Before Satish Kumar Mittal, J

SMT. MADHU GARG,—*Petitioner*

versus

UNION OF INDIA & ANOTHER,—*Respondents*

Crl. W.P. No. 1397 of 2003

6th April, 2004

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974—S.3(1)—Detaining Authority after recording its subjective satisfaction on the basis of material placed before it by the Sponsoring Authority passing detention order under section 3(1) with a view to prevent detenues from indulging in smuggling activities—Subjective Satisfaction recorded by Detaining Authority—Whether subject matter of judicial review by High Court—Held, No—Sponsoring authority bringing all the relevant facts and material to notice of Detaining Authority—Detaining Authority considering all these facts and material while ordering detention—Merely because Detaining Authority failing to mention these facts in detail in detention order or in grounds of detention does not render detention order vitiated on the ground of non-application of mind—Once the Detaining Authority is satisfied that the detention of a person is necessary to prevent the smuggling of goods in future, such satisfaction cannot be questioned—Object of the passing of detention order cannot be said to be punitive—No illegality in the impugned orders of detention—Petitions liable to be dismissed.

Held, that the subjective satisfaction drawn by the Detaining Authority that there was imminent possibility of bail being granted to the detenue cannot be questioned merely on the ground that in the grounds of detenion these facts have not been mentioned in detail. Secondly, there is no bar to pass an order of preventive detention under Section 3(1) of the COFEPOSA Act when the detenue is in custody. Where the detenue at the time of passing the order of detention is in custody, the only requirement is that the order of detention must indicate that the detenue is likely to be released on bail. If the

Detaining Authority while passing the detention order is not aware of the fact of custody of the detenue or has not indicated in the detention order that the detenue who was in custody was likely to be released on bail, such order of detention would be vitiated and liable to be set aside.

(Para 29)

Further held, that all the ingredients for passing a valid order were very much present. The Detaining Authority was aware of the custody of the detenue. He has reason to believe on the basis of reliable material placed before him that there was imminent possibility of the detenue being granted bail. It was also felt essential to pass the order of preventive detention against the detenue because of his past antecedents his propensity and potentiality to indulge in smuggling activities in future. The order of detention was passed after recording subjective satisfaction of the Detaining Authority. Thus, there is no illegality in passing the impugned order.

(Para 30)

Further held, that once the Detaining Authority is satisfied that the detention of a person is necessary to prevent the smuggling of goods in future, such satisfaction cannot be questioned. In the instant case, after going though the detailed grounds of detention, it cannot be said that the object of the passing of the detention order was punitive. Rather from the facts given in detail in the gounds of detention, it is clear that the order of preventive detention has been passed for preventing the detenue from indulging him in smuggling activities in future.

(Para 31)

R.S. Cheema, Senior Advocate with V.K. Chaudhri, Advocate, for the petitioners.

Sandeep Vermani, Addl. Central Govt. Standing Counsel, for respondent No. 1.

Ravinder Kaur Nihalsinghwala, DAG, Punjab, for respondent No. 2.

JUDGMENT

SATISH KUMAR MITTAL, J.

(1) This judgment shall dispose of Criminal Writ Petitions bearing Nos. 1397 and 1432 of 2003 one filed by Smt. Madhu Garg, wife of the detenue Vinod Kumar Garg and the other filed by the detenue Narsi Dass Garg.

(2) The aforesaid writ petitions in the nature of *habeas corpus* have been filed for quashing the orders of detention dated 20 October, 2003 and dated 23rd October, 2003 passed by the Joint Secretary to Government of India. New Delhi under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act) against detenues, Vinod Kumar Garg and his brother Narsi Dass Garg, respectively, being violative of fundamental rights guaranteed under Articles 14, 19, 21 and 22 of the Constitution of India.

(3) The facts are being taken from CWP No. 1397 of 2003 titled as **Madhu Garg** *versus* **Union of India and another.**

(4) The impugned order of detention dated 20th October, 2003 (Annexure P-1) has been passed by the Joint Secretary to Government of India, Ministry of Revenue, New Delhi (hereinafter referred to as 'the Detaining Authority') under Section 3(1) of the COFEPOSA Act with a view to prevent the aforesaid detenue from smuggling goods in future. It has been indicated in the detention order (Annexure P-1) that the detenue be detained and kept in custody in Tihar Jail, New Delhi. In the grounds of detention (Annexure P-2), it has been mentioned that the detenue Vinod Kumar Garg along with his brother Narsi Dass Garg had floated a number of companies (list of which has been given), which were being used in fraudulent availment of Duty Entitlement Passbook Scheme (hereinafter referred to as DEPB Scheme) credits on export of goods declared as "Alloy Steel Forgings (Machined)". The searches were conducted at various business places on 23rd August, 2003 and several incriminating documents/material including some computers and typed account ledger showing settlement of accounts by Vinod Kumar Garg were recovered and seized. It has been further mentioned that the detenue Vinod Kumar Garg had admitted in his statements dated 24th August, 2003

and 25th August, 2003 made under Section 108 of the Customs Act, 1962 (hereinafter referred to as 'the Customs Act') that though he made his elder brother Narsi Dass Garg and two of his employees proprietors of certain firms, yet he and his brother Narsi Dass Garg were the actual controlling persons of all these firms. It has been further mentioned that the invesatigation conducted by the Directorate of Revenue Intelligence (hereinafter referred to as 'the DRI') revealed that Vinod Kumar Garg and his brother Narsi Dass Garg used to export cheap, sub-standard and junk material through ICD Tughlakabad, New Delhi, ICD, Partapganj, New Delhi and ACTL, Ballabgarh, declaring them as Alloy Steel Forging (Machined) at over-invoiced prices. The actual price of the exported goods was in the range of Rs. 5 per kg. whereas the price for the same was declared at Rs. 160 per kg. approximately. Thus, the two brothers defrauded the Government under DEPB Scheme to the tune of Rs. 23.76 crores. It has been further pointed out that the modus operandi adopted by the two brothers was to prepare two sets of invoices and packing lists. In the first set, the name of an European/American firm, as mentioned in the concerned shipping bill filed before the Indian Customs, used to be mentioend as consignee. Simultaneously, a second set of invoice and packing list was prepared for the same consignment showing a firm of Dubai/Sharjah as consignee and the American/European firm mentioned in the first set as consignee as exporter. These invoices and packing lists were prepared by his Manager Mudit Kumar Tiwari, against whom the detention order was also passed. At the time of each shipment, the invoice and packing list so prepared for the previous consignment was being got amended and thus the record of all the invoices/packing lists pertaining to previous exports were got deleted. The said Mudit Kumar Tiwari, Manager, used to prepare country of original certificates fraudulently showing as if the same had been issued by the Northern India Chamber of Commerce and Industry.

