs in compliance of the summons issued under Section 108 of the Customs Act, 1962.

10. In compliance of the above order, the petitioner appeared before the Department on 7th July, 2010 for recording his statement. Then, he was specifically asked about the business premises and he stated that he has taken the premises on a monthly rent from said Ritesh Manohar Lanjewar and paid certain amount as advance rent and deposit. There was no formal agreement.

11. Then, he stated with regard to his business and also there was a search carried out at the residential premises, after which the petitioner's further statement was recorded on 21st July, 2010, 27th August, 2010 and 14th September, 2010 as well as on 11th October and 12th October, 2010. A further statement recorded on 25th October and 3rd November, 2010 would reveal that the petitioner failed to produce the original correspondence with S.F. Telecom and AV CTR, Hong Kong regarding placing of the order of the consignment the address of one Rafikbhai to whom the earlier consignment imported in April 2010 was sold. Their details were sought for but not furnished.

12. It is in these circumstances that the petitioner's representation dated 14th January, 2011 was considered before passing detention order.

13. The show cause notice dated 9th December, 2010 issued by the Customs has also been referred in paragraph 29 of the grounds of detention.

14. Based upon all this and the nature and gravity of the offence, so also the well organized manner in which the petitioner was engaged in prejudicial activities, that the Detaining Authority recorded his satisfaction and conclusion that it is imperative that he should be detained under the COFEPOSA with a view to prevent him from indulging in smuggling activities in future.

15. The Detaining Authority also referred to the documents mentioned in the list and which was served alongwith the grounds of detention. The Detaining Authority thereafter recorded his further satisfaction in terms of paragraphs 33 to 38 of the said grounds of detention.

16. It is such a detention order which was not served on the petitioner and what the petitioner firstly did was to file a Writ Petition in this Court being Criminal Writ Petition No. 918 of 2011. That Petition was filed in this Court by the petitioner through an advocate and it was circulated for admission on 6th April, 2011 before a Division Bench, but one of the members of that Bench recused himself. Thereafter, the Petition was placed

before another Division Bench on 18th April, 2011. On that date, learned APP sought time to obtain instructions as to whether the order of detention has been passed and if such an order has been passed, copies of that order were to be placed before the Court. On 19th April, 2011, that Petition appeared before the same Division Bench and the record was produced. The record revealed a order of detention dated 11th February, 2011 (the impugned detention order) being passed against the petitioner. The order of 19th April, 2011 records that the order was forwarded for service on the detenu through the competent police officials and the report dated 14th February, 2011 placed before this Court while dealing with the Writ Petition of the petitioner being Criminal Writ Petition No. 918 of 2011 indicated that the petitioner has been absconding. The report further states that on the website of the Bombay Police, information about the detention order has already been displayed. The Court noted from the file that a copy of the detention order has not been forwarded to the second respondent to that Petition for its execution. The State, through the learned APP, sought time to file an affidavit so as to bring on record the detention order as well as the report to the Deputy

Commissioner of Police. The Court therefore adjourned the matter for two weeks, but without any ad-interim order.

17. The matter was then taken up on 3rd May, 2011. After hearing both sides, this Court passed the following order:-

“1. Heard Mr. Dewani, the learned counsel for the Petitioner.

2. Leave to amend. The amendment be carried out forthwith.

3. Rule.

4. Mr. Sethana waives service for the Respondent No.2. The Respondent No.3 is a formal party though an affidavit in reply has been filed by the Assistant Director General in the Ministry of Finance, Government of India. Dr.Shaikh, the learned APP, waives service for the Respondent Nos. 1 and 4.

5. The main challenge in this petition is to the order of detention dated 11.02.2011 passed under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 by the Secretary (Appeals & Security), Home Department, Government of Maharashtra. The said order has not yet been served on the detinue and the affidavit in reply filed by Mr. Pralhad Jagtap, Police Inspector attached to the PCB Crime Branch, Bombay Police, indicates that after 14.02.2011 till 24.04.2011 no steps, whatsoever, were taken either by the DCB, CID, Unit-9 or by the Respondent No.2 who initiated the proposal for detention, to serve the detention order on the detinue in case the said authority was satisfied that he was absconding. In addition, the record placed before us, as of now, does not indicate that along with the detention order any further documents regarding the reasons for detention and the material relied upon, were served or sought to be served on the detinue.

6. *Hence, by way of interim relief, stay to the operation of the detention order dated 11.02.2011 till the next date.*

7. *We direct the detaining authority as well as the Respondent No.2 to file affidavit in reply by 20th June, 2011. Let the petition be listed for final hearing peremptorily on 01st July, 2011 and the concerned record shall be placed before us by both the authorities on the next date.”*

18. The record indicates that Rule was issued on this Petition on 3rd May, 2011. The affidavit-in-reply was filed by the second respondent, affidavit-in-reply was also filed by the detaining authority and the matter was ready for final hearing. It was taken up by the Division Bench comprising of Hon'ble Mr. Justice A. S. Oka and Hon'ble Mrs. Justice Revati Mohite Dere. The said Division Bench delivered a detailed order and dismissed the Criminal Writ Petition No. 918 of 2011. Our attention has been invited to the said order which negated the challenge to the order of detention at pre-execution stage. The Court was appraised of the position in law to submit that even at pre-execution stage, the detention order can be challenged. The Court agreed with that plea and thereafter referred to a judgment of the Hon'ble Supreme Court delivered in the case of ***Additional Secretary to the Government of India & Ors. vs. Alka Subhash***

Gadia & Anr., reported in **1992 Suppl (1) SCC 496**. The Division Bench, in paragraph 3 of the order passed on that Writ Petition, referred to the five permissible grounds on which the detention order can be challenged at that stage. The five grounds are that the order of detention is not passed under the Act under which it is purported to have been passed, that it is sought to be executed against a wrong person, that it is passed for a wrong purpose, that it is based on vague, extraneous and irrelevant grounds and finally, that the authority which passed it, had no authority to do so.

19. This Court was specifically informed that the ground which is now sought to be raised was not taken. In paragraph 5 of the order of the Division Bench, it referred to the three grounds/contingencies set out in **Alka Gadia's** case (supra). The counsel then appearing for the petitioner urged that the case of the petitioner is covered by three of the grounds/contingencies set out in **Alka Gadia's** case, namely, the ground no. (ii) that the detention order is sought to be executed on a wrong person and ground no. (iii) that it is passed for a wrong purpose and ground

no. (iv) that it is passed on vague, extraneous and irrelevant grounds.

20. It was specifically urged and duly noted in paragraph 6 of that judgment that as far as the issue of delay in execution of detention order is concerned, the counsel appearing for the petitioner conceded that the delay in execution of the detention order cannot be a ground for quashing the detention order at the pre-execution stage. Such a ground/contingency is not covered by any of the exceptions set out in *Alka Gadia's* case (supra).

21. Therefore, the above noted grounds were duly considered and the Court, while passing that order, held that there was subjective satisfaction, properly recorded by the competent authority duly authorized to pass the detention order and therefore, found no substance in any of the three grounds which were raised before it. Consequently, it held that there is no exception to the general rule in this case so as to quash the order of detention at pre-execution stage. The Division Bench found no merit in the Petition. It came to be rejected.

