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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P. (Crl.) 3105/2016

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Judgment Reserved on: 1st February, 2017

Judgment Pronounced on: 21st March, 2017

ATIKUR RAHAMAN

..... Petitioner

Through: Mr. Pradeep Jain, Mr. Shubhankar Jha,
Mr. Tarun Chawla, Mr. Rahul Raheja,
Mr. Ashish Bansal and Mr. Vikas Sarin,
Advs.

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Sanjay Jain, ASG with Mr. Ajay
Digpaul, CGSC, Ms. Mohita,
Ms. Kamika Singh and Mr. Vignaraj
Pasayat, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J.

1. Pleadings in this matter are complete. With the consent of the parties, the writ petition is set down for final hearing and disposal.
2. Present petition has been instituted under Article 226 of the Constitution of India read with Section 482 Cr.P.C. for issuance of a writ, order or direction in the nature of Certiorari for quashing the detention order bearing F. No.673/03/2016-CUS.VIII dated 20.05.2016 passed under Section 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act") against Ibrahim Ateef Damda Fakki ("detenue"). The present petition has been filed by the brother of the detenue.

3. The necessary facts to be noticed for disposal of the writ petition and as stated by the petitioner in the petition are that the detenue is a resident of Bhatkal, Karnataka. He has completed his B.Com. in the year 2003. Besides his old parents, he has four brothers and two sisters. Initially, the detenue was working as a Sales Executive in Bangalore, however, in the year 2008 he shifted to Dubai in search of a job and better future prospects. At the relevant time, the detenue was working with M/s Richmand General Trading LLC. Simultaneously, the detenue started a small time business wherein he used to trade in electronics and garments. Detenue used to purchase garments from Dubai and used to sell the same to shopkeepers in Bahrain and sometimes customers directly. In order to earn extra money, detenue also used to book online air tickets by charging some commission. Detenue also used to book air tickets of one Ajmal Sheikh in Dubai.
4. On 02.11.2015, detenue was approached by Ajmal Sheikh for booking of an air ticket for one Smt. Shehnaz Laiq Ahmed Ansari. Accordingly, the detenue booked the air ticket in the name of Ms. Ansari. On 02.11.2015 itself the detenue was scheduled to go to Bahrain. He was approached by a person named Abdul who was known to the detenue. He was requested by Abdul to handover gold jewellery weighing about 10 kg. to one Smt. Shehnaz Laiq Ahmed Ansari at the Transit Lounge of Doha International Airport. For monetary benefit, he accepted the request, without ascertaining the contents of the packet. He travelled on Qatar Airways Flight from Doha to Bahrain. The detenue handed over the packet to the said lady.
5. Around December, 2015 the detenue had come to India for the purpose of his marriage which was fixed for 21.12.2015. Around 10.12.2015 detenue received summons from DRI, Goa Regional Unit for his

appearance on 18.12.2015 before the DRI officers at Goa. As a *bona fide* person and in compliance with the summons, he duly appeared before the DRI officers on 18.12.2015. He learnt that the DRI was investigating a case of seizure of 10 kg. of smuggled gold jewellery effected vide Panchnama dated 03.11.2015 from the Qatar Airways Flight landed at Dabolim Airport, Goa.

6. Detenue claims that he cooperated in the investigation and recorded his statement under Section 108 of the Customs Act, giving the entire facts. He stated that he was not involved in any smuggling activities and he has merely handed over a parcel to a person. During the investigation, he was confronted with Smt. Shehnaz Laiq Ahmed Ansari. The detenue admitted that she was the lady to whom he had supplied the said bag. Statement of Smt. Shehnaz was also recorded wherein she also identified the detenue as the person who gave her the gold jewellery at Doha Airport. At the time of recording of his statement, detenue was asked to submit his passport which was handed over to DRI Officers on 18.12.2015. The detenue and the said woman were arrested by the DRI under Section 135 of the Customs Act, 1962. The detenue was released on bail on 19.12.2015 by the CJM, Goa on certain terms and conditions which the detenue claims to have complied with, including that he would not leave the country without prior permission of the Court.
7. Statements of the detenue were recorded on 09.02.2016 and 08.03.2016. On 31.03.2016 the detenue moved an application under Section 457 Cr.P.C. for release of his passport. However, the said application was opposed by the DRI and the Customs Department. The detenue continued to stay at his native place at Bhatkal, Karnataka when he learnt about an Official Gazette publication in the newspaper

at Bhatkal on 05.08.2016 wherein the detainee was required to be detained under the detention order passed on 20.05.2016. Detainee was directed to appear before the Director General of Police, Government of Goa, Panji, within 7 days from the date of the publication. Being a law abiding citizen, the detainee reached Goa on 10.08.2016 and surrendered before the police in compliance with the detention order. On 10.08.2016 itself, the detainee was served with a single page detention order. On the following day, he was served with a list of documents, grounds of detention and other relied upon documents. The detainee has also filed his representation before the Detaining Authority, Central Government and the Advisory Board and had also appeared before the Advisory Board.

8. Various grounds have been raised by Mr. Pradeep Jain, learned counsel for the petitioner in support of his submission that the detention order is wholly unwarranted, *per se* illegal, unconstitutional being without jurisdiction and having been passed without any application of mind. The submissions of Mr. Pradeep Jain can be summarized as under:-
- (i) The detention order has been passed based on a solitary incident;
 - (ii) Subjective satisfaction wrongly arrived at by the Detaining Authority;
 - (iii) Non-submission of vital documents before the Detaining Authority;
 - (iv) Violation of Article 22(5) of the Constitution of India read with Section 3(3) of the COFEPOSA Act;
 - (v) When ordinary law of land is sufficient to deal with the situation, the invocation of preventive detention is bad in law; and
 - (vi) Delay in execution of the detention order.

DETENTION ORDER HAS BEEN PASSED BASED ON A SOLITARY GROUND

9. Mr.Pradeep Jain, learned counsel for the petitioner submits that the detention order is liable to be quashed as the detention order has been issued based on a solitary incident in relation to the alleged seizure of gold jewellery of 10 kg. seized at Dabolin Airport, Goa. Counsel contends that the detenue has not been involved in any smuggling of gold jewellery as alleged in the grounds of detention. However, for some monetary consideration, the detenue handed over a packet containing gold jewellery to one Smt.Shehnaz Laiq Ahmed Ansari on the instructions of one Abdul at Doha Airport. It is submitted that apart from the said single act of handing over the packet to Smt.Shehnaz Laiq Ahmed Ansari on 2.11.2015, there is nothing on record to show that the detenue was, in any way, concerned or connected with any alleged offence ever. Mr.Pradeep Jain contends that the detenue was not known to the woman nor the detenue was aware about the alleged smuggling of gold, as detenue was not at all concerned with the same. It is contended that the detenue is a poor person who had gone to Dubai in search of his livelihood and to earn his livelihood, he was engaged with the business of trading of garments and electronic items which he used to buy at Dubai and sell at Bahrain. The detenue was working in a Company at Dubai and in order to supplement his income, the detenue was also engaged in booking of online air tickets against some commission.
10. It is also the case of the petitioner that due to his business of garments and electronics, the detenue used to travel between Dubai-Doha-Bahrain on regular basis. Mr.Pradeep Jain contends that the invocation of preventive detention measures by way of detention order based on

the said solitary incident under the facts and circumstances of the present case is not justified and time and again, the High Court and the Supreme Court have quashed the detention orders which are based solely on a solitary incident without having any other justified grounds.

11. It is next submitted that no document or material has been placed on record by the Detaining Authority except the statement of the detainee as well as of Smt. Shehnaz Laiq Ahmed Ansari to substantiate their allegation that the detainee was in any way connected with the smuggling of gold jewellery. In fact, the detainee has no past history in relation to any alleged smuggling activities or any other illegal activity and detainee has been simply doing his business and job in order to supplement his income for which he had gone to Dubai.
12. In support of this contention, counsel has relied upon the judgment passed in the case of ***Gimik Piotr v. State of Tamil Nadu and Ors.***, (2010) 1 SCC 609, wherein it was held as under:-

“23. The Act contemplates two situations for exercise of the power of preventive detention viz. to prevent violation of foreign exchange regulations and to prevent smuggling activities. The justification for passing the order of detention is suspicion or reasonable probability of the person sought to be detained to prevent him in carrying on smuggling activities in the future. In other words, what needs to be proved is the potentiality or propensity of the person to engage in future prejudicial activities.”

24. It is a well-established principle of law that even a single incident is enough to prove the propensity and potentiality of the detenu so as to justify the order of preventive detention as laid down by this Court in Pooja Batra v. Union of India [(2009) 5 SCC 296]:

“39. As already discussed, even based on one incident the detaining authority is free to take appropriate action including detaining him under COFEPOSA. The detaining authority has referred to the violation in respect of importable goods covered under Bill of Entry

No. 589144 dated 25-4-2007. In an appropriate case, an inference could legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activities, however, for that purpose antecedents and nature of the activities already carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him.”

This Court further observed:

“39. ... If there is no adequate material for arriving at such a conclusion based on solitary incident the court is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India.

40. Further, subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. In the matter of preventive detention, what is required to be seen is that it could reasonably be said to indicate any organised act or manifestation of organised activity or give room for an inference that the detenu would continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not repeat this activity in future.

41. In other words, while a single act of smuggling can also constitute the basis for issuing an order of detention under the COFEPOSA, highest standards of proof are required to exist. In the absence of any specific and authenticated material to indicate that he had the propensity and potentiality to continue to indulge in such activities in future, the mere fact that on one occasion person smuggled goods into the country would not constitute a legitimate basis for detaining him under the COFEPOSA. This can be gathered from the past or future activities of the said person.”

25. In *Gurdev Singh v. Union of India* [(2002) 1 SCC] this Court held:

“20. ... Whether the detention order suffers from non-application of mind by the detaining authority is not a matter to be examined according to any straitjacket

formula or set principles. It depends on the facts and circumstances of the case, the nature of the activities alleged against the detenu, the materials collected in support of such allegations, the propensity and potentiality of the detenu in indulging in such activities, etc. The Act does not lay down any set parameters for arriving at the subjective satisfaction by the detaining authority. Keeping in view the purpose for which the enactment is made and the purpose it is intended to achieve, Parliament in its wisdom, has not laid down any set standards for the detaining authority to decide whether an order of detention should be passed against a person. The matter is left to the subjective satisfaction of the competent authority.”

26. What emerges from the abovementioned cases is that, even a single solitary act can prove the propensity and potentiality of the detenu to carry on with similar smuggling activities in future. The mere fact that on one occasion person smuggled goods into the country may constitute a legitimate basis for detaining a person under COFEPOSA. For this purpose, the antecedents of the person and facts and circumstances of the case need to be taken into consideration.”

(Emphasis Supplied)

13. It is contended that from the above judgment, it is very much clear that though the detention order may be passed based on a solitary incident, however, for the same, antecedents and the activities already carried out by the person have to be seen. In the present case, there is no past activity of the detenu and he has been doing his job with the Foreign Company and apart from that, to supplement his income he was doing work of booking air tickets and selling clothes. Not even a single instance has been given to show that the detenu was involved in any alleged activity in the past.

