SUNIL FULCHAND SHAH

v.

UNION OF INDIA AND ORS.

FEBRUARY 16, 2000

[DR. A.S. ANAND, CJ., G.T. NANAVATI, K.T. THOMAS, D.P. WADHWA AND S. RAJENDRA BABU, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 : Sections 10 and 12

Preventive detention—Period of detention—Computation of—Has to be computed from the date of actual detention and not from the date of Detention Order.

Preventive detention—Grant of parole—Effect of—Held, parole does not interrupt the period of detention—That period should be counted towards the period of detention—Period of detention does not stand automatically extended by any period of parole unless the order of parole or Rules or instructions specifically provided for extention of detention.

Preventive detention—Detention order—Setting aside of by High Court directing release of detenu—On appeal Supreme Court reversing erroneous decision of High Court and directing detention of detenu—Effect on remaining period of detention.

Preventive detention—Parole during—Can be granted as per rules or administrative instructions—Detenu should approach the Government—In case of unjustifiable refusal by government High Court under Article 226 and Supreme Court under Articles 32, 136 and 142 can direct temporary release.

Parole and Bail—Distinction between—Discussed.

In these petitions the questions for consideration are :

(i) Whether the period of detention is a fixed period running from the dates specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu?

A (ii) In a case where the High Court allows a habeas corpus petition and directs a detenu to be released and in consequence the detenu is set free and thereafter, on appeal the erroneous decision of the High Court is reversed, is it open to Supreme Court to direct the arrest and detention of the detenu, to undergo detention for the period which fell short of the B original period of detention intended in the detention order on account of the erroneous High Court order?

Disposing the petitions, the Court

HELD : *PER CURIAM*

C Parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, Rules or instructions, prescribe otherwise.

PER MAJORITY (CJ., K.T. Thomas, D.P. Wadhwa and S. Rajendra D *Babu, JJ.)*

The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend E upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court.

PER MINORITY (G.T. NANAVATI, J.)

F If the period of detention is interrupted by order of court and on appeal that erroneous order is set aside the period during which the detenu was released pursuant to the order of court can be excluded while computing the maximum period of detention.

G *Per Dr. Anand, CJ. (for himself and for K.T. Thomas, D.P. Wadhwa and S. Rajendra Babu, JJ.) :*

1. On a plain reading of section 10 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 it is evident that the period of detention is to be computed from the date of *actual* H *detention* and not from the *date of the order* of detention.

2. Section 10 prescribes not only the maximum period of detention but also the method of computation of that period and on a plain reading of the Section, the period of detention is to be computed from the date of *actual detention* and not from the *date of the order* of detention. The period of one or two years, as the case may be, as mentioned in Section 10 will run from the date of the actual detention and not from the date of the order of detention. Any other interpretation would frustrate the object of an order of detention and a clever person may abscond for the entire period mentioned in the order of detention and thereby render the order of detention useless claiming on being apprehended that 'the period has already expired'. [958-B-C]

State of Gujarat v. *Adam Kasam Bhaya,* [1982] 1 SCR 740 and *State of Gujarat* v. *Ismail Juma & Ors.,* [1982] 1 SCR 1014, affirmed.

3. Personal liberty is one of the most cherished freedoms, perhaps more important than all other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. Since, preventive detention is a form of precautionary State action, intended to prevent a person from indulging in a conduct, injurious to the society or the security of State or public order, it has been recognised as "a necessary evil" and is tolerated in a free society in the larger interest of security of State and maintenance of public order. However, the power being drastic, the restrictions placed on a person to preventively detain must, consistently with the effectiveness of detention, be minimal. In a democracy governed by the Rule of Law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. Supreme Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation. [958-F-H; 959-A-B]

4. The Constitution itself permits the Parliament and the State Legislature to make law providing for detention, without trial, upto a period of

A three months without any safeguards but where the law seeks to provide for detention for a longer period than three months, it must comply with the constitutional safeguards which are found in sub-clauses (a) and (b) of Clause (4), though leaving it to the discretion of the detaining authority to decide what should be the maximum period of detention. Outside limit to the period of detention has, however, been laid down by the proviso which B says that nothing in sub-clause (a) of Clause (4) shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under Clause (7). The question whether Parliament is itself bound to prescribe the maximum period of detention under Article 22(7)(b) of the Constitution in order that the proviso to Article 22(4)(e) might C operate, is no longer *res-integra*. [960-C-F]

Fagu Shaw Etc. Etc. v. *The State of West Bengal,* [1974] 2 SCR 832, reiterated.