22. On pronouncement of the judgment by the Division Bench, the counsel for the petitioner, on 30th September, 2013, prayed that the ad-interim order passed in Criminal Writ Petition No. 918 of 2011, which was dismissed on 30th September, 2013, be continued as the petitioner intends to approach the Hon'ble Supreme Court of India. The Division Bench, on hearing both sides, found that as there was an interim relief operating from 3rd May, 2011, that deserves to be continued for a period of four weeks.

23. From the record it appears that further application of this nature was made on 28th October, 2013 and the interim order was continued for a limited period of three weeks from 28th October, 2013.

24. The petitioner carried the matter to the Hon'ble Supreme Court of India by filing a Petition for Special Leave (Criminal) No.10271 of 2013. That Petition appeared before the Hon'ble Supreme Court of India. The record indicates that on 2nd January,

2014, it continued the interim protection granted by this Court in Criminal Writ Petition No. 918 of 2011.

25. Eventually, the matter was heard on 22nd April, 2016 on which date the Hon'ble Supreme Court passed the following order :-

“No ground for interference is made out to exercise our jurisdiction under Article 136 of the Constitution of India.

The special leave petition is dismissed.

Pending application(s), if any, stand(s) disposed of.”

26. The present Petition then proceeds to state that the petitioner became aware of a judgment of the Hon'ble Supreme Court delivered in the case of ***Subhash Papatlal Dave vs Union of India***, reported in ***(2012) 7 SCC 553***. That judgment, according to the petitioner, laid down the proposition that a detention order can be challenged even without apprehension of destruction of the live link between the detention order and the prejudicial activities. Hence, there should not be any apprehension and as the petitioner has not done anything to infer that he is avoiding detention and the non-execution of the detention order was not attributable to

his conduct. Therefore, the petitioner was advised that on the ground of delay in serving the detention order, it having lost its very purpose, it can be quashed. Now, the exceptions are not restricted to **Alka Gadia**'s case, but there could be further grounds of challenge as well. The petitioner, therefore, was advised to file another Writ Petition before this Court.

27. Prior to that, we must note the events transpired, according to the petitioner himself, which led to his filing the second criminal Writ Petition. Mr. Talekar would submit that the petitioner had stated in that Petition, being Criminal Writ Petition No.889 of 2017, that he is a peace loving, hard working and law abiding citizen. He is a businessman and was engaged *inter alia* in importing various items from foreign countries and selling them in Indian markets. He has discontinued his business and now works as a real estate agent. He is permanently residing at the very address which has been mentioned in the cause title of that Petition. The petitioner categorically stated in that Petition, namely, the subsequent Petition that Criminal Writ Petition No.918 of 2011 (first Petition) was filed in this Court on 30th

March, 2011 and after the interim order therein by a detailed judgment, the same was dismissed on 30st September, 2013. The Special Leave Petition challenging that judgment and order of this Court was also dismissed on 22nd April, 2016 but the protection granted by this Court on 3rd May, 2011 continued till 22nd April, 2016. After 22nd April, 2016, the detaining authority is not enjoined or restrained from executing the detention order. Thus, there was no legal impediment in execution and service of the same upon the petitioner. The petitioner was all the while residing at the same residential address and since 2005. At best, he has been travelling and staying in Mumbai and Ahmedabad, Gujarat. Still the detaining authority did not take any concrete steps to execute the order of detention and neither detained the petitioner. The petitioner is not absconding as there is documentary evidence which indicates that he has been residing at the said address. After 8 months of the dismissal of the said Special Leave Petition but till the date of filing of second Writ Petition No. 889 of 2017 in this Court, namely, 23rd November, 2017, the detention order had not been executed. The petitioner, and from the record of that second Writ Petition, had specifically stated that he is available at his

residential address, there is no question of his absconding or avoiding service of the detention order. The petitioner, in paragraph 18 of that Petition, had averred that by very nature a detention order issued under the COFEPOSA entails extreme urgency as its object is to prevent the proposed detenu from indulging in smuggling activities. The detention is not punitive but preventive. Despite this, the respondents did not take any concrete steps nor made any serious efforts to serve the detention order on the petitioner. They visited the petitioner's house for the first time to serve the detention order between 20th to 25th May, 2016. That is nearly one month after the dismissal of his Special Leave Petition. Thus, the authorities are not serious in detaining the petitioner.

28. Then, in that second Writ Petition, the petitioner had averred that when the officers of the 4th respondent visited his house for the first time, his wife was at home. She informed the officers that the petitioner is not at his residence and has gone to Delhi for some work. From then onwards, there has been no concrete efforts by the respondents to execute the detention order

which is dated 11th February, 2011. The petitioner had, in that Petition as well as the present Petition, stated that he resides in a flat/tenement in a co-operative housing society, the premises of which has a Close Circuit TV facility. The footage of that CCTV would reveal his presence at his residential address. The petitioner sought leave to produce and refer, so also rely upon this footage. In paragraph 20 of that Petition, the petitioner has stated that there has been no serious efforts taken to execute the detention order. Its purpose is defeated as the live link is severed.

29. The petitioner, in paragraph 21 of that Petition in ground (b), specifically urged that the respondents, who are common to the present Petition, have failed to take any concrete steps to execute the detention order after the Special Leave Petition of the petitioner was dismissed on 22nd April, 2016 and the interim stay was vacated.

30. In the same memo of the second Criminal Writ Petition, in paragraph 21(e), the petitioner had averred that the inordinate delay of around 10 months in execution of the detention order

would reveal that the live link is snapped and the object of the detention order is wholly frustrated.

31. There is no evidence on record that the petitioner having indulged in anti-social activities since 2010 till the filing of second Petition. The petitioner in that Petition also referred to the law and the principles emerging from several judgments of the Hon'ble Supreme Court.

32. In paragraph 22 of the second Petition, the petitioner averred as under :

“22. The Petitioner states that the grounds raised in this Writ Petition seeking annulment of the order of detention at a pre-execution stage is entirely different from the grounds which were raised in the earlier Criminal Writ Petition No. 918 of 2011. The Present Writ Petition is a result of subsequent developments as set out aforesaid, which, were not available and were never raised and also never adjudicated in the said earlier Writ Petition. Hence, it is respectfully submitted that the earlier petition does not operate a bar for this Hon'ble Court to entertain the present Writ Petition.”

33. The petitioner, then, in paragraph 25, stated thus:

“25. The Petitioner's SLP was dismissed on 22nd April, 2016 and since then he has been staying at his Residential address given in the cause title. Two Representations were made under Section 11 of the COFEPOSA to the Detaining Authority for the revocation of the impugned detention order, which were rejected

*assigning no reasons. Hereto annexed and marked at **Exhibit 'D'** **colly** is the copy of both the orders dated 18th January, 2017 and 4th February, 2017 respectively. The last representation was rejected on 4th February, 2017 and communicated on 6th of February, 2017, thereafter which, the petitioner approaches this Hon'ble Court, which in his respectful submission is within a reasonable time period. In the event if this Hon'ble Court holds otherwise, any delay which this Hon'ble Court considers to have happened, the same may kindly be condoned."*

34. Thus, the petitioner has submitted in the second Petition that he made a representation so as to have the detention order revoked. The two representations under Section 11 of the COFEPOSA addressed to the Detaining Authority for revocation of the impugned detention order were rejected assigning no reasons and annexure "D" collectively is the copy of the order dated 8th January, 2017 and 4th February, 2017. The petitioner was communicated the rejection of the last representation on 6th February, 2017 after which, he was advised to approach this Court. That is how, on 23rd February, 2017, the second Criminal Writ Petition was filed.