**SUBJECTIVE SATISFACTION WRONGLY ARRIVED AT BY
DETAINING AUTHORITY**

14. The second ground raised by Mr. Pradeep Jain for quashing of the detention order is that subjective satisfaction has been wrongly arrived at by the Detaining Authority. It is contended that the Detaining Authority has failed to consider the vital fact that the detenu had voluntarily, on the basis of the request made by the DRI, submitted his passport with the DRI and the said passport was never returned back to the detenu. In the absence of the passport, the detenu cannot travel abroad, hence, the alleged belief that the detenu will indulge in any prejudicial activity has no basis.
15. It is submitted that even otherwise, the act of the detenu of handing over the parcel to said Smt. Shehnaz Laiq Ahmed Ansari was in a foreign land i.e. Dubai where the act in question is not an offence, hence, the invocation of COFEPOSA Act in consequence of alleged violation of Customs Act, 1962 is unjustified and illegal. Mr. Pradeep Jain contends that handing over the said packet at Dubai is not an offence punishable under the Indian Customs Act, as the Customs Act, 1962 has been extended to whole of India and not outside India.
16. Reliance is placed on the decision rendered in the case of ***Moulana Shamshunnisa and others v. Additional Chief Secretary and Others***, (2010) 15 SCC 72 and ***Gimik Piotr*** (Supra). In ***Moulana Shamshunnisa*** (Supra), it has been held as under:

“8. In *Rajesh Gulati's case* (supra), the question that came to be canvassed on behalf of the detenu was that as his passport continued to be in the possession of the customs authorities, there was no question of the appellant travelling abroad or indulging in any smuggling activity. This plea was accepted by this court by observing that it was not the case of the Detaining Authority at any stage that the detenu would be able

to continue with his smuggling activities within India, though he could not go abroad his passport having been seized. It was observed thus:

“15. ... The conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the Detaining Authority. These findings are sufficient to invalidate the impugned detention order and it is not necessary to consider the other issues raised by the appellant.”

9. This opinion has been fortified by this Court in **Gimik Piotr's** case (supra). In para 32, it has been held as under:

“32. In the present case, the detention order was passed under Section 3(1) (i) of COFEPOSA. The Customs Department has retained the passport of detenu. The likelihood of the appellant indulging in smuggling activities was effectively foreclosed. As observed by this Court in Rajesh Gulati case that the contention that despite the absence of a passport, the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation.”

And again in para 35, it was held as under:

“35. In our considered view, the submission of the learned counsel for the appellant requires to be accepted. In the instant case as the facts reveal that there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the facts and circumstances of the case.”

(Emphasis Supplied)

17. In view of the judgment, as in the present also, the passport of the detainee was with the department, there cannot be any justified basis to arrive at the conclusion that the detainee may indulge in the prejudicial activity further.

NON-PLACEMENT OF VITAL DOCUMENTS

18. Learned counsel next contends that the impugned order is liable to be quashed as the Detaining Authority has failed to consider the vital document i.e. application filed by the department for the cancellation of bail granted to the detainee by the CJM, Goa vide order dated 19.12.2015 which has a bearing on the facts of the matter. The said document has neither been made a relied upon document nor any consideration has been made *qua* the same in the grounds of detention. It is the case of the petitioner that the aforesaid document is extremely vital and relevant for the purpose of the case which, in fact, tilts the very basis and foundation of the subjective satisfaction. Had this document been placed before the Detaining Authority, the mind of Detaining Authority could have been influenced otherwise. It is very strange as to how the sponsoring authority deliberately and intentionally suppressed the aforesaid vital document. It is a settled law that non-placement of vital document vitiates the detention order.
19. It is further contended that besides the above document, in the present case the seizure of goods had taken place on 03.11.2015 vide *panchnama* dated 03.11.2015, however, no separate seizure memo has been placed or relied upon in the grounds of detention and all what has been placed is a mere *panchnama* which records that the goods were seized by the Customs Officers. Further, as per the Customs Act, 1962 the show-cause notice had to be issued by 02.05.2016 (i.e. within six months from the date of seizure 03.11.2015), however, neither any

show-cause notice has been placed on record nor any application seeking extension of time for issuance of show-cause notice has been placed on record. The show-cause notice is a vital piece of document as it is issued after culmination of investigation and it shows the result of investigation, hence, the non-placement of the said important document has rendered the impugned detention order devoid of any merits and is liable to be revoked. Though we have recorded the contention of Mr. Pradeep Jain; but during the course of hearing on 21.01.2017, learned counsel for the petitioner had given up the contention as not pressed *qua* the show-cause notice and seizure memo and restricted his submission to the non-placement of application for cancellation of bail.

20. In this regard, the petitioner relies upon the judgment in the case of *Asha Devi v. K. Shivraj Addl. Chief Secretary*, (1979) 1 SCC 222 (paragraph 6).

**VIOLATION OF ARTICLE 22 (5) OF CONSTITUTION OF INDIA
READ WITH SECTION 3 (3) OF COFEPOSA ACT**

21. It is contended that the grounds of detention and relied upon documents have been served upon the detainee on 11.08.2016 and upon perusal of the said documents, it has been revealed that many documents are incomplete or illegible, hence, the same has created an impediment in the constitutional right of the detainee in making an effective representation under Article 22 (5) of the Constitution of India read with section 3(3) of COFEPOSA Act.
22. However, we may note that this ground raised was not pressed at the time of hearing.

**WHEN ORDINARY LAW OF THE LAND IS SUFFICIENT TO DEAL
WITH THE SITUATION, THE INVOCATION OF PREVENTIVE**

DETENTION LAW IS BAD IN LAW

23. Without prejudice to the other contentions of the petitioner, it is submitted by Mr. Pradeep Jain that the Detaining Authority has failed to show and explain the reasons as to how and why the ordinary law of the country is not sufficient to deal with the present situation and why the need has arisen to invoke the preventive detention law which is also considered to be a draconian law and especially, in view of the fact that the present case is based on a solitary incident. As no sufficient reason has been recorded in the impugned detention order/grounds of detention, the order under challenge is liable to be set aside.

DELAY IN EXECUTION OF DETENTION ORDER

24. Learned counsel also contends that in the present case, there is a delay of about 3 months in execution of the detention order. No efforts or steps have been taken by the Detaining Authority for execution of the detention order, whereas the detinue was available in his house throughout the time as the detinue was not able to join his office or work for the reason that his passport was taken under custody by the DRI.
25. It is also contended that no Officers of customs or any other authority had any time visited the house of the detinue for the purpose of execution of the detention order. It is the duty of the Detaining Authority to show before the Court as to what effective steps were taken by the Detaining Authority for the purpose of execution of the detention order. Even in the response filed by the respondents, no satisfactory explanation has been given by the respondents as to what effective measures were taken by them to serve the detinue at Bhatkal where the permanent residence of the detinue is situated which was very much in the knowledge of the respondents as is clear from the

statement recorded of the detainee. There was a delay of almost 80 days in the execution of the detention order.

26. In support of his arguments, the learned counsel for the petitioner relies upon *A. Mohammed Farook v. Jt. Secy. to G.O.I.*, (2000) 2 SCC 360 (paragraphs 9 and 10) and *Manish Gadodia v. Union of India & Anr.*, 216 (2015) DLT 521.
27. It is further contended that the respondents even failed to show their efforts in accordance with their own guidelines issued with respect to COFEPOSA procedural safeguard/requirement. It is submitted that in fact, the detainee has not been served with the original detention order and all what has been served is an attested copy of the detention order which is a clear violation of the prescribed procedure in the case of preventive detention. The lethargic attitude of the department is very much reflected from the fact that the respondent is calling the detainee through newspaper to surrender before Goa police, however, the original order of detention has not been kept with the Goa police to be served to the detainee. Hence, the impugned order is liable to be set-aside.

SUBMISSIONS OF THE COUNSEL FOR THE STATE/RESPONDENTS

28. *Per contra*, Mr.Sanjay Jain, learned Addl. Solicitor General submits that the order of detention is not based on a solitary incident. It is contended that on 01.11.2015, the detainee was located in Bahrain where he had travelled on an Indian passport from where he booked two tickets for himself from Bahrain to Dubai (via Doha) for the same day and the other from Dubai to Bahrain (via Doha) for the following day i.e. 02.11.2015. On 02.11.2015, Mrs.Ansari was already in Dubai and had a direct ticket from Dubai to Mumbai for 15.11.2015.

However, the detainee who had reached Dubai on 01.11.2015, in the early hours of 02.11.2015 booked a new ticket for Mrs.Ansari, from Dubai to Doha for her return journey for the same day, i.e., 02.11.2015 from Dubai to Goa, via Doha. The flight was booked keeping in mind that Mrs.Ansari reaches Doha one hour before him to enable him to meet her within the airport at Doha.

29. It is further contended that on 02.11.2015 itself, the detainee acting as a carrier picked up 10 kgs of gold from Abdul Rehman; collected separate considerations for booking tickets (on actuals) and acting as a carrier (1000 Dirhams). Upon reaching Doha, he contacted Mrs.Ansari on her mobile number and delivered the gold to her with an assurance/ promise that she would be paid Rs.5000/- upon reaching at Goa.
30. The above sequence of events amply demonstrates that the detainee had complete knowledge required to act as a carrier in a proficient manner; that he knew the flight sector of Bahrain to Doha and Doha to Dubai with intricate knowledge of flight timings; that he was taking instructions from Abdul Rehman and his brother Ajmal Sheikh; that he undertook a journey from Bahrain to Dubai especially for the purpose of collecting gold at Dubai and then to act as a carrier of carrying gold from Dubai to Doha, where, by an independent act, he had already planted Mrs.Ansari, facilitating her to travel from Dubai to Doha to enable her to receive gold and then travel to another destination other than Mumbai, where she was scheduled to land.
31. The above facts, if interpreted in the context that he has a track record of being in transit at Doha Airport for 53 times, goes on to show that he is a professional carrier and therefore, a person who is capable of acting with so much precision; he is a potential danger, evocative of his propensity. Mr.Jain, learned ASG, relied upon *Madhab Roy alias*

Madha Roy v. State of West Bengal, AIR 1975 SC 255: (1974) 4 SCC

548 where the issue pertained to detention of a person upon a single solitary incident if carried out with certain expertise, is not to be treated as an isolated act, rendering the detention of such person valid. It was held as follows:

*“2. To answer this question it is necessary to understand the real nature of the activity of the petitioner as disclosed by the incident communicated to him. This incident must be judged in its correct setting, grave proportions and clear implications. It must be noticed that this was not an ordinary incident of theft of wheat, rice or jute bags. It was a daring act of robbery of copper return feeder wire of railway tractions which resulted in the death of one of the associates of the petitioner by electrocution and brought about serious disruption of the railway services. Now, cutting and removal of copper return feeder wire of railway traction is a sophisticated and complex operation which requires technical skill and expertise and is not the work of a layman or a novice. It postulates experience acquired as a result of a course of such or similar activities and also suggests that it is a part of an organised activity of a complex of agencies collaborating to remove, secrete and sell” such stolen goods. This activity has very serious and disturbing consequences and it can well be part of a plan of sabotage which brings to a grinding halt the movement of trains. Therefore, it is obvious that though the incident referred to in the communication served on the petitioner is a single solitary incident, it cannot be looked upon as an isolated act. It necessarily connotes a course of previous conduct of such or similar activities where specialised experience has been acquired and specialised kind of mischief has been planned to be perpetrated. The allegation that the petitioner was one of the notorious anti-social elements indulging in committing theft of copper feeder wires from railway tractions is, therefore, really nothing but an elaboration of what is already implied in the apparently single solitary incident communicated to the petitioner. To quote the words of one of us in *Anil Dey v. State of West Bengal [(1974) 4 SCC 514 : 1974 SCC (Cri) 550]* “the very proficiency and daring displayed by the petitioner, with his associates, in*

doing what he did, amounts to the attribution of a series of activities” more fully put down in para 7 of the affidavit of the District Magistrate. It is, therefore, not possible to say that in arriving at the requisite satisfaction the District Magistrate relied on any ground not communicated to the petitioner, or that in making the order of detention he was guilty of any violation of the statutory provision in Section 8 or of the constitutional safeguard in Article 22(5).”

