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

Judgement reserved on : 27.07.2020

% Judgment delivered on: 11.09.2020

\+ **W.P.(CRL) 786/2020 & CRL.M.A. 5862/2020**

MOHD NASHRUDDIN KHAN ..... Petitioner

Through: Mr. Vikram Chaudhri, Sr. Adv. with Mr. Harshit Sethi, Mr. M.B. Rajwade, Advs.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr.Dhruv Pande, Adv.
Mr. Ravi Prakash with Mr. Farmaan Ali, Mr. Aman Malik and Mr.Mohammad Shahan Ulla, Advs. for DRI.

\+ **W.P.(CRL) 1009/2020 & CRL.M.A. 8726/2020**

GOPAL GUPTA ..... Petitioner

Through: Mr. Vikram Chaudhri, Sr. Adv. with Mr. Harshit Sethi, Mr. M.B. Rajwade, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr.Dhruv Pande, Adv.
Mr. Ravi Prakash with Mr. Farmaan Ali, Mr. Aman Malik and Mr.Mohammad Shahan Ulla, Advs. for DRI

\+ **W.P.(CRL) 1019/2020 & CRL.M.A. 8743/2020**

AMIT PAL SINGH ..... Petitioner

Through: Mr. Vikram Chaudhri, Sr. Adv. with Mr. Harshit Sethi, Mr. M.B. Rajwade, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Amit Mahajan, CGSC with Mr.Dhruv Pande, Adv.
Mr. Ravi Prakash with Mr. Farmaan Ali, Mr. Aman Malik and Mr.Mohammad Shahan Ulla, Advs. for DRI.

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HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

J U D G M E N T

VIPIN SANGHI, J.

1. The above mentioned petitioners have preferred their respective writ petitions to seek similar reliefs. The underlying facts in these three cases are also similar, and stem out of – more or less, the same transaction. Learned counsel for the petitioner in each of these three cases is the same, and so is the counsel for the respondents. Learned counsels have advanced common arguments in all these three petitions, apart from pointing out certain specific features of each of these cases. Since the issues raised in all the three petitions are the same, we proceed to decide these petitions by this common judgment.

2. The reliefs sought by each of the petitioners is to seek quashing of the

respective Detention Orders issued by respondent No.2 against each of them dated 21.01.2020 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act), and all consequential proceedings arising therefrom. The petitioners also assail the respective notifications issued by respondent No.2 in respect of each of them under Section 7(1)(b) of the COFEPOSA Act dated 17.03.2020 [in the case of the petitioner Mohd Nashruddin Khan(MNK)], dated 08.06.2020 (in the case of Gopal Gupta), and dated 17.03.2020 [in the case of Amit Pal Singh (APS)]. The petitioners have challenged the aforesaid Detention Orders at the pre-execution stage.

3. The submission of Mr. Vikram Chaudhri, Sr. Advocate appearing for the petitioners is that a writ petition challenging the Detention Order – at the pre-execution stage, is maintainable, as held by the Supreme Court in ***Additional Secretary to Government of India and Others Vs. Smt. Alka Subhash Gadia and Anr,*** (1992) Supp 1 SCC 496. His submission is that each of them have made out a case for interference with the Detention Order at this stage, on the grounds set out in ***Alka Subhash Gadia*** (supra) which, in any event, are not exhaustive.

4. The case of the petitioners is that the petitioner Mohd Nashruddin Khan (MNK) is a non-resident Indian Citizen. He is engaged in the business of trading in gold jewellery in the United Arab Emirates (UAE). The petitioner carries on its aforesaid business in the name of style of M/s MN Khan Jewellers FZE. On 14.02.2019, the petitioner extended an invitation to M/s. Its My Name Pvt. Ltd. (IMNPL) for participation in a jewellery exhibition at United Arab Emirates (UAE) from 18.02.2019 to 30.03.2019.

5. Amit Pal Singh (APS), the petitioner in W.P.(CRL) 1019/2020 – an employee of IMNPL, left from New Delhi carrying jewellery with him after satisfying the requirements under the Exhibition Export Scheme of FTP, firstly on 20/21.02.2019, and again on 13/14.03.2020. On 24.04.2019, APS brought back the unsold jewellery. He landed at the IGI Airport and walked to the red channel and he declared the good brought by him. He filed re-import declaration, bills of entry, photographs of re-imported jewellery and the appraisal carried out in respect thereof. Though, he was issued the gate pass, he was detained at the exit gate. APS was issued a notice under Section 102 of the Customs Act alleging invasion of customs duty on the same day i.e. 24.04.2019.

6. On the same day i.e. 24.04.2019, the petitioner MNK arrived at IGI Airport separately. The petitioner MNK was also detained, even though nothing was found on him. Between 24th and 25th April, 2019 seizure of gold was affected at the factory premises of IMNPL. Gopal Gupta – the petitioner in W.P.(CRL) 1009/2020, who is a Chartered Accountant, was also arrested. A self-incriminating statement of the petitioner MNK was recorded on 25.04.2019 under coercion. The said petitioner disclosed his parental address at District Mau, UP, and also disclosed about his strained relations with his parents. The petitioners state that APS and Gopal Gupta were arrested on 26.04.2019 and they were produced before the Duty MM on the same day. The petitioner MNK initially retracted his statement made under Section 108 of the Customs Act on 27.04.2019 in the Court. The retraction was also sent through the Jail, addressed to the CMM on 26.05.2019.

7. Before the Court, on 29.05.2019, the DRI – in response to the bail applications moved by the three petitioners, conceded that no case of duty evasion was made out. All the three petitioners were released on bail by the learned CMM on 03.06.2019. On 20.06.2019, the petitioner MNK moved an application before the learned CMM wherein he furnished his address of Dubai, UAE for verification. He also disclosed that though his permanent address is at Rasulpur Adampur @ Rampur Dist. Mau, U.P, but he was not on talking terms with his parents and, hence, he was residing with his friends. He also disclosed that service of any process may be affected upon him through his counsel situated at Delhi.

8. The petitioners have disclosed that W.P. (Crl) 173/2019 was filed by IMNPL seeking quashing of the entire investigation and for release of goods. In those proceedings, the Court directed that no coercive steps be taken against the petitioner IMNPL. In W.P.(C) 8707/ 2019 – filed by IMNPL for release of the goods, the Court directed that decision be taken on the petitioner's representation dated 31.07.2019 within four weeks.

9. The petitioner MNK further states that he was religiously persecuted and harassed by the officers of the DRI on 22.08.2019. On the same day, the petitioner MNK sought permission to travel abroad, and for release of his passport. The DRI, on the other hand, sought cancellation of the petitioner's bail. It is also disclosed that IMNPL filed CONT.(CAS)(C) 875 of 2019 against ADG, SIO DRI for non-compliance of Order dated 09.08.2019 inasmuch, as, the representation of IMNPL for release of goods was not decided within four weeks as directed.

10. On 25.09.2019, before the CMM, the Deputy Director, DRI stated that Petitioner MNK is no more required for investigation. Consequently, the application moved by the respondents for cancellation of bail was dismissed. The petitioners also disclosed that an application was moved against the respondents under Section 340 Cr.P.C. for fabricating the records, tampering of documents and for other wrong doings. IMNPL also sought prosecution of the Officers of the respondents under Section 2019 IPC for making false and dishonest statements. They also sought initiation of Contempt proceedings under Section 12 of the Contempt of Courts Act. On 11.11.2019, the learned CMM allowed the petitioner MNK to travel abroad, and directed release of his passport. On 13.11.2019, CESTAT allowed the appeal of IMNPL, directing provisional release of goods. The challenge made by the DRI to the permission granted to MNK to travel abroad, and for release of his passport, was rejected by the Sessions Court with the dismissal of the Revision preferred by the DRI. IMNPL again moved a Civil Contempt Petition i.e. Cont. Cas (Civil) 1052 of 2019 against the Principal ADG & ADG, DRI; Commissioners of Customs and other senior officers for wilful disobedience of the Order passed by CESTAT directing provisional release of the goods. Yet another case being Cont. Cas (Civil) 1134 of 2019 was filed by the petitioner against the Principal ADG, DRI, Dy. Director and other senior officers, for not releasing the petitioner's passport.