5. Parole does not interrupt the period of detention and, thus, that D period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise.

6. Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of E Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retainconstructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still F be exercised through the conditions of the bond secured from him. The literal meaning of the word 'bail' is surety. [960-G-H]

State of Haryana v. *Mohinder Singh,* JT (2000) 1 SC 629, relied on.

G 7. 'Parole', however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. 'Parole' is a form of "temporary release" from custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence. In this country, there are H no statutory provisions dealing with the question of grant of parole. The

Code of Criminal Procedure does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking an administrative action. [962-G; E]

Rainone v. *Murphy,* 135 N.E. 2 d 567, 571 1 N.Y. 2 d 367 153 N.Y.S. end 21, 26; *Wooden* v. *Goheen Ky.,* 255 S.W. 2 d 1000, 1002 and *Jenkins* v. *Madigan,* C.A. Ind., 211 F.2 d 904, 906, cited.

Halsbury's Laws of England, 4th Ed., Vol.11, para 166; *The Concise Oxford Dictionary*—New Edition; *Black's Law Dictionary*—Sixth Edition; P. Ramanatha Aiyar's, *The Law Lexicon with legal Maxims, Latin Terms and Words & Phrases* p.1410 and *Words and Phrases,* (Permanent Edition) : Vol.31, pp. 164, 166, 167, West Publishing Co., referred to.

8. Parole, stricto-senso may be granted by way of a temporary release as contemplated by Section 12(1) or 12(1A) of COFEPOSA by the Government or its functionaries, in accordance with the Parole Rules or administrative instructions, framed by the Government which are administrative in character and shall be subject to the terms of the Rules or the instructions, as the case may be. For securing release on parole, a detenu has, therefore, to approach the Government concerned or the jail authorities, who may impose conditions as envisaged by Section 12(2) etc. and the grant of parole shall be subject to those terms and conditions. [963-F]

9. Section 12(6) of the COFEPOSA starts with a non-obstante clause and mandates that no person against whom a detention order made under COFEPOSA is in force shall be released 'whether on bail or bail bond or otherwise'. The expression 'or otherwise' would include release of the detenu even on parole through judicial intervention. The prohibition is significant and has a purpose to serve. Since the object of preventive detention is to keep a person out of mischief in the interest of the security of the State or public order, judicial intervention to release the detenu during the period an order of detention is in force has to be minimal. Under Section 12(1) or 12(1A), it is for the State to see whether the detenu should be released temporarily or not, keeping in view the larger interest of the State and the requirements of detention of an individual. Terms and conditions which may be imposed while granting order of temporary release are also indicated in the other granting clauses of Section 12 for the guidance of the State. [963-C-D]

A 10. The Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in Clause (6) of Section 12. However, the bar of judicial intervention to direct temporary release of a detenu would not affect the jurisdiction of the High Courts under Article 226 of the B Constitution or of this Court under Articles 32, 136 or 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to C be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the court leaves it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu. [963-H; 964-A-C]

11. Release on parole is only a temporary arrangement by which a D detenu is released for a temporary fixed period to meet certain situations.

12. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period - it does not interrupt the period of detention - it only changes the mode of detention by restraining the movement of the detenu in accordance with the E conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of F detention keeps ticking during this period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody. The period of detention would not stand automatically extended by any period of parole granted to the detenu G unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention. [964-F-G; 965-C]

13. The quashing of an order of detention by the High Court brings H to an end such an order and if an appeal is allowed against the order of

the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court. [967-E] A

A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there still exists a proximate temporal nexus between the period of detention prescribed when the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of 'further' or 'continued' detention. [967-G] B C

Where however long time has not lapsed or the period of detention initially fixed in the order of detention has also not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the Appellate Court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention, though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as 'set off' against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute. [967-H; 968-A-B] D E

14. In the instant case long period has lapsed since the detenus in each of these cases were released and no material has been placed before this Court by the detaining authority to warrant further detention of the detenu at this distant point of time. Therefore, the detenus need not be directed to undergo "the remaining period of detention" because the nexus between detention and object of detention would appear to have been snapped during this period of about ten years, during which period detenus were free. F G

Smt. Poonam Lata v. *M.L. Wadhwan & Ors.*, AIR (1987) SC 1383; *Pushpadevi M. Jatia* v. *M.L. Wadhawan*, AIR (1987) SC 1748 and *Harish Makhija* v. *State of U.P.*, [1987] 3 SCC 432, overruled. H

A *PER NANAVATI, J.* (Partly dissenting)