35. Mr. Talekar would however submit that the second Writ Petition appeared before a Division Bench of this Court for admission on 20th April, 2017.

36. Pertinently, Mr. Talekar does not refer to any of the events from the date of lodging or filing of the second Petition till the order dated 20th April, 2017. That is why we summoned the record of both Petitions. The second Petition filed on 23rd February, 2017 was circulated for admission on 9th March, 2017. However, the petitioner's Advocate sought adjournment and at his request, the Petition was placed for admission on 23rd march, 2017. On 23rd March, 2017, neither the petitioner nor his Advocate appeared. As a last chance or indulgence, the Petition was adjourned to 20th April, 2017. On 20th April, 2017, after hearing both sides, the Court made the following order:

*“1. Heard Mr. Mohite, the learned counsel for the Petitioner and Mr. Shinde and Mr. Yagnik for the State. Mr. Mohite for the Petitioner seeks leave to withdraw the Petition with liberty to raise all the grounds of challenge open as per the decision of the Apex Court in the case of **Subhash Popatlal Dave Vs. Union of India**.*

2. Leave with liberty is granted. Writ Petition is dismissed as withdrawn in the light of the above decision of the Apex Court.”

37. Mr. Talekar has strongly relied upon this order to submit that pursuant to the liberty granted by this Court, this third Petition is maintainable.

38. The petitioner sought leave to withdraw the second Petition with liberty to raise all the grounds of challenge open as per the decision of the Hon'ble Supreme Court in the case of *Subhash Popatlal Dave v/s Union of India & Anr.*, reported in *2014(1)SCC 280*.

39. Mr. Talekar submits that post withdrawal of the Petition, another representation was made seeking revocation of the detention order. The power conferred in the detaining authority in that behalf under Section 11 of the COFEPOSA was invoked. The representation/Petition was decided but without granting the petitioner any opportunity of being heard. Mr. Talekar would submit that in paragraph nos. 4 and 6 of this Application/Petition seeking revocation of the detention order, the petitioner averred that almost six years had elapsed but the detention order was not served. Secondly, no offence under the Customs Act or any other law is registered against him after 2004 and particularly after the detention order dated 11th February, 2011. Thus, the delay of more than six years in serving this detention order has vitiated the

same. Now, no purpose will be served by detaining the petitioner after more than six years of the detention order. A statutory duty is cast upon the detaining authority to apply its mind to all the attendant circumstances including the inordinate delay of more than six years in serving the order of detention and revoke the same.

40. That is how, according to Mr. Talekar, in paragraphs 7, 8, 10 and 11 of this Petition, the position in law was highlighted. This Petition/Application dated 11th May, 2017 being dismissed by the Detaining Authority without assigning any reasons, that according to Mr. Talekar, the third petition would lie.

41. Mr. Talekar has also relied upon two affidavits which have been filed in this Writ Petition, one after the petitioner was served with the affidavit-in-reply dated 29th September, 2017 of the detaining authority and the other one prior to the same.

42. It is submitted by Mr. Talekar that this affidavit of the petitioner amply demonstrates as to how the authorities trying to

cover up their serious lapses. They are creating false and forged record to show that the petitioner was evading service of the detention order. They have gone to the extent of pressurizing the watchman and the staff working on the premises of the cooperative housing society. The Detaining Authority, in order to frustrate and defeat this Petition, according to Mr. Talekar, have made these efforts.

43. Mr. Talekar would therefore, submit that this material is enough to get over the preliminary objection to the maintainability of the third Petition raised by Mr. Yagnik. Mr. Talekar submits that true it is that it is the third round of litigation, but we must note the outcome of the earlier Writ Petitions and specifically the point that the ground of delay was not available for being raised. The decision of the Hon'ble Supreme Court in *Alka Gadia*'s case prevented the petitioner from raising this ground or any ground other than those specifically carved out for challenging the detention order at the pre-execution stage. Therefore, any concession on the point of law by the petitioner's Advocate while arguing the first Criminal Writ

Petition would not bind him. All the more, when the question is of the petitioner's personal liberty and the complaint is that the mandate of Articles 21 and 22 of the Constitution of India is violated. The petitioner, therefore, advisedly did not press the said ground of delay. In any event, Mr. Talekar would submit that it was unavailable. It was noticed only after the Supreme Court dismissed the Special Leave Petition on 22nd April, 2016. The petitioner, therefore, was advised firstly to seek revocation of the order of detention relying upon the judgment in the case of ***Subhash Popatlal Dave*** (supra). It is in that representation that the petitioner was advised to raise this ground which he raised but those representations were also rejected in January and February, 2017. It is only after rejection of the revocation application that the second Petition was advisedly filed. Pertinently, according to Mr. Talekar, there is no interim order, nor any restraint on execution and service of the detention order. Yet the respondents took their own sweet time and made no attempts to serve the detention order. They were aware that the interim order of this Court in the first Petition came to an end on 22nd April, 2016. They did nothing from 22nd April, 2016 till the second Criminal

Writ Petition was filed and even thereafter till the date, to execute and serve the detention order. That is why, according to Mr. Talekar, the argument or ground of delay has two facets. The delay in execution and service of the detention order till the filing of the first Writ Petition and the delay in execution and service of the detention order post 22nd April, 2016 till date. Mr. Talekar would submit that the affidavit-in-reply of the respondents does not meet this ground but seeks to place the blame entirely at the door of the petitioner and wrongly accuse him of avoiding acceptance of the service of detention order. Far from any proof of this nature, the material, according to Mr. Talekar, is to the contrary. In the circumstances, relying upon paragraphs 9, 10, 14, 15, 17, 19, 27 to 28 and 31, 33, 34, 40 and 48 of the present Petition, Mr. Talekar would submit that the only ground on which the order of detention is now challenged, is of inordinate and unexplained delay in execution of the order of detention. That vitiates it, is the law of the land. There is no question of the petitioner avoiding the process of law. There was protection and which was allegedly claimed by the petitioner in terms of the interim orders of this Court and the Supreme Court of India.

Hence, the false statement made in the affidavit-in-reply will not enable the respondents to succeed. Mr. Talekar has invited our attention to pages 69, 70, 72 and 74 so also the order at page 90 of the paper book to submit that by that order, the revocation Petition has been dismissed on 13th June, 2017 without any opportunity of personal hearing to the petitioner, though sought. For these reasons, according to Mr. Talekar, the instant Petition is maintainable and should be allowed.