11. The petitioners further state that this Court dismissed the Crl. M.C 6753/2019 preferred by the DRI to challenge order permitting the petitioner MNK to travel abroad and for release of his passport. Vide order dated

27.12.2019, the DRI was directed to return the passport of the petitioner MNK within seven days. Despite the said direction, the petitioner MNK's passport was not released. This position was noticed by the Court in the proceedings held on 07.01.2020. On 21.01.2020, the impugned Detention Order came to be passed in the aforesaid background.

12. On 11.02.2020, the petitioner MNK preferred W.P.(Crl.) 63 of 2020 before the Supreme Court – challenging the Detention Order. The Supreme Court permitted the petitioner to approach this Court vide its order dated 16.03.2020. On 17.03.2020, the respondents issued the notification under Section 7(1)(b) of the COFEPOSA Act qua MNK. The petitioners state that since 22.03.2020, in view of the on-going pandemic, the borders were sealed and public transport was stopped. Janta Curfew was enforced. On 25.03.2020 country-wide lockdown was ordered for 21 days.

13. In so far as the petitioner Gopal Gupta (the petitioner in W.P.(CRL) 1009/2020) is concerned, he states that in response to the invitation received from MNK of M/s MN Khan Jewellers (FZE) – based in UAE, by IMNPL – for participation in a private jewellery exhibition at UAE from 18.02.2019 to 13.03.2019, IMNPL obtained the approval of the Gems and Jewellery Export Promotion Council for participation in the said exhibition. On 20/21.02.2019 and 13/14.03.2019 IMNPL exported jewellery after proper appraisement and approval of the Customs Appraiser for participation in the said exhibition. The petitioner Gopal Gupta – being the authorised representative of IMNPL, departed for UAE from IGI Airport, New Delhi along with the jewellery for the said exhibition after complying with all requirements under Exhibition Export Scheme of FTT. Separate permission

was given at the airport at midnight before the flight which was also recorded on the backside of the shipping bill. On 20/21.02.2019, APS personally carried gold jewellery weighing 33,805.770gms and 25,229.680 gms respectively, by declaring the same and filing the requisite documents/ shipping bills for exhibition purpose. Pictures/ colour photocopies of the jewellery were presented to the Customs Officers/ Appraisers for comparison upon the return of APS to India with unsold stock that APS brought back of unsold jewellery exported for exhibition. As noticed hereinabove, he landed on 24.04.2019 at 06.30 P.M. and proceeded to the red channel. He declared the goods re-imported by him, and he filed the bill of entry. After clearance of the goods, when APS exited the red channel, he was detained by the DRI Officials and his goods were seized. A notice under Section 102 of the Customs Act was issued alleging evasion of customs duty.

14. Like MNK, the petitioner Gopal Gupta also states that his incriminating statement under coercion was retracted by him. Several averments have been made in writ petition, which, in our opinion, are not necessary to be taken note of at this stage, keeping in view the limited enquiry that we are called upon to undertake, as the writ petitions have been preferred at the pre-execution stage of the impugned Detention Orders. The facts relating to the petitioner APS have already been noticed hereinabove. The petitioner APS also retracted his statement which was allegedly recorded under coercion.

15. In the aforesaid light, the submission of Mr. Vikram Chaudhri, learned senior counsel for the petitioners is that the impugned Detention

Orders have been passed out of *mala fides* both in fact and in law. All the petitioners were illegally confined on 24.04.2019. Their statements were recorded under coercion and, only on 26.04.2019, they were produced before the learned Duty MM, though they should have been so produced within 24 hours of their being detained/ arrested. The petitioners were granted bail on 03.06.2019 on the statement made on behalf of the DRI, that the case against the petitioners was not one of duty evasion. So far as the petitioner MNK is concerned, he was religiously persecuted. In respect thereof, he also made his complaint. The petitioner MNK was granted permission to travel abroad. Despite the said order, his passport was not released, and he was not allowed to travel abroad. The challenge made by the DRI to the said permission and to the release of the passport before this Court, failed. The petitioner MNK had to initiate Contempt Proceedings on account of non-compliance of the orders passed by this Court. The directions issued in the writ petition preferred by IMNPL (W.P.(C) 8707/2019) – whereby the respondents were directed to decide the representation for release of goods within four weeks, was not complied with. Consequently, Contempt proceedings had to be filed against the Officers of Customs at DRI. Mr. Chaudhri also draws our attention to the observations made by the CESTAT against the respondents while permitting provisional release of the goods in its order dated 13.11.2019. IMNPL was forced to prefer another Contempt Petition against the higher ranking officers of the DRI and Customs for non-release of goods, despite the order passed by the CESTAT. Those Contempt proceedings are also pending. Forgery proceedings were also lodged against Officers of the DRI for tampering/ fabricating the record. Mr. Chaudhri submits that the aforesaid

bundle of facts and circumstances, which precede the passing of the Detention Orders against the petitioners, clearly demonstrates that the impugned order against each of these petitioners has been passed vindictively and *mala fide*. Since the respondents faced adverse orders and defeat practically in all judicial proceedings, and the petitioners did not accept the conduct of the respondents, and they initiated Contempt Proceedings against the Officers of the Customs and the DRI, the said officers acted *mala fide* and contrived to have the impugned Detention Orders issued against the petitioners.

16. The next submission of Mr. Chaudhri is that there is inordinate delay in the passing of the Detention Order. The petitioners were apprehended as early as on 24.04.2019. The investigation had culminated into issuance of show cause notice on 26.09.2019. This show cause notice even claims that overseas investigations have been made qua the petitioner MNK. The impugned Detention Orders came to be issued only on 21.01.2020. Mr.Chaudhri submits that the livelink between the prejudicial acts which form the basis of the Detention Orders, and the purpose of detention is snapped. Mr. Chaudhri submits that delay in passing the order is a good ground for quashing even at the pre-execution stage, as held in ***Rajinder Arora v. Union of India and Others***, (2006) 4 SCC 796, and by this Court in ***Pankaj Kumar Shukla v. Union of India & Ors.,*** 2015 SCC OnLine Del 9925 & ***Boris Sobotic Mikolic v. Union of India & Ors,*** 2018 SCC OnLine 9363.

17. Mr. Chaudhri further submits that vital documents, evidently, either have not been placed before, or not considered by the Detaining Authority

while passing the Detention Orders and, therefore, the Detention Orders are vitiated due to non-application of mind to relevant documents and facts.

18. Mr. Chaudhri has sought to draw the attention of the Court to a large number of documents which, he claims, have not been placed before the Detaining Authority and not considered by it in the formation of its satisfaction regarding the need to detain the petitioners under Section 3(1) of the COFEPOSA Act. Mr. Chaudhri has taken us through the evolution of law right from ***Alka Subhash Gadia*** (supra) to ***Deepak Bajaj v. State of Maharashtra and Another***, (2008) 16 SCC 14, wherein the Supreme Court held that the five conditions on which a Detention Order could be challenged at the pre-execution stage were only illustrative, and not exhaustive. It was further held that non placement of vital documents before the detaining authority would be a good ground to quash a Detention Order at the pre-execution stage.