1. It is true that Article 22(7)(b) has been held permissive and, therefore, there can be a preventive detention legislation which does not provide for the maximum period of detention and a person can be detained B thereunder for a period longer than one or two years. That, however, cannot justify the view that the provision prescribing maximum period of detention should be construed liberally. When the Parliament has chosen to fix the maximum period, the question as to how the said period is to be computed will have to be decided by considering the object of the legislation and the relevant provision, the words used in that provision and C without being influenced by the nature of power conferred by Article 22(7)(b). [976-F]

2. The distinction between preventive detention and punitive detention has now been well recognised. Preventive detention is qualitatively D different from punitive detention/sentence. A person is preventively detained without a trial but punitive detention is after a regular trial and when he is found guilty of having committed an offence. The basis of preventive detention is suspicion and its justification is necessity. The basis of sentence is the verdict of the Court after a regular trial. When a person is preventively detained his detention can be justified only so long as it is E found necessary when a person is sentenced to suffer imprisonment it is intended that the person so sentenced shall remain in prison for the period stated in the order imposing sentence. The term specified in the order of sentence is intended to be actual period of imprisonment. On the other hand, preventive detention being an action of immediate necessity has to be F immediate and continuous if it is to be effective and the purpose of detention is to be achieved. The justification for preventive detention being necessity, a person can be detained only so long as it is found necessary to detain him. If his detention is found unnecessary, even during the maximum period permissible under the law then he has to be released from detention forthwith. It is really in this context that S.10 and particularly the G words 'may be detained' shall have to be interpreted. [977-A-E]

3. COFEPOSA like all other preventive detention laws has been regarded as a Draconian Law as it takes away the freedom and liberty of the citizen without a trial and on mere suspicion. It is tolerated in a H democracy governed by the rule of law only as a necessary evil. Though the

object of such legislation is to protect the nation and the society against anti national and anti social activities, the nature of action permitted is preventive and not punitive. [976-G-H] A

4. The object of enacting the COFEPOSA Act is to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith. The power to detain is to be exercised on being satisfied with respect to any person that with a view to preventing him from including in any prejudicial activity specified in S.3, it is necessary to make an order for his detention. The satisfaction of the detaining authority must be genuine. Once the detaining authority is satisfied regarding the necessity to make an order of detention.a quick action is contemplated, and if detention is to be effective then it has to be continuous. [977-F-H; 978-B] B C

5. Provisions contained in Sections 8(6), 9 and 12(6) of COFEPOSA clearly indicate the intention of the legislature that once detention starts it must run continuously and that the power to release on bail or otherwise has been taken away as it does not want the period of detention to be curtailed in any manner. Therefore, there is no justification for taking the view that the words 'may be detained' in S.10 contemplate actual detention for the maximum period. If the word 'detain' is interpreted to mean actually detained for the maximum period, then it will partake the character of punitive detention and not preventive detention. [978-F] D E

6. The reason given by this Court in *Poonam Lata*** that the period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, because he was not in actual custody then, does not appear to be sound. A temporary release under S.12, of the person detained does not change his status as his freedom and liberty are not fully restored. Therefore, the period of temporary release on parole cannot be excluded from the maximum period of detention. Though the purpose and object of S.10 is to prescribe not only the maximum period of detention but also for the method of computation of the period, the only inference that can be drawn therefrom is that the period of detention has to be computed from the date of actual detention and not from the date of the order of detention. F G H

A Since S.10 does not prescribe any other method, it is not proper to draw a further inference that the maximum period of detention is to be computed by excluding the period during which the detenu was released on parole. [978-H; 979-A-C]

B 7. The Act contemplates continuous period of detention. If in spite of that any interruption is made in the running of that period then the only effect it can have is to curtail the period of detention. Taking the contrary view that the detenu must serve out the balance period of detention would render the detention punitive after the period of one or two years, as the case may be, counted from the date of detention comes to an C end. [979-F]

8. In *Adam Kasam Bhaya's** case the only question that had arisen for consideration was whether the maximum period of detention starts running from the date of the order of detention or the date of actual D detention. How the maximum period is to be counted when it is interrupted by a Courts' invalid order or by an order of parole was not the question raised or decided in that case. The observation that "if he has served a part of the period of detention he will have to serve out the balance" was made in that context only and it cannot be taken as laying down that if the E prescribed period of detention is thus interrupted then the detenu has to serve out the balance period of detention. [976-A-B]

**State of Gujarat* v. *Adam Kasam Bhaya,* [1981] 4 SCC 216, explained and distinguished.

F 9. If the period of detention is interrupted either by an order of provisional release made under S.12 or by an order of the Court, then the maximum period of detention to that extent gets curtailed and neither the period of parole nor the period during which the detenu was released pursuant to the order of the court can be excluded while computing the G maximum period of detention. [979-H]

Amritlal Channumal Jain Etc. v. *State of Gujarat & Ors.*, WP Nos. 1342-43, 1345-48, 1567/82 and 162/83 decided by Supreme Court on 10.7.1985 and *State of Gujarat* v. *Mohd. Ismail Jumma,* (1981) 4 609, H referred to.