(Emphasis Supplied)

32. Learned ASG further submits that since the act of acting as a carrier was for a monetary consideration of 1000 dirhams, there was bound to be propensity in the act of the detinue, as held by the Supreme Court in the case of **Mohammed Sultan v. Joint Secretary of Government, (1991) 1 SCC 144:**

“7.In the grounds of detention reference has been made to the statements dated September 30, 1989 and October 1, 1989, made by the Petitioner before the Customs Officer wherein the Petitioner had stated that his income was not adequate for his maintenance and in order to earn money he had gone to Singapore after obtaining a passport in a false name and at Singapore the Petitioner developed friendship with one Majeed and on assurance given by Majeed that he would bear the cost of the air ticket of the Petitioner amounting to Rupees 5,200/- and would also pay to the Petitioner a sum of Rs. 2,000/- the Petitioner agreed to carry gold bars and other goods and to hand over the same to the son of Majeed in India and accordingly the Petitioner brought seven gold bars concealed in his body for the purpose of handing over the same to the son of Majeed. This would show that the Petitioner was indulging in the activity of smuggling of gold as a carrier for monetary consideration. This was a deliberate act on the part of the Petitioner and he had prepared himself for it by obtaining a passport in a false name and acquiring requisite skill to conceal such a large quantity of gold in his body. Taking into consideration the circumstances referred to above an inference could reasonably be drawn that unless detained the Petitioner would be likely to indulge in smuggling of goods in future and, therefore, there

was a reasonable basis for the Detaining Authority to arrive at the requisite satisfaction.”

(Emphasis Supplied)

33. Since the act is part of an organized activity done with a premeditated plan and conspiracy, it is evocative of the fact that it is likely to be repeated. The roles played by Mrs. Ansari, Abdul Rehman, his brother Ajmal Sheikh, clearly establish that it is an organized act and the detainee regularly acts as a carrier for Abdul Rehman and his brother Ajmal Sheikh.
34. As far as the subjective satisfaction of the Detaining Authority is concerned, Mr. Sanjay Jain submits that on 18.12.2015, the detainee submitted his passport to the Commissioner of Customs. Subsequently, the detainee was arrested on 19.12.2015 and was released on bail, subject to certain conditions, which *inter alia* included the condition that the detainee shall not leave the Country without prior permission of the Court. The detainee thereafter on 31.03.2016 moved an application under Section 457 Cr.P.C. for release of his passport before the Court of Chief Judicial Magistrate, Goa, which was subsequently dismissed as withdrawn.
35. In response to the contention that the acts committed by the detainee were on foreign land, where the said acts were not an offence, it is submitted that the detainee facilitated the commission of offences under the Customs Act and though the acts were committed in a foreign land, the detainee can be subjected to strictures for those acts in India by the application of Section 3 of the Indian Penal Code read with Section 188 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'). Learned counsel has relied upon ***Maqsood Yusuf Merchant v. Union of India, 2008 (103) DRJ 634*** (paragraph 16) to show the scope of S. 188 of Cr.P.C.

36. As regards the detainee's argument that under the circumstances of his passport being under custody of the DRI, there was no occasion for the detainee to travel abroad and consequently the detainee will not indulge in any prejudicial activity, it is contended that the same is ill-placed. A smuggling activity with a syndicate does not mean that the detainee should necessarily travel abroad. With contacts developed, such persons can guide other carriers. The fact that the passport was with DRI and also that an application was filed for its release was also considered by the Detaining Authority. Reference of the same can be found at paragraphs 5 and 68 of the Grounds of Detention. This shows due application of mind by the Detaining Authority.
37. It is further contended that the question whether grounds of detention can give rise to the satisfaction required for making the order is beyond the scope of the inquiry of the Court. The same was dealt by the Apex Court in ***State of Bombay v. Atma Ram***, AIR 1951 SC 157. In this case, the Apex Court has held as follows:
- “42. ...If the order was made as a result of satisfaction derive in good faith, but upon grounds which may be vague, the order will be perfectly good and cannot be challenged in any Court.”*
38. Mr. Sanjay Jain also submits that all the vital documents were placed before the Detaining Authority. It is contended that the detainee was arrested on 19.12.2015 for abetting and being guilty of an offence under Section 135 of Customs Act, 1962 by the Officer authorized by the Commissioner of Customs vide Arrest Memo issued under Section 104 of the Customs Act, 1962. Later, he was released on bail on 19.12.2015 by the CJM, Goa, subsequent to which, the respondents moved an application for cancellation of bail. The hearing of the application for cancellation of bail, which was kept for 01.06.2016, was

rendered infructuous in light of the Detention Order dated 20.05.2016 so issued. Moreover, in view of the fact that since no order was passed on that application, there was no necessity for the Detaining Authority to incorporate such facts in the Grounds of Detention.

39. The detainee was detained on 10.08.2016 pursuant to the Detention Order dated 20.05.2016 and was given a copy of the Grounds of Detention and the relied upon documents. The relied upon documents contained, *inter alia*, at Serial No.91 of the Index and page 773 of the relied upon documents the File Noting submitted by the Legal Cell Officer to his superiors, indicating that the matter pertaining to the cancellation of bail has been listed for next date of hearing that had been scheduled for 01.06.2016.
40. The aforementioned noting was not only within the custody of the Detaining Authority, but the same has also been taken into consideration, which is manifested from the fact that in para 73 of the Grounds of Detention, the Detaining Authority held as follows:

“While passing the Detention Order under the provisions of the Conservation of the Foreign Exchange and Prevention of Smuggling Activities Act, 1974 I have referred to and relied upon the documents mentioned in the enclosed list, which are also being served to you along with the grounds of detention.”

41. From the above, it can clearly be seen that the Detaining Authority was privy to the fact that an application for cancellation of bail had been moved by the respondents. Thereafter, the passing of the Detention Order, being aware of this fact, clearly shows that it did not regard the application for cancellation of bail to be of any consequence. In the case of ***Union of India & Ors. v. Arvind Shergill & Anr.***, AIR 2000 SC 2924, the Apex Court held as follows:

“4. The High Court has virtually decided the matter as if it

was sitting in appeal on the order passed by the Detaining Authority Action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person. The language of Section 3 clearly indicates that the responsibility for making a detention order rests upon the Detaining Authority who alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that Authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction was grounded. The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detainee from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid. The concerned authorities have to take note of the various facts including the fact that this was a solitary incident in the case of the detainee and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the court. In this case, there has been due application of mind by the concerned Authority to that aspect of the matter as we have indicated in the course of narration of facts. Therefore, the view taken by the High Court in the circumstances of the case cannot be sustained.”

(Emphasis Supplied)

42. Mr.Sanjay Jain further submits that the Detaining Authority was duly intimated of the status of the said application. Reliance is placed on the documents, copies of which are annexed to the counter filed by the respondents and marked as Annexure C-1 to C-11. Annexure C-7 is the copy of letter F.No.08/03-4/2016-COFEPOSA dated 17.05.2016 conveying the status report of the case proceeding in the CJM Court, Margao, including the fact that the Department has filed a Criminal Misc Application No.66/2016/A for the cancellation of bail of Ibrahim Ateef Damda Fakki and that his lawyer has prayed for some more time

to make his arguments and that the next date of hearing is fixed on 01.06.2016.

43. Without prejudice to the above argument, it is submitted that an application for cancellation of bail is not a vital document in any event, considering the fact that the detinue is anyhow proposed to be detained. The grounds of cancellation of bail are not relevant to be considered by the Detaining Authority. The respondents have to submit vital documents and not all documents. In *Mohammed Sultan (Supra)*, the Apex Court observed as follows:

*“6. The first contention that has been urged by Shri Karthikeyan, the Learned Counsel for the Petitioner, is that the Detaining Authority, while passing the order of detention, has failed to consider material documents, namely the application submitted by the Petitioner before the Additional Chief Metropolitan Magistrate for relaxation of the conditions for his release on bail and the order dated October 31, 1989 passed by the Additional Chief Metropolitan Magistrate relaxing the conditions for the release of the Petitioner on bail. As a corollary to the said submission it has been urged by the Learned Counsel that the Petitioner was not supplied with the copies of these documents and that this has resulted in denial of the right of the Petitioner to make a representation under Article 22(5) of the Constitution. In support of the aforesaid submission reliance has been placed on the decision of this Court in *M. Ahamedkuttyv. Union of India* (1990) 2 SCC 1. We find no substance in this contention. The application submitted by the Petitioner before the Additional Chief Metropolitan Magistrate for relaxing the conditions for his release on bail and the order dated October 31, 1989 passed by the Additional Chief Metropolitan Magistrate on the said application whereby the conditions on which the Petitioner was released on bail were relaxed, cannot be regarded as material documents and the failure to produce the same before the Detaining Authority before it passed the order of detention would not vitiate the order of detention. In this connection reference may be made to the decision of this Court in *Haridas Amarchand Shah v. K.L. Verma* (1989) 1 SCC 250 : AIR 1989*

SC 497. In that case also an application had been made for variation of the conditions of bail and the Chief Metropolitan Magistrate had passed an order varying the conditions of bail. That order passed by the Chief Metropolitan Magistrate varying the conditions of bail was not placed before the Detaining Authority and it was contended that as a result the subjective satisfaction of the Detaining Authority was vitiated and consequently the order of detention was bad. The said contention was rejected by the Court on the view that the order varying the conditions of bail was not a relevant document and the failure to produce the same before the Detaining Authority did not vitiate the order of detention. In *M. Ahamedkutty v. Union of India* 1990 (2) SCC 1 this Court has held that the bail application and the bail order passed by the Magistrate granting conditional bail were vital documents and if the same were not considered the satisfaction of the Detaining Authority itself would be impaired and if the same had been considered they would be documents relied on by the Detaining Authority which ought to have been supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. The decision in *Haridas Amarchand Shah v. K.L. Verma* AIR 1989 SC 497 was noticed by this Court and it was distinguished on the ground that in that case the application for bail and the order passed by the Metropolitan Magistrate varying the condition of bail were not vital and material documents inasmuch as the granting of bail by the Magistrate enabled the detenu to come out and carry on his business as before and variation of the conditions were not considered vital for the satisfaction as to need for detention. In the instant case the Petitioner cannot derive any assistance from *M. Ahamedkutty's* case because the order dated October 6, 1989 with regard to grant of bail subject to conditions has been duly considered by the Detaining Authority, as would be evident from the grounds of detention. The application for relaxation of the conditions of bail submitted by the Petitioner and the order dated October 31, 1989 relaxing the conditions of bail passed by the Additional Chief Metropolitan Magistrate on the said application were not material documents and were not required to be considered by the Detaining Authority. The non consideration of the same by the Detaining Authority would not, therefore, impair the satisfaction arrived at by the

Detaining Authority and would not vitiate the order of detention. For the same reason the non-supply of the copies of the same to the Petitioner would not result in denial of the right of the Petitioner to make a representation under Article 22(5) of the Constitution.”