19. In ***Subhash Popatlal Dave Vs Union of India & Another,*** (2012) 7 SCC 533 (***Subhash Popatlal Dave1***), the ratio of ***Deepak Bajaj*** (supra) was reiterated.

20. Mr. Chaudhri further submits that in the second case of ***Subhash Popatlal Dave,*** reported as (2014) 1 SCC 280, (***Subhash Popatlal Dave2***) the same 3-Judge Bench, by majority, held that if the proposed detenue absconds or evades the execution of the Detention Order, and subsequently challenges the order of detention at the pre-execution stage after a long lapse of time, he could not take advantage of non-execution of the order, and challenge the Detention Order which remained unexecuted. The Court, by

majority, held that the petitioner – who had evaded execution of the Detention Order by absconding, would not be entitled to raise a challenge to the said order. He, however, points out that in all such cases, the Detention Orders had remained unexecuted for varying periods ranging from two to ten years approximately, which is not the case at hand.

21. In respect of notifications issued under Section 7(1)(b) of the COFEPOSA Act, Mr. Chaudhri submits that all the three notifications have been issued as acts of malice. There was no question of issuing a notification under Section 7(1)(b) of the COFEPOSA Act within a matter of a few months of the issuance of the Detention Order.

22. Mr. Chaudhri submits that Section 7 of COFEPOSA contemplates 3 stages:-

i. Notifying an order in the official gazette by the Government directing the proposed detenue to appear before such officer, at such place and within such period as may be specified **[First part of Section 7(1)(b)]**;

ii. Making a report in writing by the Government of the fact of absconsion of the proposed detenue to a Magistrate, whereupon provisions of Sec. 82, 83, 84 and 85 Cr.P.C. shall apply in respect of the detenue **[Section 7(1)(a)]**;

iii. Launching of prosecution by the Government for non-compliance with the order notified in the official gazette **[Later part of Section 7(1)(b)]**.

23. In the cases of the petitioners, only an order has been notified in terms of first part of Section 7(1)(b), and no action has been taken in terms of

Section 7(1)(a), and no prosecution has been launched in terms of latter part of Section 7(1)(b).

24. Mr. Chaudhri submits that in matters of preventive detention, the proposed detenue has no means to be aware of the issuance of Detention Order. The view taken by Hon'ble Chelameswar J in Para 46 of the judgment in ***Subhash Popatlal Dave2*** (supra) has to be accorded a due meaning . The word '*absconder*' or '*evaded the process of law*', have to be read in the context of those persons, who were absconding even when the order of detention was issued, or those who even upon coming to know of the existence of the Detention Order, avoided and evaded the execution thereof.

25. Mr. Chaudhri submits that none of the detenues in the instant petitions have evaded the process of law or absconded. On the contrary, they have been associated with the investigation; they were arrested and released on bail, and there is no allegation of non-compliance of any condition imposed upon them. Immediately upon coming of know of the existence of the Detention Orders, they have knocked the doors of this Court.

26. Mr. Chaudhri submits that if the respondents' plea, that merely because an order is notified by the Government in the Official Gazette under the first part of Section 7(1)(b), the intended detenues' right to seek redress at pre-execution stage gets extinguished is accepted, it would tantamount to barring constitutional remedies for such proposed detenues. That could have never been the ratio of ***Subhash Popatlal Dave2*** (supra).

27. Mr. Chaudhri submits that in the case of MNK, he had approached the Supreme Court vide W.P.(Crl) No. 63/2020 on 11.02.2020, challenging the impugned Detention Order when, vide order dated 16.03.2020, the said petition was disposed of in the presence of the Respondents with permission to approach this Court. No submission was made by the Respondents that action under Sec. 7 of COFEPOSA has been initiated against the Petitioners, whereas, on the very next day i.e. 17.03.2020, impugned Notification under Sec. 7(1)(b) of COFEPOSA was issued. Mr. Chaudhri submits that this conduct is deplorable, as MNK was already before the constitutional court, availing his remedies.

28. Mr. Chaudhri submits that it is further a matter of record that MNK had sought to file his petition before this Court on 30.3.2020, i.e. during the period of suspended functioning/lockdown which could not be entertained and, subsequently, the petition was filed after ease down of listing norms which came up for hearing on 24.4.2020 when the Detention Order was stayed.

29. Mr. Chaudhri submits that the allegation that MNK was not found at his address in District Mau, UP is equally specious. When MNK was arrested, his statement was recorded on 25.4.2019, when he had informed the DRI that though the only permanent address that he has in India is his father's residence, but he was not on talking terms with his father and he has been an NRI for a long time. MNK had already furnished his counsel's address for service. No information has been given at his counsel's address and no summons have been issued to MNK after issuance of the Detention Order.

30. He submits that MNK was granted bail by the CMM, and during the course of hearing, he had undertaken that any process or summons served upon his counsel shall amount to service upon him. Similar undertaking was recorded by this Court while deciding the issue relating to release of his passport, and permission to travel abroad. MNK has not travelled abroad despite the said permission and, therefore, neither was there any intention to abscond, nor to evade the execution of the Detention Order.

31. He submits that to ascertain whether a person has '*absconded*', or has '*evaded the process of law*', the intent and knowledge will have to be seen, and not merely an arithmetical or mathematical assessment is to be made for an order under Section 7(1)(b) to be notified.

32. He submits that both MNK and APS moved respective applications before CMM for clarification of the order 22.01.2020, vide which the CMM had taken the rejection of retraction on record in an *ex parte* manner. Persons who are absconding or are evading the process of law, do not file such applications to contest the proceedings. From the very beginning, all the petitioners have been taking recourse to their remedies in accordance with law.

33. Mr. Chaudhri points out that APS was not even remotely aware about the existence of the impugned Detention Order. On account of serious family issues – especially the old age and general indisposition of his father, APS has been frequently residing at his father's home located in Delhi. Sometimes, APS's father stays at his home. Even during the period of lockdown, APS has been staying at his father's home. APS was informed by his wife about the visits of some persons claiming themselves to be some

officials; however, it could not even be remotely countenanced that those visits may have been related to COFEPOSA. Needless to say, that ever since the onslaught of atrocities by the DRI, some or the other department has been instigated by the DRI to hound and indulge in witch-hunt against the Petitioners. It is alleged that the DRI and its coterie of vested interests have indulged in such overreach, without even considering the APS's peculiar family circumstances where a baby girl has arrived only a few months back.

34. Mr. Chaudhri submits that insofar as Notification under Section 7 qua Gopal Gupta is concerned, a pretence to execute the order is being shown. No reason is forthcoming as to why an attempt was not made to execute the Detention Order at his native place/permanent residence at Hathras, U.P. Moreover, the delayed issuance of Notification in June, 2020 is itself unjustifiable.

35. He submits that the respondents have issued the impugned Notification qua Gopal Gupta on 08.06.2020, whereas the Detention Order was passed way back on 21.01.2020. Even during this period, no efforts have been made by the Respondents to execute the Detention Order even when Gopal Gupta was physically present before this Court on 29.01.2020. Therefore, the allegation that the Petitioner has '*absconded*' is wholly misconceived.

36. Moreover, the Respondents have not complied with their own guidelines which stipulate the initiation of proceedings under Section 7 of COFEPOSA 'immediately' after one month of the passing of the Detention Order.