44. Mr. Talekar has relied upon the following judgments in support of his contentions:-

1. *Subhash Popatlal Dave vs. Union of India*, reported in (2012) 7 SCC 533;
2. *Election Commission of India vs. St. Mary's School & Others*, reported in (2008) 2 SCC 390;
3. *Malini Mukesh Vora vs. Union of India & Ors.*, reported in ILR (2010) I Delhi 35;
4. *K.S. Puttaswamy vs. Union of India*, reported in 2017 SCC Online SC 996;
5. *Ghulam Sarvar vs. Union of India & Ors.*, reported in (1967) 2 SCR 271;
6. *Lallubhi Jogibhai Patel vs. Union of India & Ors.*, reported in (1981) 2 SCC 427;

7. ***Kirit Kumar Chaman Lal Kundaliya vs. Union of India & Ors.***, reported in 1981 (2) SCC 436;
8. ***Deepesh Mahesh Zaveri vs. Union of India & Ors.***, reported in 1998 (2) Mh.L.J. 634;
9. ***V.M. Salgaocar and Bros. Pvt. Ltd. vs. Commissioner of Income Tax***, reported in (2000) 5 SCC 373;
10. ***T.P. Moideen Koya vs. Govt. Of Kerala and Others***, reported in (2004) 8 SCC 106;
11. ***Chandi Prasad and Ors. vs. Jagdish Prasad and Ors.***, reported in (2004) 8 SCC 724;
12. ***Srikant vs. District Magistrate, Bijapur and Others***, reported in (2007) 1 SCC 486;
13. ***Election Commission of India vs. St. Mary's School and Others***, reported in (2008) 2 SCC 390;
14. ***Maqsood Yusuf Merchant vs. Union of India & Anr.***, reported in (2008) 16 SCC 31;
15. ***Baby Devassy Chully @ Bobby vs. Union of India and Others***, reported in (2013) 4 SCC 531

45. As noted above, Mr. Yagnik appearing for the respondents, would submit that this Criminal Writ Petition should be dismissed on the ground of maintainability. His argument is that even if one was to assume but not admit that in the first Criminal Writ Petition, the ground of delay in execution and service of the

detention order and that being therefore vitiated, was not available bearing in mind the principles laid down in *Alka Gadia's* case, but surely, the judgment in the case of *Subhash Popatlal Dave*, which is heavily relied upon, was very much in the field when the petitioner approached the Hon'ble Supreme Court by filing a Special Leave Petition and during the pendency of that Special Leave Petition from 2014 till 22nd April, 2016. According to Mr. Yagnik, the record does not indicate that the petitioner made any attempt to have the Special Leave Petition argued on the point of delay or if that ground or point was not raised, to amend it, and consequently raise it for consideration of the Hon'ble Supreme Court of India. The petitioner was not prevented from raising such ground and we must assume that such ground was available and was indeed pressed when the special leave petition was dismissed on 22nd April, 2016. Alternatively and without prejudice, Mr. Yagnik would submit that there is no explanation as to why, when the second Criminal Writ Petition was filed in this Court, that ground and specifically raised in the memo of that Petition, was not pressed. It was available for being urged as there was a clear pleading and foundation for the same.

It was permissible for the petitioner in law to raise that ground and press it considering the law as laid down, according to the petitioner himself, in the case of ***Subhash Popatlal Dave*** (supra). Though the memo of the second Writ Petition was containing all the grounds and available material, the petitioner chose to withdraw that Writ Petition. On the date when he withdrew it, namely 20th April, 2017, the view in ***Subhash Popatlal Dave*** was in the field. Yet, the petitioner made a false statement before this Court and withdrew the second Writ Petition. Now, in the garb of a further representation to the Detaining Authority under Section 11 of the COFEPOSA for revocation of the impugned detention order being rejected, we should not entertain this ground in the third Criminal Writ Petition. The argument of Mr. Yagnik is that this objection is not based on the principle of *res judicata* or constructive *res judicata*, both of which are not applicable in the case of withdrawal of Petition of *habeas corpus* or challenging a preventive detention order. However, equally important is the principle of finality of judgments and orders. That is the principle which, cutting across the nature of the litigation, applies with full force to Writ Petitions under Article 226 of the Constitution of

India. Mr. Yagnik would submit that there is no licence to abuse the process of this Court. The petitioner cannot, by giving up his challenge on the ground of delay on his own though available earlier, now turn around and state that the said plea or ground be allowed to be raised in the third round. This third round is not available as of right. Mr. Yagnik would submit that if this rule is not followed, there would be multiple challenges to a detention order and at the instance of such litigants who manage to avoid acceptance of its service or evade execution of the same. That is surely not the object and purpose of a writ of *habeas corpus*. The issuance of that writ, therefore, must squarely take into consideration the conduct of the parties like the petitioner.

46. In raising this objection, Mr. Yagnik relied upon a Division Bench judgment of this Court in the case of ***Deepesh Mahesh Zaveri vs. Union of India & Ors.***, reported in **1998 (2) Maharashtra Law Journal 634**.

47. The argument based on the principle laid down in this decision is that a fresh and new ground of attack against the

legality of the detention or custody should arise after the decision of the first Petition, in this case the second Petition, and where for some exceptional reason, that ground has been omitted in the earlier Petition. In either of these two circumstances, in appropriate cases, the High Court will hear the second Petition on such grounds for ends of justice. Mr. Yagnik would press the later part of the principle enunciated in this judgment and submit that the present petition will not be competent on the same ground as was available at the time of hearing of the second Petition merely because an additional facet of a contention on delay or additional argument is available to be raised in the present or fresh Petition. In such circumstances, the third Petition can be dismissed relying upon the principle laid down in the Division Bench judgment, is the argument of Mr. Yagnik.

48. He would also submit that the petitioner is squarely responsible for the non-service of the detention order. The non-execution or non-service has been duly explained in the affidavit-in-reply of the Detaining Authority. There were several attempts made and the original record is produced before us by Mr. Yagnik

in that behalf. He would submit that every time a attempt was made to execute or serve the detention order, the petitioner has been avoiding or evading the same. He has absented himself deliberately from his residential premises. The repeated visits would show as to how the Detaining Authority eventually decided and after the disposal of the second Criminal Writ Petition, to invoke his powers once again under Section 7 of the COFEPOSA. Those powers were invoked earlier as well. The petitioner knows that there is a proclamation issued and now, further steps would be taken in furtherance thereof. It is in these circumstances that Mr. Yagnik would rely upon the orders passed under Section 7(1) (a) and (b) of the COFEPOSA. For all these reasons and further relying upon the judgment delivered by a Division Bench of this Court in Criminal Writ Petition Nos. 506 and 970 of 2014 dated 1st August, 2014, in the case of *Smt. Khushbu Sandeep Jain Vs. State of Maharashtra and others* and *Anjana Rikabchand Mehta Vs. The State of Maharashtra and others*, the submission is that the Petition be rejected.

49. For properly appreciating above contentions and the preliminary objection, we must first note some undisputed facts.

50. Mr. Talekar has been fair in pointing out that earlier two Criminal Writ Petitions were filed. He has submitted that a concession was given by the counsel appearing for the petitioner at the hearing of the first Criminal Writ Petition that the ground of delay in execution and service of the detention order is not available considering the principles or exceptions carved out in *Alka Gadia's* case. We proceed on the footing that there was a concession of law and given by the petitioner's counsel. That would not bind him. However, we are in complete agreement with Mr. Yagnik that nothing prevented the petitioner from raising this ground to challenge the order of preventive detention at the pre-execution stage when he approached the Hon'ble Supreme Court.