(Emphasis Supplied)

44. The Supreme Court has gone further ahead and held that the Courts under the Writ Jurisdiction cannot decide on the adequacy of the documents on record of the Detaining Authority. The same is to be as per the subjective satisfaction of the Detaining Authority. This was held in *State of Gujarat v. Adam Kasam Bhaya*, AIR 1981 SC 2005: (1981) 4 SCC 216 as follows:

“6. ... The High Court in its writ jurisdiction under Article 226 of the Constitution is to see whether the order of detention has been passed on any materials before it. If it is found that the order has been based by the detaining authority on materials on record, then the Court cannot go further and examine whether the material was adequate or not, which is the function of an Appellate Authority or court. It can examine the material on record only for the purpose of seeing whether the order of detention has been based on no material. The satisfaction mentioned in Section 3 of the Act is the satisfaction of the detaining authority and not of the court. The judgment of the High Court, therefore, is liable to be set aside. We set aside the order of the High Court and allow the appeal.”

(Emphasis Supplied)

45. As far as the other ground pleaded by the petitioner that when the ordinary law is sufficient to deal with the situation, the invocation of the Preventive Detention Law is bad in law, is concerned, Mr. Sanjay Jain submits that regard must be made to the purpose and objective of preventive detention laws in India. The same was discussed by the Apex Court in the case of *Dropti Devi & Anr. v. Union of India & Ors.*, (2012) 7 SCC 499, wherein it was held as follows:

“67. 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 continue to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardising 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 national economy.”

68. In today’s world physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. 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 antisocial elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.”

69. 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 imperilling the security, the safety of State and the welfare of the Nation.”

70. 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 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 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

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

(Emphasis Supplied)

46. Moreover, a bare perusal of the long title of the COFEPOSA Act, 1974 would go on to reflect that this is a complete code in itself and would apply in addition to the general law, in this case the Customs Act, 1962.
47. With regard to the ground of delay in execution of the detention order, it is submitted by the learned ASG that unlike the procedure for serving the summons/warrants issued by the Courts which are directly sent by the Issuing Court to the Administrative Judge or the Chief Metropolitan Magistrate or the District and Sessions Judge of the place of execution, the Detention Order is served through the Executing Authority; in the

case of Detention Orders, there are three authorities traditionally recognized by Courts, who have a role to play in the above process. These are the Sponsoring Authority, Detaining Authority and Executing Authority. Usually, a proposal is mooted by the Investigating Agency, which as per internal guidelines, submits the proposal to the concerned officer of the rank of Chief Commissioner or Director General. Once, the officer of the rank of Chief Commissioner or Director General, after applying his mind, comes to the conclusion that the material gathered should be sent for the consideration of the Detaining Authority, the head of department of the investigating agency becomes the Sponsoring Authority.

48. Mr.Sanjay Jain further submits that the Detaining Authority (either Central or State Government, as the case may be) upon receiving such a proposal after scrutiny by the Screening Committee, considers the case and decides whether the Detention Order needs to be passed. If the Detaining Authority decides to pass the Detention Order, the same is to be served upon the proposed detainee as soon as possible through the Executing Authority. The Executing Authority is the senior-most police officer of the State where the proposed detainee is proposed to be detained, which happens to be the place where the Sponsoring Authority is located or is in the closest proximity. It is for this reason, that the detention orders were first forwarded to the Director General, Goa, where the proposed detainee was proposed to be detained, who in turn sent it to the concerned authorities for the same being served within the local jurisdiction. This is as per the internal guidelines and practice of the Government. In this case, the Sponsoring Authority, till such time the order under Section 7(1)(b) was issued, kept on inquiring from the Executing Authority about the status of the service. The

reason why the procedure under Section 7(1)(b) was adopted first, was so that it would be less prejudicial to the proposed detainee.

49. Learned ASG further submits that the detainee was detained on 10.08.2016 and was furnished the Grounds of Detention and the relied upon documents on 11.08.2016. Section 3(3) of the COFEPOSA Act, 1974 requires the service of the Grounds of Detention upon the detainee within five days of the date of Detention Order. He submits that due process of law was followed by the Detaining Authority by serving the detainee with the Grounds of Detention and the Relied Upon Documents upon his detention well within five days of the Detention Order.
50. We have heard the counsel for the parties and considered their rival contentions. It would be appropriate to deal with the contentions of the parties under different heads.

DETENTION ORDER HAVING BEEN PASSED ON A SOLITARY INCIDENT

51. Extensive arguments have been led to the validity of the detention order as having been issued on the basis of a solitary incident. Mr. Pradeep Jain has contended that the sole action attributable to the detainee would be the handing over of the packet to Smt. Ansari, which is insufficient to sustain an order of preventive detention. The stand of the State remains that the detainee had indulged into numerous acts in furtherance of the smuggling activity which would clearly show his expertise in the matter and that the same were executed in furtherance of a premeditated plan and conspiracy. Mr. Sanjay Jain has submitted that all these acts clearly establish propensity and potentiality of the detainee to indulge in similar smuggling activities in the future.

52. It is settled law that one single act may constitute the basis of passing of a preventive detention order provided the same could reasonably be said to indicate an organized act or manifestation of an organized activity or leaves room for an inference that the detainee will indulge in such activities in the future. [*Attorney General for India v. Amratlal Prajivandas*, (1994) 5 SCC 54 (paragraph 48); and *Pooja Batra v. Union of India*, (2009) 5 SCC 296 (paragraph 40)]. The deciding factor remains as to whether the single incident is enough to prove the propensity and potentiality of the detainee to justify the order of preventive detention [*Gimik Piotr (Supra)* (paragraph 24)]. In order to ascertain propensity, the courts may *inter alia* take into account the expertise shown [*Madhab Roy (Supra)* (paragraph 2)] as well as the amount of preparation undertaken by the detainee [*Mohammed Sultan (Supra)* (paragraph 7)]. At the same time, higher standard of proof is required to justify the detention order as the matter involves the curtailing the personal liberty of a person.
53. We proceed to analyse the case of the detainee. Admittedly, the detention order is premised in the smuggling of 10 kg gold jewellery seized at the Dabolin Airport, Goa. The incident took place as under:

<u>Time</u>	<u>Act</u>
	Detenue located at Bahrain
On 01.11.2015 (Sunday)	
Before 02:42 AM	Detenue booked two tickets for himself: • From Bahrain to Dubai via Doha (same day) • From Dubai to Bahrain via Doha (next day)
07:00 AM to 09:10 AM	Detenue travels to Dubai

<u>Time</u>	<u>Act</u>
	Carrier/Smt.Ansari already in Dubai holding a direct ticket from Dubai to Mumbai for 15.11.2015
On 02.11.2015 (Monday)	
Before 01:38 AM	Detenue booked new ticket for Smt.Ansari from Dubai to Goa via Doha for the same day.
	Detenue picks up 10 kg of gold from Abdul Rehman at Dubai and was paid 1000 dirhams for acting as carrier and separate consideration for booking services
06:30 PM	Smt.Ansari boards flight QR 1013 in Dubai
06:40 PM	Smt.Ansari arrives at Hamad International Airport, Doha
07:30 PM	Detenue boards flight QR 1065 in Dubai
07:40 PM	An hour later: Detenue arrives at Hamad International Airport
Between 07:40 PM and 09:40 PM	<u>Both Detenue and Smt.Ansari present at transit lounge of Hamad International Airport</u> Detenue calls Smt.Ansari and enquires about her whereabouts. Detenue hands over the gold to Smt.Ansari after contacting her on her mobile with an assurance that she will be paid Rs.5000/- upon reaching Goa.
09:40 PM	Detenue boards flight QR 1106 to Bahrain
09:55 PM	Smt.Ansari boards flight QR 522 and proceeds to Goa, India
On 03.11.2015 (Tuesday)	
03:50 AM	Smt.Ansari reaches Goa, leaves the packet under her seat and exits the airport. She is searched by the customs authority, but they do not find anything on her.

<u>Time</u>	<u>Act</u>
About 03:50 AM	The package is found by the authorities while searching the flight in question.

54. The foregoing clearly shows that the incident involved extensive planning, expertise in flight timings and coordination. It cannot be said that the incident was an isolated one but infact constituted a series of acts which culminated *qua* the detinue with the handing over of the packet.
55. It reveals an interesting *modus operandi*, the detinue used to book tickets without any ticketing licence. The detinue travelled between countries in the Middle East (Dubai, UAE - Doha, Qatar - Bahrain), knowing fully well that there is no limit on carrying gold in countries in the Middle East, thereby avoiding the scanner at all points. At the same time, the detinue ensured that the carrier would meet him at the transit point, i.e. Doha International Airport by booking tickets in the nick of time to avoid detection by the authorities. Once again ensuring that when the carrier boards her flight for India, in this case at Dubai, she has no gold upon her. Thereafter, meeting the carrier at the transit point and handing over the contraband to be taken to India. The carrier then upon reaching India, leaves the package on the plane and exits the Airport clean avoiding detection by the authorities.
56. From the foregoing, it is clear that the detinue had a vital role to play in the smuggling of goods into India. He showed expertise in flight timings to enable booking of flight tickets in the nick of time. He thereafter ensured the presence of the carrier at the transit point and personally handed over the packet to her. All of this, admittedly, for a consideration of 1000 dirhams. What this reveals is that the detinue, though may not be the king-pin, but was atleast acting as a *wazir* or

bishop, efficiently planning and coordinating the entry of the contraband in India. He cannot be said to be a mere carrier. Accordingly, we are of the opinion that the propensity and potentiality of future activities is manifest as the incident was clearly an organized act perpetrated with great expertise and preparation.

57. Therefore, this ground of the petitioner deserves to be rejected.

SUBJECTIVE SATISFACTION HAS BEEN INCORRECTLY ARRIVED AT BY THE DETAINING AUTHORITY

58. The next aspect to be considered is as to whether the subjective satisfaction of the detaining authority has been wrongly arrived at? This contention of Mr. Pradeep Jain is premised on the fact that the detainee had voluntarily surrendered his passport and therefore, there was no scope for the detainee to indulge in smuggling in the future.