37. Mr. Chaudhri submits that the respondents have made an attempt to shift the blame of non-execution of the Detention Orders on the Executing Authority, while trying to protect the officers of DRI/Sponsoring Authority for their lapse in executing the Detention Order. Even as per the guidelines issued by the respondents, the Sponsoring Authority is equally responsible for execution of the Detention Order, and it cannot feign ignorance and adopt a casual/lethargic attitude by claiming that it is only responsible to sponsor an order of detention, but not to execute the same.

38. Mr. Mahajan, learned Central Government Standing Counsel has advanced his submissions in opposition to the present writ petitions. So far as the plea of the petitioners with regard to malice in fact and in law is concerned, he submits that the Detention Orders have been passed by the competent authority under the COFEPOSA Act based on facts and materials available, and only upon arriving at his subjective satisfaction with regard to the necessity of detaining the petitioners with a view to prevent them from undertaking the undesired activities of smuggling. He submits that all the allegations are directed against the Officers of the DRI and the Customs, and not one of them is directed against the members of the Central Screening Committee – which consists of senior officers of different Ministries/ Departments – which screens the proposal and makes its recommendations, much less, against the Detaining Authority. Ultimately, it is the Detaining Authority which has to apply his mind to all the materials placed before him, and form a subjective satisfaction in the matter with regard to the need to preventively detain the proposed detenue.

39. He further submits that the Supreme Court has held that the basis of detention is the satisfaction of the Executive – of a reasonable probability of the likelihood of the detenue acting in a manner similar to his past acts, and preventing him by detention from doing the same. It has been further held that there is no parallel between prosecution in a court of law, and a Detention Order under the Act. One is a punitive action, and the other is a preventive act. The Supreme Court in unequivocal terms has observed that action taken under Section 3 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. In this regard, reliance is placed on ***Haradhan Saha v. State of W.B.***, (1975) 3 SCC 198 : 1974 SCC (Cri) 816; (paragraphs 19, 32 and 34)

40. He submits that it has been time and again held that the Court cannot substitute its opinion for the subjective satisfaction of the Detaining Authority as it is subjective in nature. It is submitted that various unsubstantiated allegations have been made by the petitioners to take benefit in various proceedings pending, and to browbeat the officers. Moreover, the allegations made against the officers of the investigating agency does not affect the validity of the Detention Order, passed by a separate body which is independent of the Sponsoring Authority.

41. Mr. Mahajan submits that the jurisdiction exercised by the Detaining Authority in the matter of passing an order for preventive detention is a

jurisdiction of suspicion i.e. jurisdiction based on suspicion and the action is taken "with a view to preventing" a person from acting in any manner prejudicial to the Foreign Exchange position of the country and to prevent activities enumerated in the relevant detention law, and the Detaining Authority has issued the Detention Order after it had arrived at the subjective satisfaction that the three detenues had to be preventively detained for the ground which have been elaborated in the Grounds of Detention. Similarly, the disputed allegations of ill treatment, custodial violence etc would not affect the validity of the Detention Order. Reliance is placed on ***State of Maharashtra & Ors. v. Bhaurao Punjabrao Gawande*** [(2008) 3 SCC 613]; **(para 41,42, 51, 53, 55,63.)**

42. So far as the plea of the petitioners that vital documents have either not been placed by the Sponsoring Authority before the Detaining Authority, or even if placed, not considered by the Detaining Authority is concerned, the submission of Mr. Mahajan is that the said plea of the petitioners is baseless, since the Grounds of Detention and the Relied Upon Documents (RUDs) have not yet been served upon the petitioners, which would be served in accordance with law, either at the time of detention, or within the time available therefor under the COFEPOSA Act after the execution of the Detention Order.

43. The examination of the question whether the Detaining Authority had sufficient material to pass the Detention Order, or the allegation that vital documents were not placed before him, before the passing of the Detention Order, would amount to examining the sufficiency of the material relied upon by the Detaining Authority at the pre-execution stage, which is not

permissible. In this regard, he places reliance on ***Subhash Popatlal Dave 2*** (paragraph 15) followed in ***Pankaj Kumar Shukla v. UOI*** 2015 SCC Online Del 995 (paragraph 29).

44. Mr. Mahajan submits that reliance placed on the judgments in ***Deepak Bajaj*** (supra) is misplaced, because the said judgement was passed in the peculiar facts of that case (see para 15, 18, 29, 31 of ***Deepak Bajaj*** (supra)). He submits that the decision in ***Deepak Bajaj*** (supra) stands impliedly overruled by the subsequent 3-Judge Bench in ***Subhash Popatlal Dave 2*** (supra). He submits that all the relevant and vital documents were placed before the Detaining Authority, and only after arriving at its subjective satisfaction, the Detaining Authority passed the Detention Order. When the petitioner has not even been served with the Grounds of Detention and the Relied Upon Documents, on the basis of their bald and frivolous allegations about non-placement of the vital documents by the Sponsoring Authority before the Detaining Authority, roving and fishing enquiry cannot be made by the Court at this stage.

45. So far as the delay in passing and execution of the Detention Orders is concerned, Mr. Mahajan submits that at the pre-execution stage and in the light of the averments made in the counter affidavit, firstly, the said aspect should not be gone into, and secondly, in any event, there is no merit in the said pleas of the petitioner. Mr. Mahajan has taken us through the averments made in the counter affidavit, which we shall advert to a little later.

46. Mr. Mahajan submits that if the apparent delay in passing and executing the Detention Order is explained by the respondents, that cannot be a ground for quashing a Detention Order. In this regard, he places reliance on ***Union of India v. Muneesh Suneja***, (2001) 3 SCC 92. Even in a case of undue or long delay between the prejudicial activity and the passing of Detention Order, if the same is satisfactorily explained and a tenable and reasonable explanation is offered, the order of detention is not vitiated. In this regard, he places reliance on ***Licil Antony v. State of Kerala*** (2014) 11 SCC 326. He also places reliance on ***T.A.Abdul Rahman vs State of Kerala***, (1989) 4 SCC 741, wherein the Supreme Court held in paragraph 12 that *no hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and order of detention…*

47. He submits that the Supreme Court was mindful of the ratio laid down in ***Rajinder Arora*** (supra) and yet held that delay in passing of Detention Order would not be fatal.

48. Mr. Mahajan submits that the repeated reliance placed by the petitioner on ***Rajinder Arora*** (supra) is misplaced and ill- conceived. It is submitted that it is no more res-integra that a precedent has to be read and followed in the backdrop of its facts and circumstances. It is submitted that a bare-perusal of ***Rajinder Arora*** (supra) would reveal that facts in that case can by no stretch of imagination be held to be similar, much less identical, in

as much, as in the case of ***Rajinder Arora*** (supra) the following were primarily the reasons, which prompted the Supreme Court to interfere;

i) The petitioner had established a prima-facie case of torture; para 2,3

ii) The sponsoring authority had not even issued a show cause notice; para18

iii) No explanation for delay had been tendered; para 22

iv) That a certain status report, which negated the passing of the Detention Order, was not placed before the Detaining Authority. Para 4,15

49. He submits that in view of the aforesaid peculiar facts and circumstances, the Supreme Court quashed the Detention Order at the pre-execution stage.

50. He submits that the facts and circumstances of the present case are completely dissimilar from the facts in ***Rajinder Arora*** (supra).

51. On the aspect of abscondence, Mr. Mahajan submits that each of the petitioners had been deliberately absconding and, therefore, the Detention Orders could not be served upon them and executed. He submits that the Detention Orders are required to be executed through the local police, and in respect of each of the petitioners reports were called with regard to the status of the execution order. He has placed on record the relevant correspondences in this respect.