(5) On the basis of the aforesaid facts and circumstances, the Detaining Authority was satisfied that the activities of both the detenues amount to 'smuggling' as defined under Section 2(39) of the Customs Act and as adopted in Section 2(e) of the COFEPOSA Act. The Detaining Authority on the basis of the material placed before him formed the opinion that he had no hesitation in arriving at the satisfaction that the aforesaid detenues had the inclination, propensity and potentiality to indulge in smuggling activities, and unless prevented, they are

likely to indulge in such prejudicial activities in future. Considering the nature and gravity of the offence and the well organised manner in which the detenues had indulged in such prejudicial activities, the Detaining Authority formed the opinion on its satisfaction that the detenues are likely to indulge in such activities in future, hence, it became necessary to detain them under the COFEPOSA Act with a view to prevent them from indulging in smuggling of goods in future.

(6) In the case, the detention orders were passed against three persons, namely, Vinod Kumar Garg, Narsi Dass Garg and Mudit Kumar Tiwari, Manager, but when the case of detention of the aforesaid three persons was placed before the Central Advisory Board, consisting of three Hon'ble sitting Judges of the Delhi High Court under Section 8(3) of the COFEPOSA Act, the Board approved the detention of Vinod Kumar Garg and Narsi Dass Garg and the detention order of Mudit Kumar Tiwari was not approved. Thereafter, the Central Government confirmed the detention orders of both the detenues and fixed the period of detention as one year from the date of detention of the detenues.

(7) The petitioners have challenged the detention orders being illegal, arbitrary and violative of his fundamental rights, *inter-alia*, on the following grounds :—

(a) that the impugned orders of preventive detention has been passed against Vinod Kumar Garg and his brother Narsi Dass Garg under Section 3 of the COFEPOSA Act on the ground that their detention is necessary to prevent them from smuggling goods in future. But the alleged activities of the detenues do not constitute and fall under the definition of Smuggling, therefore, no detention order can be passed against the detenue under Section 3 of the Act. In this regard, the petitioners have referred to various provisions of the DEPB Scheme and the Customs Act. The contention of the petitioners is that the export goods which are neither prohibited nor dutiable, and even otherwise are not liable to be confiscated under Section 113 read with Section 77 of the Customs Act, cannot fall under the definition of 'Smuggling' as defined under Section 2(e) of the

COFEPOSA Act read with Section 2(39) of the Customs Act. Further more, since the export was made under the DEPB Scheme, the provisions of Section 113 of the Customs Act are not attracted at all. Therefore, the passing of the impugned orders under Section 3 of the COFEPOSA Act for preventing smuggling activities is totally beyond the scope of the power of the Detaining Authority to pass such an order ;

(b) that the detention orders have been passed in a most casual manner by the Detaining Authority by completely overlooking the cardinal principle that such an order is to be passed in the rarest of rare circumstances ;

(c) that the Detaining Authority has passed the orders of detention wholly without application of mind. There is error of law apparent on the face of the record while passing the impugned detention orders. The Detaining Authority has merely acted as a rubber stamp by issuing the detention order based upon allegations of the sponsoring authority without application of his mind. The relevant material or vital facts which would have bearing on the issue and weighed the satisfaction of the Detaining Authority were withheld by the sponsoring authority and not considered by the Detaining Authority before issuing the impugned detention orders. Thus, the subjective satisfaction of the Detaining Authority has been vitiated.

(8) Pursuant to the notice, respondent No.1—Union of India filed reply in which the allegations levelled by the petitioner have been denied by contending that the detention order was rightly passed.

(9) At the outset, Learned Senior counsel for the petitioners does not press the first ground to challenge the impugned orders of detention to the effect that the alleged prejudicial activities of the detenues do not fall under the definition of 'Smuggling" as defined under the COFEPOSA Act, in view of the law laid down by the Hon'ble Supreme Court in **Om Parkash Bhatia** *versus* **Commissioner of Customs, Delhi (1).** In the said judgment, it was held that

(1) (2003) 6 S.C.C. 161

over-invoicing of the goods exported and attempted to be exported contrary to any prohibition imposed by or under the COFEPOSA Act for the time being in force falls under the ambit of Section 113(d) of the Customs Act and thus consequently fall under the definition of 'Smuggling" as defined under Section 2(e) of the COFEPOSA Act.

(10) The learned Senior counsel for the petitioners, however, stressed that the impugned orders of detention have been passed by the Detaining Authority wholly without application of mind which renders the impugned order as punitive in nature and not preventive. He referred to the non- application of mind by the Detaining Authority regarding arriving of his subjective satisfaction while passing the order of detention on the ground that it was necessary in order to prevent the detenue from smuggling activities in future. He submitted that though the subjective satisfaction recorded by the Detaining Authority cannot be questioned, however, if before the Detaining Authority, the most relevant material or vital facts were not placed by the sponsoring authority and/or the Detaining Authority has not considered any material which was available on the record, which could have changed its decision, then in the absence of carrying out such an exercise, the impugned order is liable to be quashed. He submitted that any fact or material which certainly has a bearing, could have led to the subjective satisfaction of the Detaining Authority one way or the other before issuing the detention order. Such material or facts are required to be placed before the Detaining Authority by the sponsoring authority at the appropriate time, and the Detaining Authority is further required to look into and go through the same facts before recording his satisfaction regarding passing of the order of detention.