59. The first case to be considered is that of ***Rajesh Gulati v. Govt of NCT of Delhi***, (2002) 7 SCC 129. The detainee therein was a carrier, described by the court as a 'pawn' who had repeatedly brought into India various household items at the instance of his employer, M/s B.D. Denim. His passport had been seized, yet the detaining authority had proceeded on the premise that the detainee was "*likely to travel clandestinely for the purpose of smuggling.*" The relevant portion of the detaining order reads as:

"On the basis of the foregoing facts and circumstances the Lt. Governor of the National Capital Territory of Delhi has no hesitation in arriving at the conclusion that you have the inclination and propensity for indulging in smuggling activities in an organised and clandestine manner and unless prevented you are likely to indulge in the smuggling activities in future. The Lt. Governor is aware that the prosecution proceedings have already been initiated against you under the Customs Act, 1962 and adjudication proceedings under the

Customs Act, 1962 are likely to be initiated against you. Your passport is with the Customs Department but you are likely to travel clandestinely for the purpose of smuggling, hence the Lt. Governor of the National Capital Territory of Delhi is satisfied that it is necessary to detain you under the provisions of the Conservation of the Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to preventing you from smuggling goods in future.”

(Emphasis Supplied)

60. This did not find favour with the Supreme Court, which held that “[t]he conclusion that despite the absence of his passport the appellant could or would be able to continue his activities is based on no material but was a piece of pure speculation on the part of the detaining authority.”
61. In **Gimik Piotr (Supra)** the detenu was a Polish citizen who was caught carrying currency valuing Rs. 40,72,878/-, which was seized and his passport was retained by the authorities. The State contended that if it was not for the detention, the detenu would abet smuggling activities. The argument was repelled by the bench as the order was passed under S. 3 (1) (i) of the COFEPOSA Act and not S. 3 (1) (ii). In this background, the Supreme Court relying upon **Rajesh Gulati (Supra)** held that since “[t]he Customs Department has retained the passport of the detenu. The likelihood of the appellant indulging in smuggling activities was effectively foreclosed.” (paragraph 32). Thereafter, the Supreme Court came to the following conclusion:

“35. In our considered view, the submission of the learned counsel for the appellant requires to be accepted. In the instant case as the facts reveal that there was no pressing need to curtail the liberty of a person by passing a preventive detention order. Foreign currency cannot be smuggled as the person cannot move out of the country on account of his passport being impounded. Merely because a person cannot otherwise survive in the country, is no basis to conclude that a

person will again resort to smuggling activities, or abetting such activities by staying in the country. There is higher standard of proof required in these circumstances involving the life and liberty of a person. The material provided by the respondents is not enough to justify the curtailment of the liberty of the appellant under an order of preventive detention in the facts and circumstances of the case.”

(Emphasis Supplied)

62. The Supreme Court in ***Moulana Shamshunnia (Supra)*** was dealing with a case wherein the detenu had been caught at the Bangalore International Airport possessing 4.35 kg of gold jewellery which had not been disclosed to the authorities. His passport was seized, yet the order of detention was passed against him. In this background, the Apex Court quashed the detention order relying on ***Rajesh Gulati (Supra)*** and ***Gimik Piotr (Supra)***.
63. One common feature of the judgments in ***Rajesh Gulati (Supra)***, ***Gimik Piotr (Supra)*** and ***Moulana Shamshunnia (Supra)*** is that in all the cases, the detention orders were passed to prevent smuggling of goods and not its abetment. COFEPOSA Act provides for circumstances under which the detaining authority may pass an order. Section 3 (1) of the Act reads as under:

“3. Power to make orders detaining certain persons.—(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of the State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from—

(i) smuggling goods, or

(ii) *abetting the smuggling of goods, or*
 (iii) *engaging in transporting or concealing or keeping smuggled goods, or*
 (iv) *dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or*
 (v) *harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,*
it is necessary so to do, make an order directing that such person be detained”

(Emphasis Supplied)

64. A bare reading of the provision would show that the detention order may be passed if the detention authority is satisfied that a person may act “*in any manner prejudicial to the conservation or augmentation of foreign exchange*” or to prevent him from indulging in any of the five stipulated acts.
65. For the present case, we may only deal with S. 3 (1) (i) and S. 3 (1) (ii). Both operate in different spheres. Sub-clause (i) may be invoked when the detainee himself may smuggle goods, while sub-clause (ii) enables detention of a person who may abet smuggling. In ***Rajesh Gulati (Supra)***, ***Gimik Piotr (Supra)*** and ***Moulana Shamshunnia (Supra)***, the detainee was a carrier of the contraband who had been detained in order to prevent him from indulging in similar activities in the future. To put it differently, the detainee was a ‘pawn’ actually transporting the goods from point ‘A’ to point ‘B’. In such circumstances, the surrendering of passport may go a long way to inhibit or even foreclose his potentiality altogether.
66. That is not the case in the present matter. The detention order in the present matter is under Section 3 (1) (ii) and not Section 3 (1) (i). The relevant portion of the grounds of detention read as under:

“70. Considering the fact that you boldly conspired and

attempted smuggling of gold as an active member of organized smuggling syndicate through Dabolim Airport, I am satisfied that you have a high propensity and potentiality to indulge in aforesaid prejudicial activities again. I am therefore satisfied that you should be immobilized by detention under COFEPOSA Act, 1974 with a view to prevent you from engaging in abetting smuggling of goods in future. Therefore, in order to prevent you from continuing your prejudicial activities (smuggling) as discussed above, your immediate detention under COFEPOSA Act, 1974 is the only remedy. Hence I direct that you be detained under Sections 3(1)(ii) of the COFEPOSA Act, 1974 to prevent you from abetting smuggling in future.”

(Emphasis Supplied)

67. In view of the foregoing, it becomes necessary to scrutinize the role of the detainee in smuggling of the contraband into India. His role has been extensively dealt with in paragraphs 53 to 56 foregoing and we do not deem it necessary to reiterate the same to avoid prolixity. Briefly stated the role of the detainee was of planning and coordination in addition to acting as a carrier. He was the one that ensured the presence of the carrier/Smt. Ansari at the transit point and that too with efficiency and speed to avoid easy detection by the authorities. We are of the opinion that though the detainee might not be the king of the organized smuggling racket, but he surely was playing a greater role than a pawn or mere carrier. He, in all probability, was equivalent to a *wazir* or bishop in a game of chess.
68. Further his expertise seems to be having in-depth knowledge of flight timings and how to coordinate the handing over the contraband to the carrier without detection. Such logistical support can easily be provided whilst sitting in India and there is no need for a passport. Thus, he can continue to abet smuggling activities. Accordingly, the subjective satisfaction having been arrived at by the detaining authority

cannot be faulted with.

69. Another aspect to be considered is as to the invocation of the COFEPOSA Act in respect of acts committed on foreign land. Admittedly, all the acts in furtherance of the smuggling of goods were committed in foreign land, i.e. the Middle East. Learned counsel for the petitioner has heavily relied upon Section 1 (2) of the COFEPOSA Act to show that the Act “*extends to the whole of India*” and not beyond. Therefore, the detenue could not be detained for acts committed on foreign land. On the converse, Mr. Sanjay Jain has relied upon S. 3 of the Indian Penal Code, 1860 with S. 188 of the Cr.P.C. to show that the detention order could have been passed.
70. A coordinate bench of this Court in ***Maqsood Yusuf Merchant (Supra)*** was hearing a case against a detention order at the pre-execution stage. One of the contentions of the counsel for the petitioner therein was that the petitioner “*was not resident in India at the relevant time*”; the petitioner “*at all material times ... was not in India*” and all the acts attributable to him “*took place outside India.*” Rejecting the contention, Justice Vikramajit Sen, giving the opinion for the bench, observed as under:

“13. With due respect to the Commission, we are unable to find any reasoning behind their conclusion that “even on merits, it can be seen that the applicant had only signed some documents at the instance of the principal offender Sh. Yusuf Dhanani. Sh. Yusuf Dhanani has been heavily penalised for it in the said Final order. Thus on merits too the penalty against this person is not attracted and no prudent adjudicator would order levy of penalty in such facts.....If the contention of the Revenue is accepted then all foreign suppliers, all over the world, who have connived and colluded will (sic. with) for under valuation by raising two sets of invoices should have the subject matter of show cause notice issued by the Customs/Revenue in India. This has never been done as the

law is not applicable to such persons who have neither abetted or concluded or have been an accomplice in the acts of omission or commission committed by Indian Importers which have rendered goods liable to confiscation.” We are unable to agree with these findings especially since no reasons have been given for coming to this conclusion. Once it is found that the offence has been committed, or a violation of the Customs Act has been perpetrated in India, persons who have abetted in the perpetration of this violation would justifiably be charged as abettors. A distinction has to be drawn between the commission of an offence, or the perpetration of a violation of the Customs Act beyond the territory of India, and the abettment of this species of offences committed outside India. Once abettment is proved, the law would take its course even with respect to persons who were at the material time outside Indian boundaries. In our own research we have come across the decision of the Supreme Court in *Union of India v. Sampat Raj Duggar*, (1992) 2 SCC 66. Duggar, an Indian national resident and transacting business at Hong Kong, had dispatched a consignment of silk to India in the name of Respondent No. 1 who was doing business at Delhi. The consignment was confiscated because the import licence had been cancelled after the goods had been imported into India. Cancellation was based on violations by Respondent No. 2 of the terms of previous import licences. The Supreme Court upheld the decision of the Single Judge of the Bombay High Court to the effect that title in the goods had not passed to Respondent No. 2 since payment had not been made, and therefore the goods continued to be owned by Respondent No. 1; and further that there was no violation of the terms of import justifying confiscation of the goods. In conclusion, and this can be extrapolated to the present case, their Lordships observed as follows:—

24. It is also significant to notice that it is not the case of the appellants that respondent 1 was a party to any conspiracy or other fraudulent plan hatched or sought to be implemented by respondent 2. If that were the case, different considerations would have arisen.

14. These observations are relevant and ominously foreboding so far as the present Petitioner is concerned. If it is eventually proved that the Petitioner was party to any conspiracy or

other fraudulent plan hatched or sought to be implemented by Mr. Dhanani, abettment of a crime committed in India would uncontrovertably be made out. The observation of the Settlement Commission that action has not been taken against a foreigner does not appeal to us. There is no bar in prosecuting any person who has been abetting in a violation of the Customs Act merely because such action may not have been initiated in the past. We are required to pre-judge the entire issue at the pre-execution stage of the detention orders. We must be loathe to do so.

...