52. On 25.02.2020, the Deputy Secretary to the Government of India in the CEIB (COFEPOSA wing) sent a communication to the Principal

Director General, DRI (HQ) – enquiring the status of the Detention Order issued against the petitioner MNK. He called for the report with regard to the steps taken to serve the Detention Order upon the petitioner MNK. The DRI responded to the same on 05.03.2020. Along with its response, the communication received from the Headquarters, Director General of Police UP, Lucknow dated 25.04.2020 was enclosed. Mr. Mahajan submits that the petitioner MNK was not found at his given address. Mr. Mahajan submits that the petitioner MNK deliberately did not disclose his address as to where he could be found, while claiming that he was not on good terms with his parents and he was staying with his friends. If that were the case, he should have provided the address of his friends where he was staying, and if there were more than one such friends, addresses of his friends should have been provided. However, the petitioner MNK only provided the address of his advocate for the purpose of correspondence, apart from the address of his parents where, even according to him, he could not be found. Mr. Mahajan submits that a Detention Order could possibly not have been served on the counsel of MNK and it had to be personally served upon the petitioner MNK. The whole object of serving the Detention Order would be lost, if it were to be communicated to MNK's counsel. The only manner of execution of the said Detention Order was to serve MNK personally. However, MNK used his counsel as a shield, while holding back the address where he was residing. This itself shows that the petitioner MNK intentionally absconded and evaded the service of the Detention Order. Mr. Mahajan has placed on record the non-execution report dated 14.02.2020 received from the office of the Superintendent of Police, Mau, UP, received in the CEIB on 11.03.2020. He submits that the relevant files were placed

before the Detaining Authority and after obtaining his approval, the notification under Section 7 was published in the Gazette of India on 17.03.2020 in English and in Hindi as well. Thus, there was complete justification for issuance of the notification under Section 7 of the COFEPOSA Act. Mr. Mahajan further submits that there is no legal necessity that before or after issuance of notification under Section 7(1)(b), proceedings under Section 82/83 of the Cr.P.C. are required to be undertaken. That is clear from a plain reading of Section 7 of the COFEPOSA Act.

53. In relation to the petitioner Gopal Gupta, Mr. Mahajan has placed on record the report sent from the office of the Commissioner of Police, Delhi to the Joint Secretary, Ministry of Finance, Department of Revenue, CEIB, COFEPOSA Unit on 17.03.2020, which states that as per the report of the SHO, Mayur Vihar, the detenue could not be traced despite sincere efforts. The report of the DCP/ East District was enclosed with the said communication.

54. Similarly, in relation to the petitioner APS, Mr. Mahajan submits that he was not found at his given address, which justifies the conclusion that the petitioner APS was absconding and evading the service of Detention Order upon him.

55. Mr. Mahajan submits that the Supreme Court in ***Subhash Popatlal Dave 2*** (supra) has held that a detenue cannot be allowed to take advantage of his own conduct and challenge the Detention Order on the plea that

purpose of execution of Detention Order no longer survived, especially in view of the fact that the notification under Section 7(1)(b) had been issued.

56. Mr. Mahajan submits that the argument of learned senior counsel for the petitioner that in ***Subhash Popatlal Dave 2*** (supra), the abscondence for long periods of 2 to 4 years and, therefore, the ratio laid down in that decision would not be applicable to the facts of the present case, is incorrect. He submits that it is the intentional act of abscondence and evasion which is relevant and material to justify the issuance of the notification under Sections 7(1)(b), and it is this act/ conduct which is also relevant to be considered by the Court dealing with a challenge to the passing of the Detention Order at the pre-execution stage.

57. Mr. Mahajan submits that Section 7 of the COFEPOSA Act specifically provides the action to be taken in case the person is absconding. In terms of Section 7 of the Act, the satisfaction of the appropriate Government that a person is absconding is qualified by "reason to believe" – which is based on the report of the executing agency, which at times is another independent agency i.e. concerned local Police. The reason to believe is not a mere whim or *ipsi dixit* of the officer. Notification is published under Section 7(1)(b) after having the reason to believe that the person is absconding or concealing himself, so that the order cannot be executed. Once that satisfaction is formed, it is for the proposed detenue to dispel it and satisfy the court that the satisfaction is wrongly arrived at. It is not a case where notification under Section 7(1)(b) was issued immediately on passing of the Detention order. Thus issuance of notification under Section 7(1)(b) itself is testimony to the fact that the proposed detenues were

absconding. In fact, delay in starting the process for issuance of Section 7 notification would be fatal, because the proposed detenue then would be able to argue that no steps have been taken to serve the Detention Order, making it liable for quashing.

58. Mr. Mahajan submits that punishment specified under Section 7 of the Act is for the separate offence and has nothing to do with the validity of the notification issued under Section 7(1)(b). Offence under Section 7 is of absconding, for which separate punishment is provided. It is for the person concerned to satisfy the magistrate that no further proceedings under Section 82, 83, 84 and 85 of CrPC be initiated, and the proceedings be dropped. Only when a person is able to show that he did not conceal himself deliberately, then the Jurisdictional magistrate will consider dropping of the proceedings. In the present case, no further proceeding before the magistrate could be initiated, because of the passing of the interim order by this Hon'ble Court.

59. We have given our thoughtful consideration to the entire matter. We have examined the submissions, the documents and the case law relied upon by learned counsels in support of their submissions.

60. There is no doubt that a Detention Order can validly be assailed even at the pre-execution stage. This position was recognised by the Supreme Court in ***Alka Subhash Gadia*** (supra). ***Alka Subhash Gadia*** (supra) enlists some of the grounds on which the detention order could be assailed even prior to execution. Those grounds are illustrative, and not exhaustive as held in ***Deepak Bajaj*** (supra). At the same time, "*As a general rule, an*

order of detention passed by a detaining authority under the relevant "preventive detention" law cannot be set aside by a writ court at the pre-execution or pre-arrest stage unless the court is satisfied that there are exceptional circumstances specified in Alka Subhash Gadia [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] . The Court must be conscious and mindful of the fact that this is a "suspicious jurisdiction" i.e. jurisdiction based on suspicion and an action is taken "with a view to preventing" a person from acting in any manner prejudicial to certain activities enumerated in the relevant detention law. Interference by a court of law at that stage must be an exception rather than a rule and such an exercise can be undertaken by a writ court with extreme care, caution and circumspection. A detenu cannot ordinarily seek a writ of mandamus if he does not surrender and is not served with an order of detention and the grounds in support of such order." (see ***Bhaurao Punjabrao Gawande*** (supra) para 63)

61. The Constitution Bench of the Supreme Court, in ***Haradhan Saha*** (supra) explained the difference between Preventive Detention and Punitive Detention elaborately. The Court held:

> *"19. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished*

on proof of his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent.

x x x x x x x x x

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.