(11) In support of his above contention, learned Senior counsel for the petitioner relied on the decision of Hon'ble Supreme Court in **Dharamdas Shamlal Agarwal** *versus* **The Police Commissioner and another (2),** wherein it was held that "the requisite subjective satisfaction of the detaining authority, the formation of which is a condition precdent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced his mind are either withheld or suppressed by

(2) AIR 1989 S.C. 1282

the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order." In that case, at the time when the Detaining Authority passed the order of detention, the vital facts regarding acquittal of the detenue in two criminal cases, which were shown in the table appended to the grounds of detention, were not brought to the notice of the Detaining Authority and were withheld to give an understanding to the Detaining Authority that the trial of those two cases was pending. While quashing the order of detaining, the Hon'ble Apex Court held that the vital facts which would influence the mind of the Detaining Authority were not brought to his mind and not considered by him, would vitiate the subjective satisfaction arrived by the Detaining Authority.

(12) The learned Senior counsel for the petitioner also referred to the decision of the Hon'ble Apex Court in **Merugu Satyanarayana** *versus* **State of Andhra Pardesh and others (3)** where an order of preventive detention was made against a person who was already confined to jail, was quashed as the said fact was not brought to the notice of the Detaining Authority, and due to lack of the said knowledge, the Detaining Authority could not apply its mind to the fact whether still the preventive detention of the detenue was necessary when he was already confined to jail. It was held that if the subjective satisfaction of the Detaining Authority is reached without the awareness of such very relevant fact, the detention order is likely to be vitiated. It was further held that the awareness about such vital fact must find its place either in the detention order or in the affidavit justifying the detention order when challenged. The absence of this awareness would permit an inference that the Detaining Authority was not even aware of this vital fact and mechanically proceeded to pass the order which resulted into serious consequence in depriving a person of his liberty.

(13) The learned Senior counsel also referred to another decision of the Hon'ble Apex Court in **T.D. Abdul Rahman** *versus* **State of Kerala and others (4)** wherein it was held that when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the Detaining Authority has satisfactorily examined such a delay and afforded a

(3) AIR 1982 S.C. 1543
(4) AIR 1990 S.C. 225

tenable and reasonable explanation as to why such a delay has occasioned. The unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest also create a doubt on the genuineness of the subjective satisfaction of the Detaining Authority leading to a legitimate inference that the Detaining Authority was not really and genuinely satisfied as regards the necessity for detaining the detenue with a view to preventing him from acting in a prejudicial manner.

(14) The learned Senior counsel for the petitioner also relied on a judgment of the Delhi High Court in **Varinder Singh Batra** *versus* **Union of India & others (5)** wherein the medical report of the detenue, which was made on the basis of medical examination of the detenue on his request, when he retracted from his statement made under Section 108 of the Customs Act, alleged to have been obtained under corcion, was not brought to the notice of the Detaining Authority. It was held that such medical report was most relevant document to arrive at a finding whether the statement allegedly made under section 108 of the Customs Act was voluntarily made or was made under force, coercion and as a result of the beating. It was, therefore, held that the suppression of this medical report and not producing the same before the Detaining Authority, had vitiated the decision of the Detaining Authority, and it amounted to non-application of mind while passing the detention order.

(15) On the basis of the aforesaid legal position, the learned Senior counsel for the petitioner then pointed out the facts and circumstances of this case and the meterial which was not placed by the sponsoring authority or brought to the notice of the Detaining Authority, and was not considered by the Detaining Authority at the time of issuing the detention order.

(16) The husband of the petitioner, namely Vinod Kumar Garg was taken into illegal custody by the officials of the D.R.I. on 23rd August, 2003 from Delhi. Since the whereabouts of her husband were not known, she moved a comprehensive telegram to the Hon'ble Chief Justice of the Delhi High Court, copy of which has been annexed with this petition as Annexure P–8. But the D.R.I. staff had shown the arrest of the detenues on 25th August, 2003. The date,

(5) 1993 (3) Crimes 637

time and contents of the telegram were not taken into consideration by the Detaining Authority while passing the detention order. Thereafter the detenues were produced before the Judicial Magistrate on the same date i.e. 25th August, 2003 at 12.15 a.m. in the midnight. At that point of time, the detenue was not provided with the assistance of any Advocate. Before the Magistrate, the detenue retracted his statement under Section 108 of the Customs Act and also alleged that the statement was made under torture and coercion. These facts were completely not brought to the notice of the Detaining Authority. Similarly in para 38 of the grounds of detention, the fact of producing the detenue before the Judicial Magistrate at night has been mentioned but neither the date, time and the contents of the order nor the fact that the detenue was not provided the assistance of an Advocate was considered by the Detaining Authority. The non-consideration of these facts by the Detaining Authority vitiates the order of detention.

(17) The Third circumstance and the material fact which was not even taken into consideration was that when the order of detention was passed, the bail application of the detenue Vinod Kumar Garg was pending before the Delhi High Court. His bail application was earlier rejected by the Court of Session on 20th September, 2003. Aggrieved against the said order, the detenue approached the Delhi High Court in which notice to the State was issued for 20th October, 2003. On the said date, the case was adjourned for 21st October, 2003 as the counsel for the prosecution was unable to state as to whether the department was going to file a complaint in the court or not as the detenue had already completed 57 days. The learned Senior counsel for the petitioners submitted that though the Detaining Authority in paragraph 38 of the grounds of detention, has mentioned that the matter regarding bail was pending before the Delhi High Court for 22nd September, 2003, but the fact that the case was adjourned for the next date was not brought to the notice of the Detaining Authority. Even without knowing about the next date of hearing, it has been observed in the grounds of detention that imminent possibility of bail being granted to the husband of the petitioner could not be ruled out, and in case bail is granted the detenue would again indulge in prejudicial activities in future. When the order of detention was passed on 20th October, 2003, the detenue Vinod Kumar Garg was in jail.