51. To that end, we must see the compilation of judgments relied upon by Mr. Talekar.

52. What is to be noted is that on 10th July, 2012, a three judge Bench of the Hon'ble Supreme Court delivered its first order in

Subhash Popatlal Dave vs Union of India and Another. That is reported in ***(2012) 7 SCC 533***. The argument of the counsel appearing for the detenu or the petitioner in the Supreme Court in ***Subhash Popatlal Dave*** was that the five grounds mentioned in ***Alka Gadia***'s case were not exhaustive but only illustrative as was held by the Hon'ble Supreme Court in the case of ***Deepak Bajaj vs. State of Maharashtra***, reported in ***(2008) 16 SCC 14***. The counsel then submitted that it was well settled that the power of judicial review vested in the High Courts under Article 226 of the Constitution of India and in the Hon'ble Supreme Court under Article 32 of the Constitution of India is part of the basic structure of the Constitution and it was inconceivable that such power of judicial review can be restricted by amending the Constitution or by a judicial pronouncement. This and various other contentions have been noted in the first order in the case of ***Subhash Popatlal Dave*** and eventually, the Hon'ble Supreme Court was of the opinion that such contentions as were raised by the counsel for the petitioners appearing before it cannot be brushed aside. It referred to ***Alka Subhash Gadia*** (supra) and ***Sayed Taher Bawamiya vs. Government of India***, reported in ***2000 (8) SCC***

630 which is a judgment subsequent to *Alka Gadia* and concluded as under:

“45. Nowhere in Alka Subhash Gadia case has it been indicated that challenge to the detention order at the pre-execution stage, can be made mainly on the aforesaid exceptions referred to hereinabove. By prefacing the five exceptions in which the courts could interfere with an order of detention at the pre-execution stage, with the expression “viz”. Their Lordships possibly never intended that the said five examples were to be exclusive (sic exhaustive). In common usage or parlance the expression “viz” means “in other words”. There is no aura of finality attached to the said expression. The use of the expression suggests that the five examples were intended to be exemplars and not exclusive (sic exhaustive). On the other hand, the Hon'ble Judges clearly indicated that the refusal to interfere on any other ground did not amount to the abandonment of the said power.

46. It is only in Sayed Taher Bawamiya case that another three-Judge Bench considered the ratio of the decision of this Court in Alka Subhash Gadia case and observed that the courts have the power in appropriate cases to interfere with the detention orders at the pre-execution stage, but that the scope of interference was very limited. It was in such context that the Hon'ble Judges observed that while the detention orders could be challenged at the pre-execution stage, that such challenge could be made only after being prima facie satisfied that the five exceptions indicated in Alka Subhash Gadia case had been fulfilled. Their Lordships in para 7 of the judgment in Sayed Taher case held that the case before them did not fall under any of the five exceptions to enable the Court to interfere. Their Lordships also rejected the contention that the exceptions were not exhaustive and that the decision in Alka Subhash Gadia case indicated that it is only in the five types of instances indicated in the Judgment in Alka Subhash Gadia case that the courts may exercise their discretionary jurisdiction under Articles 226 and 32 of the Constitution at the pre-execution stage.

47. With due respect to the Hon'ble Judges in Sayed Taher Bawamiya case, we have not been able to read into the judgment in Alka Subhash Gadia case any intention on the part of the

Hon'ble Judges, who rendered the decision in that case, that challenge at the pre-execution stage would have to be confined to the five exceptions only and not in any other case. Both the State and the Hon'ble Judges relied on the decision in Sayed Taher Bawamiya case. As submitted by Mr. Rohatgi, to accept that it was the intention of the Hon'ble Judges in Alka Subhash Gadia case to confine the challenge to a detention at the pre-execution stage, only on the five exceptions mentioned therein, would amount to imposing restrictions on the powers of judicial review vested in the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution. The exercise of powers vested in the superior courts in judicially reviewing executive decisions and orders cannot be subjected to any restrictions by an order of the court of law. Such powers are untrammelled and vested in the superior courts to protect all citizens and even non-citizens, under the Constitution, and may required further examination.

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, 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.*

49. *The law is never static but dynamic, and to hold otherwise, would prevent the growth of law, especially in matters involving the right of freedom guaranteed to a citizen under Article 19 of the Constitution, which is sought to be taken away by orders of preventive detention, where a citizen may be held and detained not to punish him for any offence, but to prevent him from committing such offence. As we have often repeated, the most precious right of a citizen is his right to freedom and if the same is to be interfered with, albeit in the public interest, such powers have to be exercised with extra caution and not as an alternative*

to the ordinary laws of the land.

50. In the light of the above, let the various special leave petitions and the writ petitions be listed for final hearing and disposal on 7-8-2012 at 3.00 p.m. This Bench be reconstituted on the said date, for the aforesaid purpose.”

53. It is equally true that thereafter, the Hon'ble Supreme Court speaking through the same Hon'ble Judges, pronounced the final Judgment in ***Subhash Popatlal Dave vs. Union of India & Another. (2014) 1 SCC 280.*** That judgment decides the reference finally.

54. It was a three judge Bench. The then Hon'ble the Chief Justice of India Mr. Justice Altamas Kabir delivered the minority verdict whereas the other two Hon'ble Judges, Hon'ble Mrs. Justice Gyan Sudha Misra and Hon'ble Mr. Justice Chelameswar rendered the majority opinion. It is important to note some of the observations in this majority view. Her Ladyship held that the grounds of detention might be weighty and sustainable which persuaded the authorities to pass an order of detention, but 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 same is served on him, would be clearly a double edged weapon. It could be used 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 Her Ladyship's view, would render the very purpose of preventive detention laws redundant and nugatory. That cannot be permitted. On the contrary, if the order of detention is allowed to be served on the proposed detenu even at a later stage, it would be open for the proposed detenu to confront the materials or sufficiency of the material relied upon by the authorities for passing the order of detention so as to contend that at the relevant time when the order of detention was passed, the same was based on non-existent or unsustainable grounds so as to quash the same. But to hold that the same is fit to be quashed merely because the same could not be executed for one reason or the other specially when the proposed detenu was evading the

detention order and indulging in forum shopping, the laws of preventive detention would surely be reduced into a hollow piece of legislation which is surely not the purpose and object of the Act.

55. It is in these circumstances that Her Ladyship, in her opinion in paragraphs 17 to 22, made the following pertinent observations:-

“17. Therefore, in my view, the order of detention is not fit to be quashed and should not be quashed merely due to long lapse of time but the grounds of detention ought to be served on him once he gains knowledge that the order of detention is in existence so as to offer him a plank to challenge even the grounds of detention after which the courts will have to examine whether the order of detention which was passed at the relevant time but could not be served was based on sufficient material justifying the order of detention. Remedy to this situation has already been offered by this Court in Union of India v. Parasmal Rampuria wherein it was observed as under : (SCC p.403, para 5)

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

18. The consequence that follows from the above is that each individual/proposed detenu will have to be served with the order of detention which had been passed against him along with the grounds and the materials relied upon by the authorities to pass the order of detention leaving it open to him to challenge the correctness of the order by way of a representation before the

appropriate authority or court as per procedure prescribed. It is no doubt true that the materials relied upon at the relevant time would be on the basis of which the order of detention was passed so as to hold whether the materials were sufficient and justified or not but when the correctness of the order of detention is challenged in a court of law at the pre-execution stage, then setting aside the order of detention merely on the ground of long lapse of time might lead to grave consequences which would clearly clash with the object and purpose of the preventive detention laws.