34 .... The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, ***the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report***

> ***may be no bar against the District Magistrate issuing an order under the preventive detention.*** *Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances."*(emphasis supplied)

62. In ***Union of India Vs. Muneesh Suneja***, (2001) 3 SCC 92, after noticing ***Alka Subhash Gadia*** (supra), the Supreme Court held:

> *"7. ... ...* ***This Court has been categorical that in matters of pre-detention cases interference of court is not called for except in the circumstances set forth by us earlier. If this aspect is borne in mind, the High Court of Punjab and Haryana could not have quashed the order of detention either on the ground of delay in passing the impugned order or delay in executing the said order, for mere delay either in passing the order or execution thereof is not fatal except where the same stands unexplained. In the given circumstances of the case and if there are good reasons for delay in passing the order or in not giving effect to it, the same could be explained and those are not such grounds which could be made the basis for quashing the order of detention at a pre-detention stage.*** *Therefore, following the decisions of this Court in Addl. Secy. to the Govt. of India v. Alka Subhash Gadia [1992 Supp (1) SCC 496 : 1992 SCC (Cri) 301] and Sayed Taher Bawamiya v. Jt. Secy. to the Govt. of India [(2000) 8 SCC 630 : 2001 SCC (Cri) 56] , we hold that the order made by the High Court is bad in law and deserves to be set aside."* (emphasis supplied)

63. What remains to be examined is whether the petitioners have made out a ground – in their respective cases, which could be examined at the pre-execution stage by this Court for quashing the Detention Orders; whether they, or any one or more of them absconded and, if so, whether, in the light of ***Subhash Popatlal Dave2*** (supra), the writ petitioner(s) are precluded from challenging the Detention Orders at this stage on account of such abscondence. The last issue noticed hereinabove is intertwined with the issue: whether the issuance of notification under Section 7(1)(b) of the COFEPOSA Act in respect of the petitioners is justified, or not.

64. The submission of the petitioners is that the respondents have acted with malice in fact, and in law. In this regard, Mr. Chaudhri has made reference to, inter alia, the orders passed by the Courts/ Tribunals in different petitions from time to time. The submission of Mr. Chaudhri is that the conduct of the respondents shows that they failed to comply with the Court's orders, directing the respondents to take a decision on the representation made for release of the goods, and the respondents also did not release the passport of the petitioner MNK despite specific directions. Consequently, the petitioners were driven to filing contempt proceedings against the officers of the respondents.

65. Allegations made by the petitioners with regard to their detention beyond 24 hours; recording of their statements under coercion, or duress, or; being religiously prosecuted, are allegations which cannot be gone into these proceedings. There is no admission of these allegations by the respondents and these are seriously disputed questions of fact. Even more important it is to note that the Detention Orders have been passed by the Detaining

Authority under the COFEPOSA Act, and not by the officers of either – the Customs, or the DRI. At the highest, the said authorities acted in their capacity as the Sponsoring Authority. The proposal to detain the petitioners was, firstly, examined by the Central Screening Committee of senior officers. It is not the petitioners' case that any member of the Central Screening Committee has so acted as to betray a sense of malice. After the matter is examined by the Central Screening Committee, it is for the Detaining Authority to apply his mind, and arrive at his own subjective satisfaction that the detention of the proposed detenue is necessary to prevent him from continuing with the prejudicial activity in terms of Section 3 of the COFEPOSA Act. There is nothing produced before us by the petitioners to show that the Detaining Authority had any interaction with either of these petitioners, or in relation to their respective cases, before he passed the Detention Orders against each of them. There is absolutely no material placed on record by the petitioners to justify the claim of either malice in fact, or in law, against the members of the Central Screening Committee, or the Detaining Authority. Actions taken by the petitioners to institute contempt proceedings, or perjury proceedings against the officers of the Revenue, or the DRI, by itself, does not lead to the conclusion that such authorities acted with malice either prior to institution of such proceedings, or thereafter. Bald and vague allegations of malice have been turned down by Courts time and time again. Allegations of malice have to be specific, and it also needs to be explained as to why the authority – against whom such allegations are made, treated the person with malice. The petitioners have not pleaded, or placed on record any reason as to why any authority, including the officers of the Customs, Revenue, or the DRI would act *mala*

fide against any, or all of these petitioners. We, therefore, reject the plea of malice in fact, or in law, pleaded by the petitioners as unfounded.

66. Mr. Chaudhri has also advanced the submission that vital documents were presumably either not placed before, or considered by the Detaining Authority while passing the Detention Orders against the three petitioners. As pointed out by Mr. Mahajan, this plea is premature since the Detention Orders, the Grounds of Detention, and the Relied Upon Documents have not yet been served upon the petitioners, and this submission of the petitioners cannot be substantiated by the petitioners at this stage. There is no basis for such a plea being raised. The said plea is a shot in the dark. This Court cannot presume at this stage, that any vital or material document was not placed before the Detaining Authority, or considered by it before passing of the Detention Orders. In fact, the presumption is to the contrary – that the acts performed by the Detaining Authority are valid, and it is for the petitioners who assail the action of the Detaining Authority to establish that the action is invalid. We, therefore, reject this plea of Mr. Chaudhri.

67. Mr. Chaudhri has also argued that there is inordinate delay in passing of the Detention Orders. In support of this submission, Mr. Chaudhri has argued that the petitioners were apprehended as early as on 24.04.2019. The allegedly prejudicial activity was then discovered. The investigation has culminated in issuance of show-cause notice dated 26.09.2019. According to the respondents, overseas investigation have also been made qua the petitioner MNK. Yet, the Detention Orders came to be issued only on 21.01.2020. Mr. Chaudhri has placed reliance on ***Rajender Arora*** (supra) to urge that delay in passing the detention order is a good ground for quashing

the same even at a pre-execution stage. On this aspect, he has also placed reliance on ***Pankaj Kumar Shukla*** (supra) and ***Boris Sobotic Mikolic*** (supra).

68. On the other hand, Mr. Mahajan has submitted that the aspect of delay in passing of the execution and Detention Orders, in the light of the averments made in the counter-affidavit, cannot be gone into and that, in any event, there is no merit in the said plea of the petitioner. Mr. Mahajan has referred to the averments made by the respondents in their counter-affidavit. It would be appropriate, at this stage, to take note of the averments made by the respondents in their counter-affidavit to explain as to how the passing of the Detention Orders on 21.01.2020 cannot be labelled as belated, so as to vitiate the same. The respondents have explained that though the seizure of gold jewellery was effected at the factory premises during the search conducted at the office premises of IMNPL on 24/ 25.04.2019, however, Mr. Rahul Gupta, Director of IMNPL did not join investigation and Non-Bailable Warrants were issued against him and proceeding under Section 83 were initiated before the learned CMM, Patiala House Courts. Eventually, Mr. Rahul Gupta joined investigation after procuring ex-parte interim relief from the Supreme Court, and his statement was last recorded towards the end of September 2019. During the course of investigation, it was also learnt that Customs (Prevention), Jaipur was currently investigating another case against the same smuggling syndicate involving the petitioners, in the case of M/s Bharti Gems Private Limited. A detailed note of investigation was sought from the Office of the Commissioner of Customs, Jaipur, which was received in mid September, which depicted repeated involvement of the

petitioners in acts of smuggling along with other members of the syndicate. Hence, the investigation in the matter was going on and the show-cause notice was issued by the DRI on 26.09.2020. The matter was examined keeping in view the tendency of the petitioners and their propensity to indulge in the acts of smuggling, which is detrimental to the economic security of the country. Accordingly, proposals for invoking the provisions of the COFEPOSA Act were mooted in the second week of October 2019. In the meantime, further overseas evidence was received from SPA Dubai in the first week of November 2019. The proposal to detain the petitioners was further analysed keeping in view the strong tendency to indulge in smuggling activities in future. The proposal for preventive detention of the petitioners was sent to the Detaining Authority on 02.01.2020. The proposal was placed before the Central Screening Committee on 13.01.2020, and the recommendations of the Central Screening Committee (CSC) were submitted to the Detaining Authority on 14.01.2020. The proposals were examined by the Detaining Authority, and after arriving at his subjective satisfaction, the Detaining Authority passed the Detention Orders dated 21.01.2020.