****Poonam Lata v. M.L. Wadhwan, [1987] 3 SCC 347; *Pushpadevi M. Jatia* v. *M.L. Wadhawan,* [1987]3 SCC 367 and *Harish Makhija* v. *State of U.P.,* [1987] 3 SCC 432, overruled.**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 248 of 1988 Etc.

(Under Article 32 of the Constitution of India.)

Soli J. Sorabjee, Attorney General, H.N. Salve, Solicitor General, Kuldeep Singh, Additional Solicitor General, U.R. Lalit, T.U. Mehta, M.G. Karmali, Vineet Kumar, J.B. Patel, Mrs. H. Wahi, M.N. Shroff, A. Subba Rao, P. Parmeshwaran, C.V.S. Rao, K.M.M. Khan, Wasim A. Quadri, B.K. Prasad, Ms. Sunita Hazarika, (Ms. S. Bagga, K.R. Nagaraja) (NP), Tripurari Ray, Herjinder Singh, Ms. Priya Saxena, Pramit Saxena, S.V. Deshpande, Ms. Kamini Jaiswal, Adhyaru Yashank P., Anip Sachthey, Ms. Anu Sawhney, R.P. Wadhwani, (S.V. Deshpande) (NP), Rajiv Dutta, Ms. Meenakshi Kulshrestha and Kapil Sharma for the appearing parties.

The Judgments of the Court were delivered by

DR. A.S. ANAND, CJ. I have had the advantage of going through the judgment of our learned brother Nanavati, J. and I agree that these petitions should be allowed. Long period has lapsed since the detenus in each of these cases were released and no material has been placed before us by the detaining authority to warrant further detention of the detenus at this distant point of time. The detenus, in my opinion need not be directed to undergo "the remaining period of detention" because the nexus between detention and object of detention would appear to have been snapped during this period of about ten years, during which period detenus were free. In fairness to the learned Attorney General it must be stated that he fairly conceded this position. I find myself unable to fully subscribe to the view of brother Nanavati, J. relating to the treatment of the period during which a detenu is free as a result of an erroneous order of the High Court which is set aside on appeal. I would also like to give my own reasons in support of the answer to the other questions involved in these cases.

It would be appropriate to first refer to the order of reference made by a 2-Judge Bench on Ist of May, 1989. That order reads thus :

"This writ petition under Article 32 of the Constitution and the Special Leave Petition under Article 136 of the Constitution arises out of proceedings for preventive detention taken under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. One of the substantial points which arises in these cases is whether the period of detention is a fixed period running from the date specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period or parole granted to the detenu. In case where the High Court allows a habeas corpus petition and directs the detenu to be released and in consequence the detenu is set free, and thereafter an appeal filed in this Court results in the setting aside of the order of the High Court, is it open to this Court to direct the arrest and detention of the detenu if meanwhile the original period of detention intended in the detention order has expired? Four decisions of this Court have been placed before us in support of the contention that the period of detention intended by the detention order is not a fixed period but can be correspondingly extended if the detenu absconds before he can be apprehended and detained or the period of detention is interrupted by an erroneous judgment of a High Court and the detenu is set free. Those cases are *State of Gujarat* v. *Adam Kasam Bhaya,* [1982] 1 S.C.R. 740, *State of Gujarat* v. *Ismail Juma & Ors.,* [1982] 1 S.C.R. 1014, *Smt. Poonam Lata* v. *M.L. Wadhawan and Others,* A.I.R. (1987) SC 1383, and *Pushpadevi M. Jatia* v. *M. L. Wadhawan,* A.I.R. (1987) SC 1748. We find some difficulty in accepting the view taken by the learned Judges of this Court who decided those cases. It seems to us *prima facie* that what is important is that we are concerned with cases of preventive detention, cases where the detaining authority is required to apply its mind and decide whether, and if so for how long, a person should be detained. It is preventive detention and not punitive detention. Prevention detention invariably runs from the date specified in the detention order. In the case of punitive detention, no date is ordinarily specified from which the detention will commence, and all that is mentioned is the period of detention. In case of preventive deten-