16. This discussion would not be comprehensive without a consideration of Section 188 of the Code of Criminal Procedure, 1974 (Cr.P.C). This provision deals with offences committed outside India. In the case of Indian citizens there are no restriction as to the place or situs where the offence has allegedly occurred, whereas non citizens would have to have been aboard an 'Indian Flag' vessel for the Section to apply. This amply clarifies the observations made by the Settlement Commission pertaining to the non-prosecution of foreigners heretofore in similar matters concerning under or over-invoicing. In sharp contrast to the provisions of the Cr.P.C. Section 4 of the IPC restricts the operation thereof to offences punishable under the IPC alone. It is important to underscore the fact that the word "offence" has been defined in Section 2(n) of the Cr.P.C. to mean "any act or omission made punishable by any law for the time being in force....." The Legislature clearly intended that the Cr.P.C. would not be circumscribed in its application only to offences dealt with in the IPC. Any doubt on this score would stand dispelled on a reading of Section 4, Cr.P.C. The first sub-section declares that any offence under the IPC shall be investigated, inquired into, tried and otherwise dealt with according to the Cr.P.C; and the second subsection makes the Cr.P.C. applicable to all other offences. Ergo Section 188, Cr.P.C. will regulate the prosecution of any violation of the Customs Act. There are several provisions of the Customs Act which moderate or exempt the applicability of the Cr.P.C; however Section 188 thereof is not so dealt with. It is important to draw a distinction between an inquiry and trial under the Cr.P.C, and preventive detention under the COFEPOSA or any other law. However, since Detention Orders have been passed by the

Central Government, the proviso to Section 188 would stand impliedly complied with, assuming its applies. Thus, the impugned Orders are impervious to the challenge laid out in this petition.”

(Emphasis Supplied)

71. From the foregoing, it is clear that the detention order cannot be found fault with on the ground that the act perpetrated by the detenu were on foreign land. In respect of the acts which may be considered to establish propensity, it is necessary to look into the scope of Section 3 itself. Section 3 has been extracted in paragraph 64 foregoing. The other relevant provisions are as under:

“2. Definitions.— *In this Act, unless the context otherwise requires,—*

(e) “smuggling” has the same meaning as in clause (39) of section 2 of the Customs Act, 1962 (52 of 1962), and all its grammatical variations and cognate expressions shall be construed accordingly;”

The relevant provisions of Customs Act, 1962 are as under:

“2. Definitions.— *In this Act, unless the context otherwise requires,—*

(39) “smuggling”, in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;”

“111. Confiscation of improperly imported goods, etc.— *The following goods brought from a place outside India shall be liable to confiscation:—*

- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;*
- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;*

- (c) *any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;*
- (d) *any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;*
- (e) *any dutiable or prohibited goods found concealed in any manner in any conveyance;*
- (f) *any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;*
- (g) *any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;*
- (h) *any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;*
- (i) *any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;*
- (j) *any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;*
- (k) *any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;*
- (l) *any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;*
- (m) *any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the*

declaration made under section 77 in respect thereof or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

- (n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;*
- (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;*
- (p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.”*

72. A holistic reading of the provisions shows that the place of commission of the acts in the past by the detainee have no bearing upon the capacity of the Detaining Authority to pass a detention order. It is settled law that the COFEPOSA Act is preventive in nature and not punitive for the acts committed in the past. For the acts perpetrated in the past, which may or may not constitute offences, the law takes its own course. The purpose of detention under the COFEPOSA Act remains to prevent future acts [See ***Haradhan Saha v. The State of West Bengal and Others*, (1975) 3 SCC 198**]. It is only for establishing the propensity and potentiality of the detainee that his past antecedents and conduct are taken into account and not otherwise. In a sense, the liberty of the detainee is not taken away for his past but to prevent him for indulging in analogous activities in the future, based upon the propensity and potentiality established from his past. It is irrelevant as to whether such activities were conducted in the territory of India or on foreign land, so long as the subjective satisfaction is correctly arrived at.

73. Accordingly, we find no infirmity on this count as well.

NON-PLACEMENT OF VITAL DOCUMENTS

74. Mr. Pradeep Jain has contended that the application seeking the cancellation of bail filed by the department before the CJM, Goa has not been placed from the Detaining Authority and this document was vital document which goes to the root of the decision of the Detaining Authority.

75. It is settled law that the failure to place material and vital facts, which would influence the mind of the Detaining Authority, vitiates the subjective satisfaction having been arrived at. Therefore, any document which may tilt the view of the authority to make or not to make the detention order should be placed by the Sponsoring Authority before the Detaining Authority [See *Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat*, (1979) 1 SCC 222 (paragraph 6); and *Smitha Gireesh v. UOI and Ors.*, MANU/DE/1440/2016: 2016 SCC OnLine Del 3697 (paragraph 21)].

76. We may notice the observations of a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in *Sahil Jain v. UOI & Ors.*, (2014) 140 DRJ 319, wherein a previous bail order imposing stringent conditions upon the detainee was not placed before the Detaining Authority. Such order was held to be a vital document, non-placement of which vitiated the detention order. The relevant portion reads as under:

“29. It is well settled that the subjective satisfaction requisite on the part of the Detaining Authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the Detaining Authority one way or the other are ignored or not

considered by the Detaining Authority before issuing the detention order. If material or vital facts which would influence the mind of the Detaining Authority one way or the other on the question whether or not to make the detention order are not placed before or are not considered by the Detaining Authority, it would vitiate its subjective satisfaction rendering the detention order illegal. After all, the Detaining Authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid, then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order. (Ashadevi v. K. Shivraj, Addl. Chief Secy. to the Govt. of Gujarat, (1979) 1 SCC 222).

30. In the case of *Ahamed Nassar v. State of Tamil Nadu* (1999) 8 SCC 473, the Supreme Court observed that every conceivable material which is relevant and vital which may have a bearing on the issue, should be placed before the Detaining Authority. The Sponsoring Authority should not keep it back. Para 20 of the said judgment is extracted hereunder:-

“20..... A man is to be detained in the prison based on the subjective satisfaction of the Detaining Authority. Every conceivable material which is relevant and vital which may have a bearing on the issue should be placed before the Detaining Authority. The Sponsoring Authority should not keep it back, based on its interpretation that it would not be of any help to a prospective detenu. The decision is not to be made by the Sponsoring Authority. The law on this subject is well settled; a detention order vitiates if any relevant document is not placed before the Detaining Authority which reasonably could affect its decision.”

31. The preventive detention law is based on suspicion. The Court does not sit in Appeal over the subjective satisfaction reached by the Detaining Authority except where the relevant and vital material has not been considered or extraneous

material has been taken into consideration in passing the detention order or similar other matters. ...”

(Emphasis Supplied)

77. In the present case, it must be ascertained as to whether the application for cancellation of bail filed before the CJM, Margao, Goa can be said to be a vital document which goes to the root of the decision of the Detaining Authority. We may notice that the Supreme Court in ***Haridas Amarchand Shah v. K.L. Verma*, (1989) 1 SCC 250** held that the application for variation of condition of bail and the order thereon varying the condition of appearing before the Enforcement Department were not vital and material documents “*inasmuch as the granting of bail by the Magistrate enabled the detenu to come out and carry on his business activities as before*”, while that was not the case with an order merely varying the conditions of bail. Later in ***M. Ahamedkutty v. Union of India*, (1990) 2 SCC 1** it has been held that the bail application and the bail order were vital documents and non-consideration thereof had impaired the ability of the Detaining Authority to reach a decision. In ***A. Mohammed Farook* (Supra)**, the application seeking relaxation of the conditions of bail and the subsequent order were not considered vital or material documents by the Supreme Court.
78. From the foregoing, it is clear that there cannot be any hard and fast rule as to when the bail application or order or one varying its conditions can be said to be vital and material as to impair the capacity of the Detaining Authority and thereby, vitiating its order.
79. The stand of the respondents remains that the pendency of the application was within the knowledge of the Detaining Authority as by

a Letter dated 17.05.2016 the Detaining Authority was duly intimated about the pendency of the case against the detainee. The relevant portion of the Letter dated 17.05.2016 addressed to the Detaining Authority reads as under:

“2. The department has filed an [sic: a] Criminal Misc Application No.66/2016/A for the cancellation of bail of Shri Ibrahim Ateef Damda Fakki, the lawyer of Shri Ibrahim Ateef Damda Fakki has prayed some more time for the argument hence the next date of hearing is fixed on 01.06.2016 in the CJM Court Margao.”

80. In view of the stand of the respondents, we find no merit in the said contention of the petitioner.

RESORT TO PREVENTIVE DETENTION WHEN ORDINARY LAW IS SUFFICIENT TO DEAL WITH THE SITUATION

81. The next contention of the learned counsel for the petitioner is that the present situation could have been dealt with under the ordinary law of the land and there was no need to resort to the law of preventive detention.
82. Law enabling the State to deprive a person's liberty without trial is clearly draconian in nature and should not be taken lightly by any civilized society. It is a necessary evil to be resorted to in the rarest of circumstances. At the same time, the violation of foreign exchange regulations and smuggling activities may tear apart the very economic fabric of the Nation's economy, which has necessitated statutes such as the COFEPOSA Act. [See *Dropti Devi (Supra)*].
83. Prior to dealing with the contentions of the parties, we may trace the development of the law upon the subject. In *Biram Chand v. State of U.P., (1974) 4 SCC 573*, it was held that recourse to both criminal proceedings and passing of a preventive detention order cannot be

allowed. This judgment was later overruled by a Constitutional Bench of the Supreme Court in **Haradhan Saha (Supra)** with the following observations:

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

33. Article 14 is inapplicable because preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution an accused is sought to be punished for a past act. In preventive detention, the past act is merely the material for inference about the future course of probable conduct on the part of the detenu.”

(Emphasis Supplied)

84. At the same time, the law of preventive detention cannot be abused to fail the paramount right recognised by the Constitution of India in Article 21. Being an aberration to the principles governing civilized societies, preventive detention orders cannot be passed in a cavalier or causal manner in order to avoid the hassles of trial and punish the detenu.
85. A Full Bench of the Supreme Court in **Rekha v. State of Tamil Nadu, (2011) 5 SCC 244**, was dealing with a case wherein a detention order was passed against a detenu, who was already in custody, under the “*alleged imminent possibility of the accused coming out on bail.*”

Since the only allegation against the detenu was that he was selling expired drugs after changing their labels, the Apex Court came to the conclusion that the ordinary law was sufficient to deal with the situation. Consequently, the detention order was quashed. Justice Markandey Katju, giving the opinion for the bench, observed as under:

“13. In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in R. v. Secy. of State for the Home Deptt., ex p Stafford [(1998) 1 WLR 503 (CA)] : (WLR p. 518 F-G)

“ ... The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law.”

...

21. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of one year (or any other period) is a punishment of one year's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive?

22. Mr Altaf Ahmed, learned Senior Counsel for the respondents, submitted that there are very serious allegations against the detenu of selling expired drugs after removing the original labels and printing fresh labels to make them appear as though they are not expired drugs.

23. In this connection, criminal cases are already going on against the detenu under various provisions of the Penal Code, 1860 as well as under the Drugs and Cosmetics Act, 1940 and if he is found guilty, he will be convicted and given appropriate sentence. In our opinion, the ordinary law of the land was sufficient to deal with this situation, and hence,

recourse to the preventive detention law was illegal.

...

29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.

...

33. No doubt it has been held in the Constitution Bench decision in *Haradhan Saha* case [(1975) 3 SCC 198: 1974 SCC (Cri) 816] that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him an opportunity of placing his

defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

34. Hence, the observation in SCC para 34 in Haradhan Saha case [(1975) 3 SCC 198 : 1974 SCC (Cri) 816] cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.”