19. *Therefore, I am of the view that since this Court has already held that the order of detention can be challenged on any ground beyond five conditions even at the pre-execution stage, it is in the fitness of things that the materials relied upon by the authorities be served on the proposed detenu so as to be considered before the appropriate forum whether the order of detention was fit to be sustained or not at the relevant time. In the process what has been the activities of the proposed detenu after the order of detention was passed against them so as to quash or sustain the same will have to be considered by the authority considering the representation or the court examining its sustainability. If the detenu has not indulged in any illegal nefarious activities giving rise to any economic offence, then subsequently they have also not been saddled with a fresh order of detention. But when the order of detention of a specific date relating to the relevant period is under adjudication, then the materials relied upon by the authorities at the relevant time alone should weigh with the courts as to whether the order of detention was justified or was fit to be quashed as that has been consistent view of this Court reflected in the decisions referred to hereinbefore.*

20. *It is also not possible to lose sight of the fact that if the petitioners and the appellants had preferred not to challenge the order of detention at the pre-execution stage or had not evaded arrest, the grounds of detention would have been served on them giving them a chance to challenge the same but if the petitioners and the appellants have taken recourse to the legal remedy to challenge the order of detention even before it was executed, it is not open for them to contend that it should be quashed because there is no live link between the existing/subsequent situation and*

the previous situation when the order of detention was passed overlooking that they succeeded in pre-empting the order by challenging it at the pre-execution stage never allowing the matter to proceed so as to examine the most crucial question whether there were sufficient material or grounds to pass the order of detention.

21. Subsequent events or conduct in any view would be a matter of consideration for the authorities before whom the representation is filed after the grounds are served on the detenu and cannot be gone into when the only question raised is regarding the correctness and legality of the order of detention. The alternative view is bound to operate as a convenient tool in the hands of the law-breakers which has not been approved earlier by this Court in the decisions referred to earlier.

22. A fallout and consequence of the aforesaid discussion, therefore, in my view, is that the order of detention cannot be quashed and set aside merely due to long lapse of time on the specious plea that there is no live link between the order of detention and the subsequent situation. I am, therefore, of the considered opinion that the order of detention is not fit to be quashed merely due to long lapse of time specially when the orders of detention have been allowed to be challenged even at the pre-execution stage on any ground.”

56. The Hon'ble Mr. Justice Chelameswar agreed with Her Ladyship and further added thus:

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

40. To answer the question, we must analyse the probable reason for the delay in executing the preventive detention orders. There could be two reasons which may lead to a situation by which the preventive detention order passed by the competent authorities under the various enactments could remain unexecuted.

- (1) the absconding of the proposed detenu from the process of law,
- (2) the apathy of the authorities responsible for the implementation of the preventive detention orders.

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

“7. Powers in relation to absconding persons. –

(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may-

(a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the

order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

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

42. It can be seen from the said Section 7 that in a case where proposed detenu is absconding or concealing himself, the Government may report the matter to the Magistrate having jurisdiction over the place where the proposed detenu ordinarily resides. On making of such report by the Government, the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal procedure apply to the proposed detenu and his property, as if the order of preventive detention is a warrant issued by the Magistrate under the provisions of the Code of Criminal Procedure. In substance, the property of the proposed detenu could be attached and perhaps even be confiscated in an appropriate case. Apart from that the State can also by notification in the Official Gazette direct the proposed detenu to appear before an officer specified in the said notification at such place and time. Failure to comply with such notified direction on the part of the proposed detenu- without a reasonable cause- is made an offence punishable either with imprisonment for a term extending up to one year or with fine or both.

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

49. The question whether the five circumstances specified in Alka Subhash Gadia case are exhaustive of the grounds on which a pre-execution scrutiny of the legality of preventive detention order can be undertaken was considered by us earlier in the instant case. We held that the grounds are not exhaustive. But that does not

persuade me to hold that such a scrutiny ought to be undertaken with reference to the cases of those who evaded the process of law.”

57. Thus, there may be a departure from the view taken in ***Alka Gadia***'s case, but surely the majority opinion does not give a licence or permit the detenues to challenge the detention orders at the pre-execution stage in the manner done.

58. Similarly, right from the time that the English law recognizes settled principles, the Courts in India have been accepting the same and which is best enunciated in the judgment of a Full Bench of this Court reported in ***AIR (38) 1951 (Bom) 25 (In re Prahlad Krishna Kurne)***:-

“[5] Now turning to the position in India, orders under S.491 are passed by the High Court of Bombay. It is true that the High Court acts through a Judge or Judges nominated by the Chief Justice for that purpose, and although an application under S. 491 may be heard by a Division Bench of this Court the judgment that it ultimately pronounces is not the judgment of that Division Bench but the judgment of the High Court. The Division Bench acts on behalf of the High Court and as the High Court for the purpose of hearing and disposing of an application under S.491. Therefore when the decision is given, it is the decision of the High Court. There is no provision either in the Letters Patent or in any of the rules framed by the High Court for a Judge or Judges of the High Court to exercise independent jurisdiction in matters coming under S.491. The question still remains whether in cases that

may not fall under S.491 and which may fall under Art. 226 there is any independent jurisdiction conferred upon any Judge of the High Court to issue writs contemplated by Art. 226. It is clear that even under Art. 226 it is only the High Court that can issue a writ for the enforcement of a fundamental right. The jurisdiction is conferred upon the High Court as such and not upon any Judge or Judges of that Court, and therefore when a Division Bench of this Court hears an application under Art. 226, it is hearing that application as the High Court, and its ultimate decision is not their decision but the decision of the High Court.

[6] Therefore, when *Dixit and Shah JJ.* rejected the application of the applicant on 12.6.1950, it was the decision of the High Court, and the question is whether it is open to the applicant to approach any other Judge of the High Court for a similar purpose notwithstanding the decision of the High Court to the contrary. When one analyses the situation, the effect of the argument of the applicant comes to this that the decision of the High Court on an application for a writ for the enforcement of the fundamental rights under Art. 226 is subject to review by the High Court. It is clear that no Court has an inherent power of review. A power of review like a power of appeal must be conferred by statute. As far as the Criminal Procedure Code is concerned, no power of review is given to the High Court in criminal matters, and there is nothing in Art. 226 which would induce us to hold that the constitution has conferred a power upon the High Court of review in matters falling under that article. The reason why no power of review is given in criminal cases is obvious; it is to give a finality to a judgment of a criminal Court; and we see nothing in Art. 226 which impliedly goes contrary to that fundamental principle which applies to all criminal trials and all criminal judgments. Indeed, Mr. Sule partially concedes the principle of finality because he admits that he would have no right to approach the same Judge who has once decided the application either under S. 491 or under Art. 226. If the principle of finality applies to a Judge of this Court, it is difficult to understand why the principle of finality should not apply to the High Court as such. As I said before, under Art. 226 it is the High Court that is dealing with applications under Art. 226 and not a Judge or Judges of that High Court.

[7] Mr. Sule has made an appeal to us in the interest of individual liberty and in the cause of fundamental rights which have been guaranteed to the citizens under the Constitution. Mr. Sule says that the High Court should see to it that these rights are not rendered infructuous by any view that we might take which is of a purely technical and procedural character. Such an appeal is very often irresistible, but fortunately in this case, as I shall presently point out, it is unnecessary to be apprehensive as to the right of a citizen to enforce his fundamental rights. Although the decision of the High Court refusing a writ or order under Art. 226 may become final qua the High Court, it is not as if the Constitution does not provide other remedies to the citizen. He has a right, an independent right, to approach the Supreme Court under Art. 32. The powers of the High Court and the Supreme Court in this respect are concurrent, and notwithstanding the refusal of the High Court to enforce the fundamental rights of the citizen, he can approach the Supreme Court in its primary jurisdiction. Apart from that there is a right of appeal given to the citizen from an order of refusal of the High Court to enforce his fundamental rights. He has the right to ask the Supreme Court to grant him special leave to appeal under Art. 136. Therefore it is not as if the citizen is without a remedy in the event of the High Court refusing to review its own judgment, however erroneous that judgment may be.”