(18) The learned Senior counsel for the petitioners submitted that when the Detaining Authority was neither aware about the contents of the order dated 20th October, 2003 passed by the Delhi High Court and also about the next date of the case, then how the Detaining Authority came to the conclusion that there was every possibility of bail being granted to the detenue. This fact also shows that there was non-application of mind.

(19) Fourthly, the learned Senior counsel for the petitioner submitted that there is long and unexplained delay in passing the impugned order of detention as there was no meterial with the sponsoring authority to prosecute the detenue under the common law or under the Customs Act. In the case, the search, discovery and arrest was complete on 25th August, 2003. The statements of the detenues were recorded under Section 108 of the Customs Act on 25th August, 2003. The overseas enquiries were completed on 26th August, 2003, as per the averment made in para 37 of the grounds of detention but the detention order was passed on 20th October, 2003. The learned Senior counsel submitted that actually the detention order was passed as a punitive measure and not as a preventive measure. He submitted that when the sponsoring authority was not having any material for prosecuting the detenues for the alleged irregularities under the Customs Act, then the impugned detention order was got passed, therefore, the same is liable to be quashed. The learned Senior counsel further submitted that the major non-consideration of a material fact by the Detaining Authority is that the D.R.I. department already initiated proceedings regarding fraudulent claim of drawback and D.E.P.B. credit by way of exporting misdeclared good by the firms of the detenue. In this regard, show-cause notice dated 3rd October, 2002 was issued to the detenue, copy of which has been annexed with this petition as Annexure P-12. In response to the said notice, a reply was filed by the detenue. In those proceedings, the statements of the prosecution witnesses were also recorded. The learned Senior counsel for the petitioner submitted that these facts were not taken into consideration at all by the Detaining Authority which shows the total non-application of mind.

(20) The learned Senior counsel for the petitioner further submitted that the order of detention has been passed only to deprive the husband of the petitioner from contesting the adjudication

proceedings relating to the earlier exports, which were at an advance stage. It was further alleged that the detention order against the detenue was passed with a *mala fide* objective only to outreach the process of law as the matter was pending before the court. The learned senior counsel further argued that the passport of the detenue was already taken into possession by the Detaining Authority as at the time of his arrest, the passport was surrendered by the detenue to the D.R.I. voluntarily. Secondly, most of the firms which have been alleged to have over-invoiced had already surrendered their importer-exporter code, thereby rendering themselves incapable of indulging into any import or export activity.

(21) In view of the aforesaid facts, it was clearly discernible that when the alleged firms of the detenue were incapacitated to indulge in importer-exporter code, there was no occasion for any preventive measure by way of detention order to be initiated against the detenue. These facts further establish that the impugned detention order was passed by the Detaining Authority not as a preventive measure but absolutely with punitive object. In these circumstances, the learned senior counsel for the petitioner submitted that it is apparent that the Detaining Authority has failed to consider the vital aspect in its correct prespective and the impugned order of detention suffers from the vice of non-application of mind as the satisfaction arrived at by the Detaining Authority is sham and unreal. The impugned order based on such satisfaction is accordingly liable to be set aside.

(22) On the other hand, the learned counsel for respondent No. 1 submitted that all the material and vital facts regarding the arrest of the petitioner, his production before the Judicial Magistrate within 24 hours of his arrest, the pendency of the bail application before the Delhi High Court etc., were brought to the notice of the Detaining Authority, and the same were duly considered by it. These facts have been found mention in the grounds of detention issued to the detenue. The only requirement of law is that the vital and necessary facts must be brought to the notice of the Detaining Authority. Thereafter, the Court is not required to decide whether the Detaining Authority has properly considered those facts or not. The learned counsel for respondent No. 1 submitted that the Court cannot go into or decide whether the subjective satisfaction of the Detaining Authority was justified or not. In support of his contention, he has relied upon

a decision of the Hon'ble Apex Court in **Safiya** *versus* **Government of Kerala and others, (6)** The learned counsel further submitted that when the order of detention is challenged in the High Court, the Court is not required to decide the matter as if it was sitting in appeal on the order passed by the Detaining Authority. While referring to the decision of the Hon'ble Apex Court in **Union of India** *versus* **Arvind Shergill (7),** he submitted that the 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 of COFEPOSA Act 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 the responsibility if the court substitutes its judgments 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 relevent to the object which the legislation has in view, that is, to prevent the detenue 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 learned counsel for respondent no. 1 also contended that merely the seizure of passport is no ground to quash the detention order. While referring to the decision of the Hon'ble Apex Court in **Sitthi Zuraina Begum** *versus* **Union of India and others,** (8) it has been submitted that it is for the Detaining Authority to see whether on a solitary instance the detenue can engage himself in the further smuggling activities. Merely because the passport issued to the detenue was seized or surrendered does not render the detention order invalid if the same was ordered after due recording of the subjective satisfaction of the Detaining Authority. The learned counsel for respondent No. 1 further submitted that merely because a person is in custody, the Detaining Authority can not be debarred from passing the order of preventive detention under Section 3(1)(i) of the COFEPOSA Act. If the Detaining Authority is aware of the fact that

(6) 2003 (3) R.C.R. 835
(7) 2000 (4) R.C.R. (Criminal) 251
(8) 2003 (1) R.C.R. 101

he is actually in custody and still he had reason to believe on the basis of reliable material placed before him that there is a real possibility of his release on bail, and that on being release, he would in all probability indulge in prejudicial activities. If it is felt by the authority to detain such a person to prevent him from doing so, the order passed by the Detaining Authority would be perfectly valid. In support of his contention, learned counsel for respondent No. 1 has placed reliance on **Union of India** *versus* **Paul Manickam and anothers, (9)**. He submitted that in the present case, the Detaining Authority was very much having the knowledge that the detenue was in custody and he had formed his subjective satisfaction that his release was imminent, therefore, it was necessary to pass an order of preventive detention in order to prevent him from indulging in prejudicial activities. He further submitted that all the facts regarding arrest and pendency of the bail application, were very much in the knowledge of the Detaining Authority. Therefore, there is no illegality or infirmity in the detention order.