(Emphasis Supplied)

86. We may also take note of the decision of the Supreme Court in the case of ***Munagala Yadamma v. State of A.P. and Ors.***, (2012) 2 SCC 386 wherein the Detaining Authority had passed the order for the reason that “*recourse to normal legal procedure would involve more time and would not be an effective deterrent in preventing the detenu from indulging in further prejudicial activities.*” The Apex Court allowed the appeal and quashed the detention order relying upon the decision in ***Rekha (Supra)*** holding as under:

“9. No doubt, the offences alleged to have been committed by the appellant are such as to attract punishment under the Andhra Pradesh Prohibition Act, but that in our view has to be done under the said laws and taking recourse to preventive detention laws would not be warranted. Preventive detention involves detaining of a person without trial in order to prevent him/her from committing certain types of offences. But such detention cannot be made a substitute for the ordinary law and absolve the investigating authorities of their normal functions of investigating crimes which the detenu may have committed. After all, preventive detention in most cases is for a year only and cannot be used as an instrument to keep a person in perpetual custody without trial. Accordingly, while following the three-Judge Bench decision in Rekha case we allow the appeal and set aside the order passed by the High Court dated

20-7-2011 and also quash the detention order dated 15-2-2011, issued by the Collector and District Magistrate, Ranga Reddy District, Andhra Pradesh.”

(Emphasis Supplied)

87. The present controversy is also to be decided upon the touchstone of the well settled law. We are of the opinion that the ordinary law of the land was not sufficient to deal with the present scenario. As has been discussed by us in the foregoing paragraphs, the activities of the detainee were of a serious nature and perpetrated with a great deal of expertise and coordination. The record bears out that the detainee was more than a mere carrier as he also provided logistical support. It was deemed essential by the Detaining Authority to curtail his liberty in order to halt him from abetting smuggling of goods in future. In this background, it is clear that the ordinary law of the land could not have dealt with the matter and the resort to detention order was justified.

DELAY IN EXECUTION OF DETENTION ORDER

88. The final aspect to be considered is whether delay of about 80 days in the execution of the detention order can vitiate the subjective satisfaction arrived at by the Detaining Authority? The detention order was passed on 20.05.2016, while the same was not executed until the surrender of the detainee on 10.08.2016.
89. Prior to dealing with the contentions of the parties, we deem it appropriate to revisit the law on the subject.
90. It is settled law that all the authorities should act promptly and leave no stone unturned to give effect to the detention order. Where the authorities show a lackadaisical attitude towards communicating the order, the courts have come to a conclusion that the live link between the order and its execution was ‘snapped’ and consequently, the

subjective satisfaction having arrived at stood vitiated.

91. In *A. Mohammed Farook (Supra)*, the Supreme Court was dealing with a scenario wherein there was a gap of 40 days in the execution of the detention order and it was contended that all the while the detenu was residing and working in Chennai to the knowledge of the authorities. Since no reasonable explanation was forthcoming from the authorities, the detention order was quashed by the Court. The relevant paragraphs of the opinion read as under:

“9. There is a catena of judgments on this topic rendered by this Court wherein this Court emphasised that the detaining authority must explain satisfactorily the inordinate delay in executing the detention order otherwise the subjective satisfaction gets vitiated. Since the law is well settled in this behalf we do not propose to refer to other judgments which were brought to our notice.

10. As indicated earlier the only explanation given by the detaining authority as regards the delay of 40 days in executing the detention order is that despite their efforts the petitioner could not be located at his residence or in his office and therefore the order could not be executed immediately. No report from the executing agency was filed before us to indicate as to what steps were taken by the executing agency to serve the detention order. In the absence of any satisfactory explanation explaining the delay of 40 days, we are of the opinion that the detention order must stand vitiated by reason of non-execution thereof within a reasonable time. From Annexure P-2 (the proceeding-sheet of the Metropolitan Magistrate's Court, Madras) it appears that the petitioner (accused) was present in the Court of the Additional Chief Metropolitan Magistrate on 25-2-1999 as well as on 25-3-1999. Despite such opportunities neither the detaining authority nor the executing agency as well as the sponsoring authority were diligent to serve the detention order on the petitioner at the earliest. In this view of the matter, we are of the opinion that the subjective satisfaction of the detaining authority in issuing the detention order dated 25-2-1999 is vitiated. It is in these circumstances not possible for us to sustain the detention order.”

92. Another Division Bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***Smitha Dey Bhattacharya v. Union of India & Anr.***, W.P. (Crl) 2118/2014 dated 22.01.2015 was dealing with a delay in execution of about 4 months; this Court finding that all steps had been taken and a look out circular was issued in time held that the delay stood reasonably explained. The relevant paragraphs of the judgment read as under:

“25. Reliance is also placed by counsel for the petitioner on Circular bearing F.No.671/6/2001-Cus.VIII, Government of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau, in support of his arguments that the Department has recognised the fact that an order of detention is to be served expeditiously. The circular has also noticed that the sponsoring authority tends to harbour a feeling that they have no further role to play once the detention order has been passed and this notion needs to be dispelled. It has been highlighted in the Circular that the sponsoring authority must keep in mind the fact that their role and objective is not to have a detention order issued but also have the person detained because only then the object and purpose of issuing the detention order is really achieved. It is also contended that there is no satisfactory explanation on behalf of the respondent in this regard. We find no force in the submission of learned counsel for the petitioner.

...

30. No doubt the underlying rule is that once a detention order has been passed every effort is to be made by the Department to ensure service of the detention order on the detenue and in case of unexplained delay, the order is liable to be quashed. The guidelines of the Department are also to the same effect.

31. The only question, which arises in the present case, is whether the Department had taken every possible step to serve the detenue in the shortest period of time or not. The reply explains the steps taken by the Department to serve the petitioner. As the petitioner could not be served in the ordinary

way a look out circular was issued on 28.3.2014. The Department took steps under Section 7(1)(b) of the COFEPOSA Act. A copy of the order dated 31.3.2014 was published in the official gazette. A publication was carried out in the local newspaper and a report was also sent to the ADG, DRI, for filing the same before the concerned Chief Judicial Magistrate.

32. In our view, the Department has been able to satisfactorily explain the steps taken by them to serve the petitioner and, thus, the submission of learned counsel for the petitioner is rejected.”

(Emphasis Supplied)

93. The detenu in **Manish Gadodia (Supra)** was continuously residing at his residence and attending court proceedings, yet there was a delay in the execution of the detention order of about 19 days. Quashing the detention order, a coordinate bench of this Court observed as under:

“28. ... It is no more res integra that the Detaining Authority must explain satisfactorily the inordinate delay in executing the detention order, otherwise the subjective satisfaction gets vitiated.

...

32. The petitioner also placed reliance on the ‘Procedural safeguards/requirements to be observed to avoid delay in execution of detention order’ dated 21.02.2007. The relevant portion is extracted below:

“4. Despite these clear instructions, instances have come to the notice of this Ministry where even though the detenu was available at his own address, no real effort had been made to locate the detenu and execute the detention order. **The Hon'ble Supreme Court has held in a no. of cases that if the authorities did not make sincere and honest efforts and take any urgent or effective steps the service of the detention order on the detenu, the order of the detention is liable to be set aside.**

5. It is generally noticed that the Sponsoring Authorities who originally move the proposal, somehow develop a lax attitude after a detention order based on their proposal has been issued. They tend to harbour a feeling

*that they have no further role in the matter and it is entirely for the Detaining Authority and the Executive Authority to ensure that the Detention Order is served. This wrong notion needs to be dispelled forthwith. **The Sponsoring Authority must keep in mind the fact that their role and object is not confined merely to having a detention order issued but to have a person detained otherwise the very object of issuing the detention order gets defeated.***

6. All the Sponsoring Authorities, Executive Authorities and the Detaining Authorities are once again requested that they must ensure that timely action is taken for execution of the detention order after it has been issued. Simultaneously, they should keep detailed records of the efforts made for execution of the Detention order from time to time, as it would be important to convince the Advisory Board/Hon'ble High Courts, if need arises.....”

(Emphasis Supplied)

33. The detention order is passed as a preventive measure and therefore, its purpose is defeated if the detenue is not detained at the earliest possible opportunity after the alleged act. The actions of the respondents should display a sense of urgency in the matter of passing of, and execution of the detention order, if the preventive detention is to be justified. In the present case, the entire exercise undertaken by the respondents appears to be rather casual and cavalier.

(Emphasis Supplied)

94. A reference to the Letters bearing No. F.No.671/6/2001-Cus.VIII dated 12.07.2001 and bearing No. F.No. 702/MAD/S/33/2006-Cus.IX dated 21.02.2007 mentioned in **Smitha Dey Bhattacharya (Supra)** and **Manish Gadodia (Supra)** respectively issued by the Ministry of Finance, Government of India shows that the Government itself has directed prompt communication of the detention order. Our attention is directed towards another Letter bearing No. F.No.671/12/2009-Cus.VIII dated 03.08.2009 which reiterates the directions.

95. We may also notice the decision of a coordinate bench of this Court, wherein one of us (G.S. Sistani, J.) was a member, in ***Smitha Gireesh v. UOI & Ors.***, 2016 SCC OnLine Del 3697: MANU/DE/1440/2016. The detention order therein was passed on 31.03.2015 and the detainee was, even thereafter, working as ACIO-I at Bhubaneswar, Odisha, yet there was a delay of about 9 months in execution of the detention order. This Court found that the authorities were all along aware about the whereabouts of the detainee while futile efforts to serve him were made in his home state, i.e. Kerala. In view thereof, the order of detention was quashed by this Court. The relevant portion of the judgment reads as:

37. Delay in executing the detention order has been considered rather seriously by the Courts for the reason that delay clearly indicates that there is no genuine satisfaction on the part of the detaining authority regarding the necessity of immediately detaining the person in order to prevent him from committing and continuing to commit the prejudicial activities alleged against him. Wherever the explanation rendered is found to be genuine, the same has been accepted by the court.

...

45. It may be noted that this exercise was futile and an eye wash as even in the record of the detaining authority the detainee stood transferred to Bhubaneswar and all steps taken to serve this detention order to the detainee at a place where he was not posted shows complete non-application of mind. Knowing fully well that he was working for gain at Bhubaneswar and sending any communication at the address at Kerala was a mere formality and a futile exercise.

47. The law in this regard is well-settled. After the passing of the detention order, the detaining authority must ensure that the order of detention is served upon the detainee at the earliest opportunity available unless and until respondents are able to give a satisfactory explanation for the reasons of non-execution of the detention order.

48. In this case, although an explanation is sought to be given but the explanation cannot be accepted as firstly the detenue is a Government servant and he was not absconding and was available and performing his duties at Bhubneswar. Further, material placed on record would show that the detenue continued to perform his duties upto 13.7.2015. Thus, in our view, the order of detention is liable to be quashed as there is unexplained delay in execution of the impugned detention order.”