(emphasis supplied)

59. True it is that an order of detention can be challenged and can be quashed at pre-execution stage and that is the mandate flowing from the Constitutional provisions, namely, Articles 21 and 22 of the Constitution of India. Further true it is that merely because a Writ Petition under Article 226 of the Constitution of

India to challenge a preventive detention is dismissed by the High Court, the detenu is not prevented from invoking the jurisdiction of the Hon'ble Supreme Court of India under Article 32 of the Constitution. However, equally, true is the principle that against an adverse order on a Petition of *habeas corpus* passed by the High Court, an Appeal is always available in which Appeal even while invoking Article 136 of the Constitution of India, the detenues are not prevented from raising appropriate grounds and also those which are not specifically raised and urged or pressed before the High Court. Once the issue is of personal liberty, then, the highest Court in the Country is not prevented from entertaining points though not specifically raised in the pleadings before the High Court by the detenues. All the principles therefore, and emerging from the judgment of the Hon'ble Supreme Court in the case of ***Lalubhai Jogibhai Patel vs. Union of India & Ors.***, reported in ***AIR 1981 SC 278***, continue to hold the field.

60. However, when the Division Bench judgment was rendered by this Court in ***Deepesh Mahesh Zaveri***'s case and subsequently in the case in Criminal Writ Petition Nos. 506 and 970 of 2014 of

August 2014, the Division Benches have been emphasizing the principles that detenues cannot, as of right, file successive Petitions to challenge the same detention order by raising grounds which were available for being raised and argued in the initial or earlier round of litigation. If they were indeed available for being argued and there was material in that behalf and there are no changed circumstances pointed out, then, there is no licence to go on filing subsequent Petitions nor is the Court obliged to entertain them. Surely, no judgment has been brought to our notice which would take away the discretionary and equitable nature of our jurisdiction under Article 226 of the Constitution of India. None of the judgments cited would say that in the cases of the present nature and in the peculiar facts, the detenu's conduct is irrelevant.

61. If that is the law, then, we would be justified in the approach that we adopt in this case or the view that we eventually take.

62. In the later unreported judgment (*supra*) brought to our notice by Mr. Yagnik, though there is no reference to the two

judgments of the Hon'ble Supreme Court, we would be failing in our duty if we do not refer to them.

63. In *T.P. Moideen Koya vs. Govt. of Kerala and Others*, reported in *(2004) 8 SCC 106*, the facts were that the residence of one gentleman was searched, gold biscuits of foreign origin and Indian currency and foreign currencies were recovered and some documents and a computer with accessories were also seized. The statements were recorded and the seized material showed that the petitioner Koya before the Supreme Court had dealt with 290 smuggled gold biscuits valued at Rs.1.5 crores. The details were mentioned and thereafter, a detention order was passed on 21st January, 2002. The petitioner Koya absconded and proceedings under Section 7(1) of the COFEPOSA had to be initiated. Thereafter, he surrendered before the Court of Additional Chief Judicial Magistrate on 4th September, 2002 and was taken in custody. The detention order was then served upon him in jail on 12th September, 2002. His wife filed a *habeas corpus* Petition seeking seeking quashing of the detention order and for setting him at liberty. The High Court dismissed the *habeas corpus*

Petition on 11th February, 2003. Safiya, his wife, preferred a Special Leave Petition in the Hon'ble Supreme Court which was also dismissed by a detailed order dated 28th July, 2003. That judgment was reported in **(2003) 7 SCC 46**. Thereafter, a Writ Petition under Article 32 of the Constitution was filed for quashing of the detention order. The Union of India raised a preliminary objection to the maintainability of that Petition and submitted that the exact issue raised before the Court in the Special Leave Petition was, whether the detention order passed against the petitioner was valid and proper, and this Court having upheld the validity of the detention order and the continued detention of the petitioner, the present Petition Under Article 32 was not maintainable. The argument of Koya was that the detention order violated his fundamental right and his right to approach the Supreme court by a Petition under Article 32 is guaranteed under the Constitution and cannot be taken away by any technical consideration.

64. These contentions were dealt with and after referring to the earlier judgments, including the judgment on the principle of *res*

judicata and constructive *res judicata* laid down in the case of ***Daryao & Ors. vs. State of Uttar Pradesh***, reported in ***AIR 1961 SC 1457***, the Supreme Court concluded that the Petition under Article 32 would not be maintainable, but still considered the merits of the controversy. In dealing with the preliminary objection, The Hon'ble Supreme Court held thus:-

“11. The principle which can be culled out from these authorities is that the bar of res judicata or constructive res judicata would apply even to a petition under Article 32 of the Constitution where a similar petition seeking the same relief has been filed under Article 226 of the Constitution before the High Court and the decision rendered against the petitioner therein has not been challenged by filing an appeal in the Supreme Court and has been allowed to become final. However, this principle, namely, the bar of res judicata or principles analogous thereto would not apply to a writ of habeas corpus where the petitioner prays for setting him at liberty. If a person under detention files a writ of habeas corpus under Article 226 of the Constitution before the High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking order) and the said decision is not challenged by preferring a special leave petition under Article 136 of the Constitution and is allowed to become final, it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of habeas corpus.

12. However, the position here is quite different. After the habeas corpus petition seeking quashing of the detention order passed against the petitioner and for setting him at liberty had been dismissed by the Kerala High Court, the matter was carried in appeal to this Court by filing a petition under Article 136 of the Constitution. After leave was granted, the appeal was dismissed by a detailed judgment wherein all the contentions raised laying challenge to the detention order and also to the

continued detention of the petitioner had been considered. The question is whether, even in such circumstances, a subsequent petition under Article 32 of the Constitution seeking to challenge the same detention order would be maintainable.

13. *It is well settled that a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reserved by adopting a procedure prescribed by law. It is in the interest of the public at large that finality should attach to the binding decisions pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. While hearing a petition under Article 32 it is not permissible for this Court either to exercise a power of review or some kind of an appellate jurisdiction over a decision rendered in a matter which has come to this Court by way of a petition under Article 136 of the Constitution. The view taken in Bhagubhai Dullabhbbhai Bhandari V. District Magistrate that the binding nature of the conviction recorded by the High Court against which a special leave petition was filed and was dismissed cannot be assailed in proceedings taken under Article 32 of the Constitution was approved in Daryao v. State of U.P.”*

65. ***T.P. Moideen*** (supra) fell for consideration of a two Judge Bench of the Hon'ble Supreme Court in the case of ***Srikant vs. District Magistrate, Bijapur and Ors.***, reported in ***(2007) 1 SCC 486***. The Division Bench of the Karnataka High Court dismissed the *habeas corpus* Petition challenging the detention of one Shivalingappa under the provisions of Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985. The detention order was passed on 26th May, 2005. A Writ

Petition was filed in the High Court of Karnataka which was dismissed on 6th October, 2005. There was no challenge to the same. Then, a second Writ Petition was filed and identical grounds were taken in that Petition, was the objection and therefore, the second Petition came to be dismissed.

66. The High Court held that though successive Writ Petition can be filed challenging the detention, yet it has to be shown that fresh grounds were involved and not the grounds which were already raised or were available to be raised. That Writ Petition was dismissed. The matter was carried to the Supreme Court and though the detenu was released after serving out the detention order, the objection being of importance, the Hon'ble Supreme Court considered the issue of maintainability, referred the **T.P.Moideen's** case and then held thus:-

“8. Whether any new ground has been taken has to be decided by the court dealing with the application and no hard-and-fast rule can be laid down in that regard. But one thing is clear, it is the substance and not the form which is relevant. If some surgical changes are made with the context, substance and essence remaining the same, it cannot be said that challenge is on new or fresh grounds.”