69. In our view, the aforesaid satisfactorily explains and justifies the time consumed in mooting the proposal for detention of the petitioners under the COFEPOSA Act and for consideration of the said proposal, firstly, by the Central Screening Committee, and thereafter, by the Detaining Authority. The time lapse, in our view, is not such as to lead to the inference that the live-link between the prejudicial activity of the petitioners, which was discovered in April 2019, and the object of detention, namely, to prevent

them from indulging in such prejudicial activity, stood snapped. Pertinently, it is not the case of either of these petitioners that they have discontinued their ostensible business of dealing in gold and gold jewellery. In our view, the observations in ***Muneesh Suneja*** (supra) is attracted in the facts of these cases. We also agree with the submission of Mr. Mahajan that petitioners' reliance on ***Rajinder Arora*** (supra) is misplaced for the reasons advanced by Mr. Mahajan and recorded hereinabove. Therefore, we reject this submission of Mr. Chaudhri.

70. The next issue that arises for our consideration is whether the petitioners absconded and, if so, whether they are precluded from assailing the Detention Orders in respect of each of them on that account. Intertwined with this issue, is the challenge raised by the petitioners to the notifications issued under Section 7(1)(b) of the COFEPOSA Act in respect of the three petitioners.

71. Mr. Chaudhri submits that so far as the petitioner MNK is concerned, he had disclosed to the respondents right from the beginning that he is a Non-Resident Indian; that he is not on good terms with his parents and does not reside at his native place with his parents when in India; that he resided with his friends while in India and; that he had provided the contact details and address of his counsel for the purpose of service of any communication. Mr. Chaudhri submits that the petitioner MNK was continuously launching litigation, and just prior to issuance of notification under Section 7(1)(b), the petitioner had even approached the Supreme Court to assail the impugned Detention Order. The Supreme Court had allowed the petitioner to approach this Court, and before the said petition could be listed before the Court, the

respondents proceeded to issue the notification under Section 7(1)(b) of the Act qua MNK on 17.03.2020. The submission of Mr. Chaudhri is that a person who is litigating his rights in Court cannot be called an absconder.

72. In respect of the petitioner APS, Mr. Chaudhri has submitted that he too had moved an application before the learned CMM for clarification of the order dated 22.01.2020 vide which the learned CMM had taken the rejection of retraction on record in an ex-parte manner. Mr. Chaudhri submits that APS was not even remotely aware about the existence of the impugned Detention Order. On account of the serious family issues, especially the old age and general indisposition of his father, APS was residing at his father's home located at Delhi. Even during the period of lockdown, APS has been residing at his father's home. Mr. Chaudhri submits that the petitioner's wife informed the petitioner APS that persons claiming themselves to be officials had visited his residence in his absence. However, the petitioner's wife was not aware of the identity of the said officers and the petitioner could not even remotely imagine that those visits were made in relation to, or for service of the Detention Orders.

73. So far as the petitioner Gopal Gupta is concerned, Mr. Chaudhri has submitted that no attempt was made to execute the detention order at his native place/ permanent place of residence at Hathras, UP. Thus, it is argued that there was no intentional abscondence of any of the three petitioners with a view to evade the service and execution of the Detention Orders upon the petitioners.

74. Mr. Chaudhri has submitted that Section 7 of the COFEPOSA Act

deals with the situation where the appropriate Government has reason to believe that the person in respect of whom the Detention Order has been made, has absconded, or has conceded himself so that the order cannot be executed. The said provision reads as follows:

> *"7. Powers in relation to absconding persons.*
>
> *(1) If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may-*
>
> *(a) make a report in writing of the fact to a Metropolitan Magistrate of or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;*
>
> *(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall , unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.*
>
> *(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under clause (b) of sub-section (1) shall be cognisable."*

75. Mr. Chaudhri submits that, firstly, the Government may make a report

in writing of the fact, namely of the abscondence of the person concerned, to a Metropolitan Magistrate, or a Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides and thereupon the provisions of Sections 82, 83, 84 and 85 of the Code of Criminal Procedure shall apply in respect of such person and his property as if the order directing that he be detained, is a warrant issued by a Magistrate. The second step that the Government could take was to notify an order in the official gazette directing the said person to appear before such officer, at such place and within such period as may be specified in the order and if the said person fails to comply with such direction, he would be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. The person concerned, however, has the right to prove that it was not possible for him to comply with the order and that he had within the period specified in the order, informed the officer mentioned in the order of the reasons which render compliance therewith impossible, and of his whereabouts.

76. Mr. Chaudhri submits that the respondents have proceeded to bypass the steps that the Government could have taken under Clause (a) of Section 7(1) and straightaway notification under Section 7(1)(b) has been issued only to be able to label the petitioners as absconders – which they are not.

77. On the other hand, Mr. Mahajan has argued that the act of abscondence is an intentional act. The intention of the person concerned has to be gathered from his conduct. Mr. Mahajan submits that neither of the three petitioners conducted themselves in a manner so as to demonstrate their availability for service and execution of the Detention Orders. Mr.

Mahajan submits that looking to the past conduct of the petitioners and their propensity to indulge in smuggling of gold, the petitioners were aware of the possibility of they being detained under the COFEPOSA Act. Keeping this in mind, the petitioner MNK deliberately did not provide his correct and actual address in India where the Detention Order could be served upon him. Mr. Mahajan submits that a Detention Order passed under Section 3 of the COFEPOSA Act is no ordinary communication and the same could not have been served upon his representative, or counsel. The whole purpose of detention would be defeated, if the Detention Order were to be served on the counsel, or the representative of the petitioner MNK, since that would alert the proposed detenue and he would be able to evade its service. By its very nature, the Detention Order has to be served only on the detenue. If his submission is that he was staying with his friends, then he should have provided the address(es) of his friends with whom he was staying from time to time. He failed to do so deliberately with a view to evade the service of the Detention Order.

78. Mr. Mahajan has submitted that the execution of the Detention Orders is a task which is assigned to the local authorities and it is neither the Sponsoring Authority, nor the Detaining Authority, who are tasked with the responsibility of serving the Detention Order. In respect of the Detention Orders issued by the Detaining Authority, reports were called from the Executing Authorities as taken note of above. Mr. Mahajan has placed on record such communication on the basis of which the Appropriate Government formed the belief that the three detenues, namely the petitioners herein, had absconded, or were concealing themselves so that the order of

detention could not be executed. The report in respect of the petitioner MNK has been noted while noticing the submissions of Mr. Mahajan earlier. In respect of the petitioner APS, status reports were sought from the Sponsoring Authority, i.e. DRI Delhi (HQ) vide letter dated 25.02.2020 regarding the efforts made to serve the Detention Order on the proposed detenue. Vide their letter dated 05.03.2020, the Sponsoring Authority forwarded the execution report dated 26.02.2020 received from the Office of the DCP, West District, New Delhi, which was received in the CEIB on 11.03.2020. Founded upon the said communication, the matter was posted for issuance of the notification under Section 7 of the Act. The communication dated 26.02.2020 issued by the ACP, West District, New Delhi, in relation to the execution of the Detention Order upon the petitioner APS, inter alia, states:

> *"... ... ... that as per report of SHO/Rajouri Garden a fresh enquiry has been got conducted by local police at given address House No. ED-118, First Floor Tagore Garden, New Delhi where Harpreet Kaur W/o Sh. Amit Pal Singh Mob.:- 9971268383 met and stated that the above said person was not residing at the given address. Sh. Bhupinder Singh S/o Late S. Gurdit Singh R/o House No. L-64 New Mahavir Nagar, Tilak Nagar, New Delhi Mob. No. 9811165233 (father of Amit Pal Singh) also examined and he also stated that he does not know whereabouts of Amit Pal Singh. Further enquiry, was conducted from the local residents but no information could be obtained about the above said person namely Sh. Amit Pal Singh S/o Sh. Bhupinder Singh.*
>
> *In view of the above, the detention orders issued against Sh. Amit Pal Singh S/o Sh. Bhupinder Singh could not be executed despite sincere efforts of local police. Moreover, SHO/Rajouri Garden has been directed to take necessary*

efforts to detain the Proposed Detenue and the service report will be sent to your office timely."