(24) I have heard the arguments of the learned counsel for both the parties and have perused the record of this case.

(25) In this case, the detention order has been passed under Section 3(1) of the COFEPOSA Act with a view to prevent the detenue from indulging in smuggling of goods in future. The said order was passed by the Detaining Authority after recording his subjective satisfaction on the basis of the material placed before him by the sponsoring authority, which has been mentioned in detail in the grounds of detention. On the basis of the said meterial, the Detaining Authority was satisfied that the detenue had the inclination, propensity and potentiality to indulge in smuggling activities, and unless prevented, he would likely to indulge in such prejudicial activities in future. Considering the nature and gravity of the smuggling activities, the well organised manner in which the detenue had indulged in such prejudicial activities, and the further likelihood of the detenue to indulge in such activities, the detail of which has been given in the grounds of detention, the Detaining Authority formulated his subjective satisfaction before passing the order of detention. The subjective satisfaction so recorded by the Detaining Authority is not the subject matter of the judicial review by the Court. The Court is not required

(9) 2003 (4) R.C.R. 927

to decide whether subjective satisfaction of the Detaining Authority is justified or not. In **Union of India** *versus* **Arvind Shergill** *(Supra),* It was held by the Apex Court that the language of Section 3 of the COFEPOSA Act clearly indicates the responsibilty of making the 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 the 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 Detaining Authority in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenue from engaging in smuggling activities. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant facts, cannot be stated to be invalid. Similarly, the Hon'ble Apex Court in **Safiya** *versus* **Government of Kerala's case** *(Supra)* has held that the Court is not required to decide whether the subjective satisfaction of the Detaining Authority is justified or not. If the Detaining Authority has considered all the relevant aspects borne out from the records before issuing the detention order and after arriving at the subjective satisfaction as to the necessity of detaining a person by invoking the provisions of the COFEPOSA Act, then the Court should be slow in interfering in the matter. The Court should not lose sight of the fact that those who commit economic offence do harm to the national interest and economy. There is a very limited scope for the Court to set aside the order of preventive detention.

(26) The learned Senior counsel for the petitioner in the instant case has not challenged the impugned order of detention on the ground that the alleged illegal activities of the detenue do not constitute the smuggling as defined in Section 2(39) of the Customs Act, as adopted in Section 2(e) of the COFEPOSA Act. Nor he has challenged it on the ground that the subjective satisfaction recorded by the Detaining Authority was without any material or the material, which was taken into consideration, was inadequate. The learned Senior counsel for the petitioner, however, challenged the impugned order of detention firstly on the gorund that it was passed by the Detaining Authority wholly without application of mind, which renders it vitiated. His contention is that though the subjective satisfaction recorded by the Detaining Authority cannot be questioned, however,

if before the Detaining Authority, the most material or vital fact was not placed by the sponsoring authority, and/or the Detaining Authority has not considered any material which was available on the record which could have influenced its decision, then in absence of carrying out such an exercise, the impugned order is liable to be quashed. Secondly, he has challenged the impugned order of detention on the ground that it is punitive in nature and not preventive, and the same was passed in a haste and with an object to give punishment to the detenue for his illegal activities.

(27) The learned Senior counsel for the petitioner in this regard has referred to several facts and circumstances and the material which were not placed by the sponsoring authority or brought to the notice of the Detaining Authority, and which were not considered by the Detaining Authority at the time of issuing the detention order. I have considered those facts and circumstances, and the material pointed out by the learned senior counsel for the petitioner in light of the detention order and the grounds of detention annexed with this petition.

(28) A telegram was sent by the wife of the detenue on 23rd August, 2003 to various authorities, including the Hon'ble Chief Justice of Delhi High Court, copy of which has been annexed with this petition as Annexure P-8. This telegram was brought to the notice of the Detaining Authority and the same was considered by him, as mentioned in para 39 of the grounds of detention, while finding no substance in the same, it was rejected. Merely, the Detaining Authority has not mentioned the date, time and the contents of the telegram in the grounds of detention, it cannot be taken that the said telegram was not considered or taken into account by the Detaining Authority while passing the detention order. Further the fact the detenue was arrested on 25th August, 2003 and the fact that he was produced before the Judicial Magistrate on the same date at 12.15 A.M. in the midnight and the fact that before the Magistrate the detenue retracted from his statement made under Section 108 of the Custom Act, were also in the notice of the Detaining Authority, as is clear from paras 38 and 44 of the grounds of detention. Merely because the detenue at the time of his production before the Judicial Magistrate was not assisted by an Advocate, it cannot be held that the order of detention has been vitiated. The contention of the learned senior counsel for the petitioner that the Detaining Authority in the grounds of detention

has neither mentioned the contents of the order passed by the Judicial Magistrate, the exact date and time the detenue was produced before the Judicial Magistrate, therefore, it vitiates the detention order, cannot be accepted. The only requirment of law is that the relevant fact or the material which may have any bearing on the formation of the subjective satisfaction of the Detaining Authority regarding passing of the order of preventive detention must be brought to the Detaining Authority. There is no such requirement that the Detaining Authority is required to mention those facts in detail in the detention order or in the grounds of detention. Therefore, merely because the Detaining Authority has not mentioned these facts in detail in the detention order or in the grounds of detention, does not render the detention order vitiated on the ground of non-application of mind.