(Emphasis Supplied)

96. Accordingly, the present case is also to be decided upon the touchstone of the well-settled law. The contention of the learned counsel for the petitioner is that there was a delay of 80 days in execution of the detention order when it was clearly within the knowledge of the authorities that the detenue was residing at his native place at Bhatkal, North Kannada, Karnataka. While the stand of the respondents remains that there was no delay on the part of the authorities in executing the order and the authorities were all along seized in the matter. As per procedure, the order was sent by the Sponsoring Authority to the Executing Authority, being the senior-most police officer of the State where the proposed detenue was to be detained, i.e. Goa.
97. In the Counter Affidavit, the State has detailed the steps taken by it in a chronochological manner. We deem it appropriate to reproduce it in its entirety below:

“GROUND F :

... Copy of the Chronological Chart showing the steps taken pursuant to the issuance of the Detention Order is given hereunder:-

<i>SN</i>	<i>Date</i>	<i>Event</i>
<i>01</i>	<i>20.05.2016</i>	<i>COFEPOSA Detention Orders in respect of Shri Ibrahim Ateef Damda Fakki and Smt Shehnaz Laiq Ahmed Ansari were signed by the Competent Authority.</i>
<i>02</i>	<i>23.05.2016</i>	<i>Detention Orders along with GOD, Index and RUD were handed over to Department's</i>

<i>SN</i>	<i>Date</i>	<i>Event</i>
		<i>Officer at New Delhi.</i>
<i>03</i>	<i><u>24.05.2016</u></i>	<i>Detention Orders along with Ground of Detention, photographs of detenue and SOPs were handed over to the DGP, Goa Police office.</i>
<i>04</i>	<i>27.05.2016</i>	<i>Calls were made to the Office of the SP (North Goa) to enquire about the status of execution.</i>
<i>05</i>	<i>30.05.2016</i>	<i>Officer deputed to the Office of the SP (North Goa) to enquire about the status of execution.</i>
<i>06</i>	<i><u>01.06.2016</u></i>	<i>Officer deputed to the Office of the SP (North Goa) to enquire about the status of execution. The officer once again briefed the concerned officers and provided contact numbers for any assistance.</i>
<i>07</i>	<i>01.06.2016</i>	<i>Departmental Officer attended the court hearing i/r of release of passport of Shri Ibrahim Ateef Damda Fakki. The advocate of Shri Fakki requested the court to allow him withdraw the application.</i>
<i>08</i>	<i>01.06.2016</i>	<i>Departmental Officer attended the Court hearing i/r of cancellation of Bail of Shri Ateef Damda Fakki filed by the Department. The next date of hearing is fixed on 22.06.2016</i>
<i>09</i>	<i>06.06.2016</i>	<i>Letter written to the Superintendent of Police (North Goa) asking for Status of Execution of Detention Order, marked as “Annexure D-1”</i>
<i>10</i>	<i><u>13.06.2016</u></i>	<i>Letter Written by Superintendent of Police (North Goa) to the Superintendent of Police Uttar Kannada District Karwar Karnataka forwarding the Detention Order and requesting to detain the said person, marked as “Annexure D-2”</i>
<i>11</i>	<i>15.06.2016</i>	<i>Departmental Officer attended the Court i/r of cancellation of Bail of Smt Shehnaz filed by the Department. The next date of hearing is fixed on 25.07.2016</i>
<i>12</i>	<i>17.06.2016</i>	<i>Letter written to the Superintendent of Police (North Goa) requesting to expedite the matter</i>

<i>SN</i>	<i>Date</i>	<i>Event</i>
		<i>and submit the action taken report to the ministry, marked as “Annexure D-3”</i>
<i>13</i>	<i>22.06.2016</i>	<i>Departmental Officer attended the Court hearing i/r of cancellation of Bail of Shri Ateef Damda Fakki filed by the Department. The next date of hearing is fixed on 13.07.2016</i>
<i>14</i>	<i>22.06.2016 27.06.2016 30.06.2016</i>	<i>Calls were made to the Office of the SP (North Goa) to enquire about the status of execution.</i>
<i>15</i>	<i>06.07.2016</i>	<i>Ministry asked for the Action Taken Report both from the Sponsoring Authority as well as from the Executing Authority</i>
<i>16</i>	<i>14.07.2016</i>	<i>Comprehensive Action taken Report sent to the Director (COFEPOSA) CEIB New Delhi, marked as “Annexure D-4”</i>
<i>17</i>	<i>25.04.2015</i>	<i>Apart from these, the department had already filed Criminal Misc Application before Hon’ble Chief Judicial Magistrate, Margao for the cancellation of bail granted to the accused on 25.04.2016, on the request of the defense advocate next date of hearing was fixed on 05.05.2016.</i>
<i>18</i>	<i>05.05.2016</i>	<i>On the request of the defense advocate next date of hearing was fixed on 01.06.2016.</i>
<i>19</i>	<i>01.06.2016.</i>	<i>Case was adjourned to 22.06.2019</i>
<i>20</i>	<i>22.06.2019</i>	<i>Case was adjourned to 22.06.2019</i>
<i>21</i>	<i>13.07.2016</i>	<i>Departmental Officer attended the Court hearing i/r of cancellation of Bail of Shri Ateef Damda Fakki filed by the Department. The</i> <i>Court ordered to keep the case in abeyance in view of COFEPOSA detention order.</i>
<i>22</i>	<i>28.07.2016 & 05.08.2016</i>	<i>Action under section 7(1)(b) of the COFEPOSA Act were initiated against Shri Ibrahim Ateef Damda Fakki and Smt. Shehnaz Laiq Ahmed Ansari which was published in the Gazette of India on 28.07.2016 and also in the Local Newspaper on 05.08.2016.</i>
<i>23</i>	<i><u>10.08.2016</u></i>	<i><u>The Detention Order against Shri Ibrahim Ateef Damda Fakki was and the detenue has been kept in</u></i>

SN	Date	Event
		<u>Modern Central Jail, Colvale, North Goa.</u>
24	11.08.2016	Detenue was served Grounds of Detention, Relied Upon Documents and Index of Relied Upon Documents along with to CDs numbered 104 & 743 on 11.08.2016. These two CDs have been played before the detenue and he has viewed/heard all the audio clips/video recordings. Which had been duly acknowledged by the detenue under his signature.”

(Emphasis Supplied)

98. Though at a cursory look the steps taken may seem that the authorities were committed to the matter and there was no break in the live link; but on a proper analysis, it is revealed that the most of the steps were forlorn attempts to serve the order while the authorities were all along aware of the whereabouts of the detenue.
99. The petitioner has placed on record the statements of the detenue recorded on 18.12.2015, 09.02.2016 and 08.03.2016; Arrest Memo dated 19.12.2015; application for release of passport filed before the CJM, Margao, Goa dated 31.03.2016 and the Reply thereto. All of the documents clearly bear the residential address of the detenue in Bhatkal, North Kannada, Karnataka. We only reproduce the annexure to the statement recorded to the statement recorded on 09.02.2016 to avoid prolixity, which reads as under:

“Annexure to the Statement of Shri Ibrahim Ateef Damda Fakki dated 09.02.2016 tendered under Section 108 of the Customs Act, 1962

	Address	
A	Present	House No 765/2A, DF House Bunder Road, IInd Cross Muscat Colony, Kokti Nagar, Bhatkal, Uttara kannada, Karnataka 581320, (New Address)

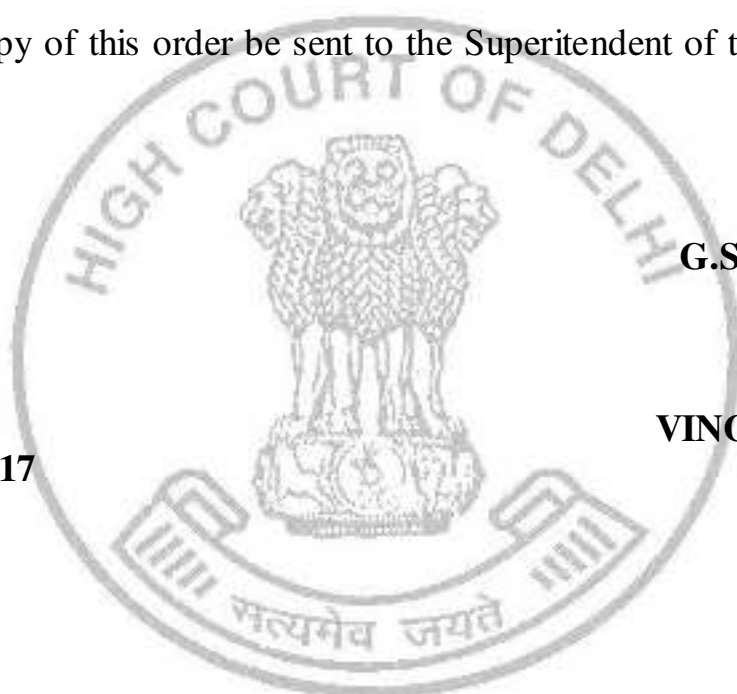
		<i>House No 29 DF House Kokti Nagar, I Cross Uttar Kannada , Karnataka-581320 (Old Address)</i>
		<i>Flat No 2 Khayal Al-Watani (National Tailor) Building, Alras Deira Dubai</i>
<i>B</i>	<i>Permanent</i>	<i>House No 765/2A, DF House Bunder Road, IInd Cross Muscat Colony, Kokti Nagar, Bhatkal, Uttara kannada, Karnataka 581320,</i>
<i>C</i>	<i>Native Place</i>	<i>Bhatkal , Karnataka”</i>

100. From the foregoing, it is manifest that the authorities were all along aware of the residential address of the detainee, where the detainee alleges to have resided whilst in India. It has been specifically averred in the writ petition that the detainee “*was staying at his native place at Bhatkal, Karnataka*” and came to know of the detention order only after its publication in a national newspaper on 05.08.2016. There is no reply to this averment.
101. Returning to the chart reproduced in paragraph 102, it is unclear as to why the Executing Authority was not informed as to the whereabouts of the detainee at the first instance, i.e. 24.05.2016. Even thereafter, the Executing Authority was not informed on 27.05.2016, 30.05.2016, and 01.06.2016 about the native place of the detainee. It seems to be only in the Letter dated 06.06.2016, i.e. after 16 days of passing of the detention order, that the Executing Authority was informed of the address of the detainee. The Letter was written to the SP, Uttar Kannada, District Karwar, Karnataka to communicate the order on 13.06.2016; but thereafter, no effective measures seem to have been taken by the authorities until 28.07.2016.
102. Accordingly, we are of the view that there is a clear delay in the execution of the order which is not satisfactorily explained by the State

snapping the live link between the order and the subjective satisfaction arrived at. Thus, we accept the contention of Mr.Pradeep Jain and quash the detention order on this ground.

103. To conclude, the respondents have succeeded on all other grounds but failed to explain the delay in the communication of the detention order.
104. Thus, the petition is allowed. The Detention Order bearing F. No.673/03/2016-CUS.VIII dated 20.05.2016 is quashed. Rule is made absolute. The detainee shall be released forthwith unless wanted in any other case.
105. Let a copy of this order be sent to the Superintendent of the concerned Jail.

March 21st, 2017
// /ka



G.S.SISTANI, J.

VINOD GOEL, J.