67. The conclusion is, whether any new ground has been taken, has to be decided by the Court dealing with the application and no hard-and-fast rule can be laid down in that regard. It is the substance and not the form which is relevant. If some surgical changes are made with the context, substance and essence remaining the same, it cannot be said that challenge is on new or fresh grounds.

68. It is precisely this test which we have applied to the facts and circumstances of the present case. We are not laying down any general rule. Eventually, in all such matters, facts and circumstances peculiar to a detenu must guide the Court in dealing with the technical or preliminary objection of the present nature. Therefore, we should not be understood to have laid down any principle of law contrary to those which we have culled out from the judgments rendered by this Court as also by the Hon'ble Supreme Court. We have throughout borne in mind the importance of life and liberty and that precious freedom guaranteed by the Constitution of India. That this is a preventive detention and therefore, we must be cautious in upholding such

objections beyond permissible limits as emerging from the principles laid down in the Supreme Court judgments. We should not import or bring into consideration other issues in an oblique and indirect manner, the principle of *res judicata* or constructive *res judicata*. We are not introducing that principle.

69. We should be equally aware of the object and purpose of the COFEPOSA and a legislation of that nature.

70. The two Judge Bench of the Hon'ble Supreme Court of India, In the *Dropti Devi & Anr. Vs. Union of India & Ors.* reported in **AIR 2012 SC 2550** had this to observe insofar as the object and purpose of a legislation like the COFEPOSA. The Hon'ble Supreme Court, in paragraphs 58 to 60, held as under:-

“58. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continues to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind COFEPOSA is to prevent violation of foreign exchange regulations or smuggling

activities which have serious and deleterious effect on the national economy. In today's world the physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. The smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA – by their misdeeds and misdemeanours – directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. We must remember: the person who violates foreign exchange regulations or indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventive detention of the anti-social elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.

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

60. On the touchstone of constitutional jurisprudence, as reflected by Article 22 read with Articles 14, 19 and 21, we do not think that the impugned provision is rendered unconstitutional. There is no constitutional mandate that preventive detention cannot exist for an act where such act is not a criminal offence and does not provide for punishment. An act may not be declared as an offence under law but still for such an act, which is an illegal activity, the law can provide for preventive detention if such act is prejudicial to the state security. After all, the essential concept of preventive detention is not to punish a person for what he has done but to prevent him from doing an illegal activity prejudicial to the security of the State. Strictly speaking, preventive detention is

not regulation (many people call it that way), it is something much more serious as it takes away the liberty of a person but it is accepted as a necessary evil to prevent danger to the community. The law of preventive detention arms the State with precautionary action and must be seen as such. Of course, the safeguards that the Constitution and preventive detention laws provide must be strictly insisted upon whenever the Court is called upon to examine the legality and validity of an order of preventive detention.”

71. Once the whole intent and idea beyond the COFEPOSA is to prevent violation of foreign exchange laws or curbing smuggling activities which has a serious and deleterious effect on the national economy even in the days of liberalization, privatization and globalisation, then, allowing parties like the petitioner to avoid consequences of a valid preventive detention would be doing precisely what the Supreme Court has cautioned us against doing. We are mindful, therefore, of the fact that once the petitioner in this case had filed the second Criminal Writ Petition and even prior to that when he had challenged the order passed in the first Criminal Writ Petition in Appeal before the Supreme Court, ***Subhash Popatlal Dave*** (supra) was very much in the field. All the grounds that can be now urged were available for being raised and this is nothing but a cosmetic or surgical change which is introduced in the garb of a fresh challenge. The fresh challenge

arises on fresh or subsequent events. The events should be indeed fresh and equally the grounds. If the same old and stale grounds are reintroduced by raising a different facet of the same argument, then, this would be a complete abuse of the process of this Court. Precisely for that reason in ***Dropti Devi*** (supra), the Supreme Court held that a preventive detention order has a life. If an argument of the nature canvassed, that because time has gone by after its passing and it being not served is accepted unmindful of the contumacious conduct of the detenu, then, the whole object and purpose of the law and the detention order is frustrated. In paragraph 68 of decision in ***Dropti Devi***'s case, the Hon'ble Supreme Court brought into focus the issue of contumacious conduct and the principle that one cannot take advantage of ones' own wrong. If that is applied equally in such matters, then, ignoring the binding judgments would be violating the judicial discipline. It is precisely that course and adherence to judicial discipline which enables us to uphold the preliminary objection in this case.

72. The petitioner is a COFEPOSA detenu. He was throughout advised by the competent legal brains. He had the advantage of best legal assistance. He was briefing counsel and the senior counsel throughout. He could have pressed, at least in the second Writ Petition, all these grounds which are now pleaded. We have referred to the earlier pleadings and heavily relied upon by Mr. Yagnik. They are to be found in the memo of the second Criminal Writ Petition. In the representations and Applications seeking revocation of the detention order. Those were rejected and by orders dated 8th January 2017 and 4th February 2017. The Petitioner challenged these orders in the Second Criminal Writ Petition. (See para 25 page 27, 28 of the memo in Criminal Writ Petition No. 889 of 2017.) The Petitioner specifically urged in that petition that more than eight months have elapsed after the Hon'ble Supreme Court dismissed his SLP by order dated 22nd April 2016. However, the detention order is not acted upon. Thus, the delay is not of 6 and 1/2 years but 8-10 months after the order of the Hon'ble Supreme Court. In grounds (b) and (e) at pages 18, 19 of the memo in the second Criminal Writ Petition the point or ground of delay is squarely taken. If that was withdrawn with the

liberty to raise the contentions based on *Subhash Papatlal Dave*, we do not see how the above grounds were not available for being raised on 20th April, 2017. By then, the entire law had been settled. We have only referred to the settled legal principles and not departed or deviated from the same. Once this very plea which was available was indeed raised, so also the ground was elaborated, then, not pressing it does not mean that there is any fresh event or subsequent development which adversely affects the life and liberty of the petitioner. Even otherwise, throughout what has been pointed out and from the record as to how the petitioner was not available in these 10 to 12 months. The petitioner's wife and son had made statements which were recorded and which we do not find in any way explained, far from retracted, that last one or one and half years and at least from 22nd April, 2016 onwards, the petitioner was not available at his residential address.

73. Thus, there is no enormous and unexplained delay in execution and service of the order of detention dated 11th February 2011. Its operation, execution and enforcement was

stayed by this Court from 3rd May 2011 to 28th October 2013 and for a further period of three weeks thereafter. Then, the Petitioner approached the Hon'ble Supreme Court which stayed the detention order further till 22nd April 2016. It is only after that date the order became executable. However, even the delay in execution after 22nd April 2016 till April 2017 was challenged in the Second Criminal Writ Petition by the Petitioner – Detenue but he withdrew it with liberty to raise the very same grounds again. Thus, this liberty is of no avail. In that garb, the same ground which was expressly taken but not pressed cannot be raised again.

74. In such circumstances, all the more, we are disinclined to entertain this Writ petition. The Petition is therefore dismissed. Rule is discharged.

(SMT. BHARATI H. DANGRE, J.)

(S. C. DHARMADHIKARI, J.)