(29) Similarly, the next circumstances and the meterial which is alleged to have been not brought to the notice of the Detaining Authority is the pendency of the bail application of the detenue before the Delhi High Court. The contention of the learned senior counsel for the petitioner is that though it was in the notice of the Detaining Authority that the bail application of the detenue was pending in the Delhi High Court, but the fact that the said bail application was fixed for 21st October, 2003 in the said Court, was not brought to the notice of the Detaining Authority. If that was the position, the learned senior counsel for the petitioner submitted that how the Detaining Authority has framed the opinion that there was an imminent possibility of bail being granted to the detenue. Thus, it was contended that when the detenue was already in custody, there was no question of indulging in prejudicial activities in future. Hence, passing of the order on 20th September, 2003 by the Detaining Authority was wholy without application of mind. This contention of the learned senior counsel for the petitioner is devoid of merit. The fact regarding the pendency of the bail application filed by the detenue on 22nd September, 2003 before the Delhi High Court was in the notice of the Detaining Authority. In the said bail application, on 25th September, 2003 the Delhi High Court issued notice for 20th October, 2003 and on that date, the case was adjourned for 21st October, 2003 on the request of the learned counsel for the State to inform to the Court whether the State was likely to file complaint in the case or not as the detenue was in custody for the last 57 days. Though the date of hearing of the bail application and the contents of the order dated 20th October,

2003 have not been mentioned in para 43 of the grounds of detention yet it cannot be presumed that those facts were not within the knowledge of the Detaining Authority. From the contents of the grounds of detention, it appears that the Detaining Authority was very much aware of all these facts, and that is why he has observed that imminent possibility of bail being granted to the detenue could not be ruled out because when the State was not in a position to file a challan and in that situation, the detenue was to be released on bail. Therefore, the subjective satisfaction drawn by the Detaining Authority that there was imminent possibility of bail being granted to the detenue cannot be questioned merely on the ground that in the grounds of detention these facts have not been mentioned in detail. Secondly, there is no bar to pass an order of preventive detention under Section 3(1) of the COFEPOSA Act when the detenue is in custody. Where the detenue at the time of passing the order of detention is in custody, the only requirment is that the order of detention must indicate that the detenue is likely to be released on bail. If the Detaining Authority while passing the detention order is not aware of the fact of custody of the detenue or has not indicated in the detention order that the detenue who was in custody was likely to be released on bail, such order of detention would be vitiated and liable to be aside , as held in **Dharmendra Suganchand** *versus* **Union of India, (10)** If the Detaining Authority is aware of the custody of the detenue and also indicated in the detention order or grounds of detention that the detenue is likely to be released on bail, such order of detention is perfectly valid. The Hon,ble Supreme Court in **Union of India** *versus* **Paul Manickam's case** *(supra)* has held that an order of preventive detention of a person passed under Section 3(1) of the COFEPOSA Act, who is already in custody, is valid—

(a) If the authority passing the order is aware of the fact that he is actually in custody;

(b) if he has reason to believe on the basis of reliable material placed before him that there is a real possibility of his release on bail, and that on being released, he would in all probability indulge in prejudicial activities;

(c) if it is felt essential to detain him to prevent him from so doing; and

(10) AIR 1990 S.C. 1196

(d) if an order is passed after recording satisfaction in that regard, the order would be valid.

(30) In the instant case, all the aforesaid ingredients for passing a valid order were very much present. The Detaining Authority was aware of the custody of the detenue. He has reason to believe on the basis of reliable material placed before him that there was imminent possibility of the detenue being granted bail. It was also felt essential to pass the order of preventive detention against the detenue because of his past antecedents his propensity and potentiality to indulge in smuggling activities in future. The order of detention was passed after recording subjective satisfaction of the Detaining Authority. Thus, there is no illegality in passing the impugned order.

(31) The second ground on which the learned senior counsel for the petitioner assailed the detention order to the effect that the said order was punitive in nature and not preventive. In this regard, he has referred to certain facts in the grounds of detention. According to him, in case, the search, discovery and arrest of the detenue was complete on 25th August, 2003; the statement of the detenue was also recorded under Section 108 of the Customs Act, on 24th /25th August, 2003; the overseas enquires were completed on 26th August, 2003, but the detention order was passed on 20th October, 2003. On the basis of these facts, a contention has been raised that there was a long delay in passing the detention order, therefore, the detention order appears to have been passed not as a preventive measure but as a punitive measure. This contention of the learned Senior counsel for the petitioner cannot be accepted. In paragraph 42 of the grounds of detention, the Detaining Authority has specifically mentioned that he had particularly given careful consideration to the proximity angle in the case. After considering the facts and circumstances of the case, which became apparent from the material placed before him and chronological sequence of events, the Detaining Authority was fully satisfied that the time gap between the date of incident and passing of the detention order had not diminished the high propensity and potentiality of the detenue to indulge in such prejudicial activities in future. This fact clearly indicates that the Detaining Authority was fully aware about the factum of gap between the incident and passing of the detention order, and after considering the relevent material and circumstances, he formulated his subjective satisfaction before passing

the order of detention in question. It is true that the preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to punish a person for an offence committed by him. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Detaining Authority is convinced on the materials available and placed before him that such detention is necessary in order to prevent the person detained from acting in a matter prejudicial to certain objects which are specified by the law. Such matter is to be necessarily left to the discretion of the Detaining Authority. It is not practicable to lay down objective rules of conduct, the failure to conform to which alone should lead to detention. Once the Detaining Authority is satisfied that the detention of a person is necessary to prevent the smuggling of goods in future, such satisfaction cannot be questioned. In the instant case, after going through the detailed grounds of detention, it cannot be said that the object of the passing of the detention order was punitive. Rather from the facts given in detail in the grounds of detention, it is clear that the order of preventive detention has been passed for preventing the detenue from indulging him in smuggling activities in future.

(32) The learned Senior counsel for the petitioner also submitted that regarding non-consideration of the fact by the Detaining Authority, that is, that the DRI department already initated proceedings regarding fraudulent claim of drawback and DEPB credit by way of exporting mis-declared goods by the firms of the detenue. In those proceedings, the reply of the detenue was filed and the statements of the prosecution witnesses were recorded. But while passing the impugned order of detention, the Detaining Authority did not take into consideration those factors. In support of his contention, the learned senior counsel relied upon the decision of the Apex Court in **Kurjibhai Dhanjibhai Patel** *versus* **State of Gujarat and others, (11)** In that case, the show cause notice issued under the Customs Act and the detenu's reply thereto, were not placed before the Detaining Authority before the issuance of the detention order. In that situation, the Supreme Court held that since the show cause notice and the detenu's reply were admittedly not placed by the sponsoring authority before the Detaining Authority at the appropriate time, therefore, the order of detention was held invalid. But the position is not same in the instant

(11) 1985 (1) SCALE 136

case. It is not the admitted position here that the Detaining Authority was not aware of any such documents. In para 45 of the grounds of detention, it has been clearly mentioned that the Detaining Authority was aware of the pendency of the proceedings under the Customs Act, which were punitive in nature. But keeping in view the high propensity and potentiality of the detenue to indulge in such prejudicial activities, the Detaining Authority was fully satisfied to pass the order of detention under the COFEPOSA Act with a view to prevent the detenue from smuggling goods in future.