79. In respect of the petitioner Gopal Gupta, the report submitted by the DCP, East District, Delhi dated 12.03.2020, inter alia, states as follows:

> *" In this regard, it is stated that a report from SHO/Mayur Vihar has been obtained which revealed that despite sincere efforts the detenue has not been traced so far. During enquiry, Smt. Smita W/o Sh. Gopal Gupta (detenue) was found present at the given address. She told that her husband Sh. Gopal Gupta had gone to somewhere in South India for his medical treatment and she does not have any knowledge about exact whereabouts and date of arrival of her husband.*
>
> *Beat staff of the area has also been directed to collect the informations secretly through the informers to know the whereabouts of Sh. Gopal Gupta (detenue) and to intimate the senior officers immediately if any clue is found about the detenue.*
>
> *Moreover, SHO/Mayur Vihar has also been directed to make further efforts and maintain surveillance in the Court Complexes as the proceedings against the detenue to be held in upcoming months of 2020 and locate the proposed detenue to serve the detention order upon him under intimation to all concerned."*

80. Mr. Mahajan submits that the stand taken by the petitioners before this Court is completely belied by the report submitted by the respective DCPs. This itself shows that the said petitioners were seeking to evade the service of the Detention Orders and they were deliberately absconding for that reason.

81. Mr. Mahajan also submits that there is no merit in the petitioners' submission with regard to the interpretation of Section 7 of the Act. A bare

perusal of Section 7 of the Act shows that it is open to the Appropriate Government to take resort to Clause (a) and/ or Clause (b) and a plain reading of Section 7 does not suggest that only after exhausting the remedies under Clause (a), the remedies/ steps under Clause (b) could be undertaken.

82. Having considered the respective submissions on these aspects, we are of the view that there is no merit in the petitioners' submissions that neither of the three petitioners was not absconding. Abscondence is not only a matter of physical disappearance, but also carries with it the intent to hide, disappear, or evade the concerned person, or authority.

83. The petitioner MNK – while stating that he would not be found at his permanent address on account of his relationship with his parents not being good, failed to provide the actual address where he could be found. Even if the petitioner MNK was residing with his friends – as claimed by him, he should have provided the actual address where he would be residing, and if he were to shift from one address to the other, it was obligatory on him to keep the authorities posted of his current address to ward off the charge of abscondence. Had the petitioner MNK intended not to evade service of Detention Order, he would not have provided only his counsel's address for the purpose of service of communications and notices. Service/ execution of Detention Order could, possibly, have not been effected on the counsel of the petitioner MNK. The purpose of serving the Detention Order is to actually detain the named detenue against whom the Detention Order has been issued. A Detention Order would lose its force and object, if it were to be served upon the representative, or counsel, as the element of surprise would be lost – which is crucial to be able to detain a person, as there is

every likelihood of the person absconding, or evading execution of the Detention Order the moment he learns that such an order had been passed. The respondents are not obliged to serve the Detention Order, the Grounds of Detention, or the Relied Upon Documents on a third party. If this submission of the petitioner MNK were to be accepted, it would render the law of preventive detention completely ineffective and not workable. The petitioner MNK, however, failed to provide his actual address where he could be served the Detention Order. If the petitioner MNK was not to be found at his ancestral address, there was no point of furnishing the same. Thus, we are satisfied that the petitioner MNK deliberately absconded to evade the service of the Detention Order.

84. So far as the petitioner APS is concerned, we find that the position is no different. The reason given by the petitioner APS for his not being found at his given address is completely belied by the reports submitted by the DCP, West District, New Delhi – relevant portion whereof has been extracted hereinabove. At his given address, the wife of APS/ Harpreet Kaur was found and she stated that APS was not residing at the given address. Even his father/ Sh. Bhupinder Singh was examined, and he also stated that he does not know the whereabouts of his son APS. We find it very hard to believe that neither the petitioner APS's wife, nor his father was aware of his whereabouts. Clearly, APS was in hiding and his wife and his father also feigned ignorance, which would be the case only if the petitioner APS were to instruct them not to disclose his whereabouts. We are, therefore, of the view that the petitioner APS is equally guilty of abscondence.

85. So far as the petitioner Gopal Gupta is concerned, once again, we find that he was not found at his given address. His wife/ Smita was found at the said address who stated that the petitioner Gopal Gupta had gone somewhere in South India for his medical treatment and she did not have any knowledge about the exact whereabouts, and the date of arrival of her husband. This again, we find to be rather unusual that a wife would not know where her husband has gone and would not even know when he would arrive. In today's day and age – when mobile communication is common place, we find the statement made by the petitioner Gopal Gupta's wife Smt. Smita to be unacceptable and clearly the idea was to suppress the information with regard to the whereabouts of Gopal Gupta. The stand now taken by the petitioner Gopal Gupta – that he was at his father's residence, is completely contradicted with the statement of his wife Smita.

86. The submission of Mr. Chaudhri – that the abscondence of the petitioners in the present petition was for too short a period, unlike in the case of ***Subhash Popatlal Dave2*** (supra) and, therefore, their abscondence would not come in the way of their pressing these petitions, has only to be noted to be rejected. The time duration for which the proposed detenue absconds is not material. What is material is that he has deliberately absconded, and taking advantage of such abscondence, he approaches the Court to assail the Detention Order at the pre-execution stage. It is the act of deliberate abscondence which disentitles the proposed detenue to seek quashing of the Detention Order at the pre-execution stage, because a petitioner – when he approaches the High Court under Article 226 of the Constitution of India to seek the quashing of the Detention Order at the pre-

execution stage, invokes the extraordinary discretionary jurisdiction of the Court. The High Court would not exercise such discretionary jurisdiction in favour of a person who is evading the law.

87. We also find merit in the submission of Mr. Mahajan with regard to interpretation of Section 7 of the COFEPOSA Act. A plain reading of the said Section shows that the Government may take steps in accordance with Clause (a) and/ or (b) and there is nothing to say that the Government is bound to first take steps under Clause (a) of the Section 7(1) of the Act. The formation of the belief that the three petitioners, in respect of whom Detention Orders had been made have absconded, or that they were concealing themselves so that the order could not be executed is supported by cogent material taken note of hereinabove. Therefore, we find that there is no illegality about the notification issued under Section 7(1)(b) of the COFEPOSA Act qua each of these petitioners.

88. The submission of Mr. Chaudhri with regard to the affidavits not being sworn or verified properly does not impress us, since the respondents have placed reliance on the record, and on the law laid down by the Supreme Court. We, therefore, reject the same.

89. For the aforesaid reasons, we find that, firstly, the petitioners are not entitled to maintain these petitions in view of their conduct of abscondence and in view of the decision of the Supreme Court in ***Subhash Popatlal Dave2*** (supra), and even otherwise, we do not find any merit in any of the grounds taken by the petitioners to assail the Detention Orders issued in respect of each of them under Section 3 of the COFEPOSA Act at the pre-

execution/ detention stage.

90. We, accordingly, dismiss these petitions leaving the parties to bear their respective costs. Interim orders stand vacated.

(VIPIN SANGHI)
JUDGE

(RAJNISH BHATNAGAR)
JUDGE

SEPTEMBER 11 , 2020
N.Khanna