(33) The learned Senior counsel for the petitioner also raised the point that since the passport of the detenue was already taken into possession by the Detaining Authority at the time of his arrest and secondly that most of the firms which have been alleged to have over-invoiced had already surrendered their importer-exporter code, therefore, there was no possibility of the detenue being indulge in smuggling of goods in future.

(34) I do not find any force in the aforesaid contention of the learned Senior counsel for the petitioner also. Merely because the detenue surrendered his passport and the firms of the detenue had surrendered import-exporter code, it cannot be held that the Detaining Authority could not form his subjective satisfaction about the detenue being indulged in prejudicial activities of smuggling in future. The Hon,ble Apex Court in **Sitthi Zuraina Begum** *versus* **Union of India and others,** *(supra)* has held that seizure of passport of the detenue is no ground to quash the order of detention. The Detaining Authority was aware of this fact that the passport of the detenue was surrendered. Inspite of that, while taking into consideration the documentary material available on the record, the Detaining Authority passed the order of preventive detention keeping in view the past conduct of the detenue and his prejudicial activities.

(35) In view of the aforesaid discussion, I do not find any illegality or infirmity in the order of detention of the detenue Vinod Kumar Garg.

Crl.W.No. 1432 of 2003

(36) Against petitioner Narsi Das Garg, the order of preventive detention was passed by the Detaining Authority on 23rd October, 2003 under Section 3 (1) of the COFEPOSA Act with a view to prevent the aforesaid detenue from smuggling goods in future. The grounds

of detention supplied to the detenue are almost similar to that of his brother detenue Vinod Kumar Garg. The material, facts and circumstances and the allegations of prejudicial or smuggling activities, on the basis of which the orders of preventive detention have been passed against both the brothers, are almost similar. The only difference in this case is that the order of detention of petitioner Narsi Dass Garg was passed 3 days later i.e. on 23rd October, 2003.

(37) He was arrested on 25th August, 2003 at 6.00 P.M. under section 104 of the Custom Act, from his house at Ludhiana. After medical, he was produced before the Illaqa Magistrate, who remanded him to judicial custody. His judicial remands were extended periodically from time to time on 26th August, 2003, 8th September, 2003, 7th October, 2003 and 31st October, 2003 up to 3rd November, 2003. During the period of judicial remand, the petitioner filed bail application before Chief Judicial Magistrate, Ludhiana, on 26th August, 2003, which was rejected,--*vide* order dated 1st September, 2003. Thereafter, the petitioner filed another bail application before Additional Sessions Judge, Ludhiana, on 8th September, 2003. The said application was also rejected on 27th September, 2003. Thereafter, second bail application was filed by the petitioner before Additional Sessions Judge, Ludhiana, on 15th October, 2003, which was allowed on 29th October, 2003 after passing of the impugned order of detention on 23rd October, 2003. Thus, when the impugned order of detention was passed, the petitioner was in judicial custody and his bail application was pending before Additional Sessions Judge, Ludhiana.

(38) In this petition, learned Senior counsel for the petitioner has raised two additional grounds to challenge the impugned order of detention. Firstly, that the grounds of detention of petitioner Narsi Das Garg are verbatim copy of grounds of detention relied in case of Vinod Kumar Garg. It shows a total non-application of mind by the Detaining Authority as it did not apply its mind independently on the material, facts and circumstances and the alleged prejudicial or smuggling activities pertaining to the petitioner. Therefore, the order of detention is liable to be quashed. In support of his this contention, learned Senior counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in **Jai Singh and others** *versus* **State of Jammu & Kashmir, (12)** and a decision of this Court in **Sarjeevan Dhir** *versus* **State of Punjab, (13).**

(12) AIR 1985 S.C. 764
(13) 1995 (1) RCR (Criminal) 131

(39) Secondly, learned counsel for the petitioner submitted that when the impugned order of detention was passed on 23rd October, 2003, the petitioner was in judicial custody and his bail application was rejected by Chief Judicial Magistrate on 1st September, 2003 and by Additional Sessions Judge on 19th September, 2003, therefore, there was no material before the Detaining Authority on 23rd October, 2003 to conclude that the petitioner was likely to be released on bail and his detention was necessary in order to prevent him from indulging in smuggling activities in future. The mere fact that he was subsequently released on bail on 29th October, 2003 is of no consequence. In support of his contention, learned Senior counsel for the petitioner relied upon a decision of the Hon'ble Apex Court in **Rajesh Gulati** *versus* **Government of N.C.T. of Delhi and Another, (14).**

(40) I have considered the submissions made by learned counsel for both the parties on the aforesaid two additonal grounds and have perused the recond of the case. I do not find any substance in both the additional submissions made by learned Senior counsel for the petitioner. It is true that the grounds of detention against both the detenues are similar. The detention orders against both the detenues have been issued in this case on the basis of the same material, facts and circumstances and the allegations of prejudicial or smuggling activities. Since the matter is the same, then the basic facts and the relied upon documents are also the same in both the cases, therefore, it is natural that grounds of detention are also almost similar in nature. Merely on this basis, it cannot be said that in case of petitioner Narsi Dass Garg, the detention order was passed by the Detaining Authority wholly without application of mind in a mechanical manner. On the basis of the material and the facts and circumstances, as discussed in detail in the grounds of detention, the Detaining Authority came to the conclusion that the detention of the petitioner was necessary to prevent him from indulging in smuggling activities in future. The judgment cited by learned counsel for the petitioner in Jai Singh's case (supra) is entirely on different facts. In that case, the grounds of detention were the verbatim reproduction of the dossier submitted by the sponsoring authority requesting for passing the detention order against the detenu Jai Singh. When the detention order was passed and the grounds of detention were issued, the only

(14) JT 2002 (6) S.C. 331 = 2002 (4) RCR (Criminal) 89

change was made in the word "he" which was referring to Jai Singh as "you" in the dossier. In that factual position, the detention order was held to be bad on account of non-application of mind. This is not the fact here. Here the Detaining Authority, after applying its mind and considering all the relevant material, facts and circumstances and the past activities of the detenue, has passed the detention order after formulating its subjective satisfaction.

(41) The second additional submission made by learned counsel for the petitioner in case of Narsi Dass Garg is also having no merit. Though it is correct that when the impugned order of detention was passed on 23rd October, 2003, the petitioner was in judicial custody. It is also correct that prior to the date of passing of the impugned order, the bail applications filed by the petitioner were rejected by the Chief Judicial Magistrate and the Additional Sessions Judge. But it is also correct that when the impugned order was passed, the third bail application of the petitioner was pending before Additional Session Judge, Ludhiana, which was allowed on 29th October, 2003 after passing the impugned order. When the impugned order of detention was passed, the Detaining Authority was very much aware of two facts, firstly that the petitioner was on judicial remand which was being extended from time to time as mentioned in paragraph 38 of the grounds of detention. The case was being adjourned from time to time to await the decision of the DRI department when they were going to file the complaint against the petitioner under the Customs Act. If the said complaint was not filed within a period of 60 days, then the petitioner was bound to be released on bail under Section 167 (2) of the Code of Crimnal Procedure. Since the 60 days time in case of the petitioner was going to expire on 25th October, 2003 and his bail application was also pending and fixed for 29th October, 2003, there was imminent possibilty of the petitioner being released on bail. In view of these facts, the Detaining Authority, while noticing the fact of rejection of the bail application of the petitioner by Chief Judicial Magistrate and Additional Sessions Judge and the fact that his third bail application was pending in the Court of Additional Sessions Judge, has clearly opined that the imminent possibilty of bail being granted to the petitioner could not be ruled out. Therefore, it was considered necessary in the facts and circumstances of the case and keeping in view gravity of the offence committed and the antecedents, propensity and

potentiality of the petitioner to indulge in prejudicial activities in future, the order of preventive detention was passed. I do not find any illegality in the same. The judgement cited by learned counsel for the petitioner in **Rajesh Gulati's case** *(supra)* is entirely on different facts. In that case, the bail was refused to the detenu five times when he was in judicial custody. However, the order of detention was passed on the ground that the accused/detenu was likely to be released on bail. In the case, there was no meterial available before the Detaining Authority to conclude that the detenu was likely to be released on bail when his bail application was rejected five times. In those circumstances, the Hon'ble Supreme Court set aside the detention order, although the detenu in that case was released on bail on the very next day of the passing of the detention order. The Hon'ble Supreme Court in that case observed that the Detaining Authority was aware of the fact that the detenu was in judicial custody when the order of detention was passed and it mentioned in the grounds of detention that the bail is normally granted in such cases, therefore, there was imminent possibility that the accused/ detenu would come out on bail. In those circumstances, it was held that when the order of detention was passed pertaining to a person in custody, the normal rule of release on bail had not been followed by the Court and it could not have been relied on by the Detaining Authority to be satisfied that the appellant would be released on bail. But the case in hand is entirely different. Here, the third bail application of the petitioner was pending at the time of passing of the detention order. He was on judicial remand which was being extended from time to time to await the result of the complaint filed by the department. The 60 days time as prescribed under Section 167 (2) Cr. P.C. was going to expire on 25th October, 2003 and the DRI was not ready to file the complaint against the petitioner/ detenu. Therefore, in these circumstances, the subjective satisfaction was recorded by the Detaining Authority that there was imminent possibility of bail being granted to the petitioner. This subjective satisfaction cannot be said to be vitiated in any manner. This fact is apparent from the contents of the order dated 29th October, 2003 granting bail to the petitioner, as the detenue was released on bail only on this ground that the department has failed to file the complaint within the stipulated period of 60 days. Thus, I do not find any force in this contention of learned counsel for the petitioner.

42. The rest of the contentions, which have been raised in this case by learned counsel for the petitioner, have already been dealt with by me in the earlier part of this judgment, while dealing with the case of detenu Vinod Kumar Garg. For the same reasons, the similar contentions raised in this case are also rejected. In these circumstances, I do not find any illegality in the impugned order of detention of petitioner Narsi Dass Garg also.

43. In view of the aforesaid discussion, both these petitions are dismissed with no order as to costs.

R.N.R

Before G.S. Singhvi & S.S. Saron, JJ

RAJBIR SINGH,—*Petitioner*

versus

COMMISSIONER & SECRETARY TO GOVERNMENT OF HARYANA & ANOTHER,—*Respondents*

C.W.P. NO. 5103 OF 2003

The 5th August, 2003

Constitution of India, 1950—Arts. 14, 16 & 226—Haryana Panchayati Raj Act, 1994—Ss. 51(1)(b) & 51(2)—Principles of natural justice—On a complaint of Sarpanch BDPO finding the Panches guilty for non-participation in the meetings—During pendency of regular enquiry, suspension of Panches ordered by Deputy Commissioner without considering their reply and without assigning any reason for not accepting the same—S. 51(1)(b) entitles the Panches an adequate opportunity to explain in case of removal during the course of an enquiry—D.C. ignoring the facts & explanation given by Panches–Order of D.C. suspending Panches is vitiated by arbitrariness & violates the rules of natural justice—Government also failing to consider their reply & dismissing the appeals—Petitions allowed—Orders of respondents liable to be quashed.

Held, that the expression "adequate opportunity to explain" appearing in clause (b) of Section 51(1) of the Act has not been defined in the Act or the rules framed thereunder but on the basis