tion the detaining authority applies its subjective judgment to the material before it and determines what should be the period for which the detenu should be detained, that is to say, the period during which he should be denied his liberty in order to prevent him from engaging in mischief. It seems to us *prima facie* that one possible view can be that if parole is granted that period of parole should be counted within the total period of detention and not outside it. As regards the problem raised by the release of the detenu pursuant to an erroneous decision of the High Court, and the subsequent reversal of that decision by this Court, the remedy probably lies in the enactment of legislation analogous to s.5(1) and s.15(4) of the Administration of Justice Act, 1960 in the United Kingdom. The question is an important one affecting as it does on the one hand the need for effective measures of preventive detention and on the other the liberty of the subject and his right to freedom from detention beyond the period intended by the statute. As the matter is of great public importance, and most cases of preventive detention are bound to be affected, we refer these cases to a Bench of five Hon'ble Judges for consideration of the law on the point."

From the above order of reference, essentially the substantial questions which arise for our consideration are :

Firstly, whether the period of detention is a fixed period running from the dates specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu. Secondly, in a case where the High Court allows a habeas corpus petition and directs a detenu to be released and in consequence the detenu is set free and thereafter on appeal the erroneous decision of the High Court is reversed, is it open to this Court to direct the arrest and detention of the detenu, to undergo detention for the period which fell short of the original period of detention intended in the detention order on account of the erroneous High Court order.

Brother Nanavati, J. has dealt with various judgments referred to in the order of reference and analysed them. I agree that the judgments in *Harish Makhija* v. *State of U.P.*, [1987] 3 SCC 432, *Poonam Lata* (supra) and *Pushpadevi* (supra) do not lay down the correct law because the

A propositions of law laid down in those judgments, which has been extracted by brother Nanavati, J. have been very widely stated. I do not intend to deal with those judgments and would like to address myself to the questions as noticed above.

B Section 10 of COFEPOSA prescribes not only the maximum period of detention but also the method of computation of that period and on a plain reading of the section, the period of detention is to be computed from the date of *actual detention* and not from the *date of the order* of detention. The period of one or two years, as the case may be, as mentioned in Section 10 will run from the date of the actual detention and not from the date of C the order of detention. Any other interpretation would frustrate the object of an order of detention and a clever person may abscond for the entire period mentioned in the order of detention and thereby render the order of detention useless claiming on being apprehended that the period has already expired'. The view expressed in *Adam Kasam Bhaya's* (supra) case D and *Ismail Juma's* (supra) case, in this behalf lays down the correct law and I adopt that reasoning and hold that the period of detention specified in the order of detention would commence not from the date of the order but from the date of actual detention. That period is the maximum period of detention. Would that period get automatically extended by any period E of parole granted to the detenu is the next question? I shall deal with the other observation in *Adam Kasam Bhaya's* (supra) case viz. "if he has served a part of the period of detention, he will have to serve out the balance" separately, in the later part of this order.

F Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanising the harsh authority over individual liberty. Since, preventive G detention is a form of precautionary state action, intended to prevent a person from indulging in a conduct injurious to the society or the security of State or public order, it has been recognised as "a necessary evil" and is tolerated in a free society in the larger interest of security of State and maintenance of public order. However, the power being drastic, the restric- H tions placed on a person to preventively detain must, consistently with the

effectiveness of detention, be minimal. In a democracy governed by the Rule of Law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. This Court, as the guardian of the Constitution, though not the only guardian, has zealously attempted to preserve and protect the liberty of a citizen. However, where individual liberty comes into conflict with an interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation.

It would be relevant at this stage to notice the provisions of Article 22(4)(a) and (7) of the Constitution.

Article 22(4)(a) of the Constitution provides as follows :

"22 (4)(a) - an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7)."

Clause (7) of Article 22 says :

"Clause (7) - Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

A A combined reading of Clauses (4) and (7) makes it clear that if a law made by Parliament or the State Legislature authorises the detention of a person for a period not exceeding three months, it does not have to satisfy any other constitutional requirement except that it must be within the legislative competence of the Parliament or the State Legislature, as the case may be. (Article 246, Entry 9, List I and Entry 3, List-III of B Seventh Schedule). The Constitution itself permits the parliament and the State Legislature to make law providing for detention, without trial upto a period of three months without any safeguards but where the law seeks to provide for detention for a longer period than three months, it must comply with the constitutional safeguards which are found in sub-clauses C (a) and (b) of Clause (4), though leaving it to the discretion of the detaining authority to decide what should be the maximum period of detention. Outside limit to the period of detention has, however, been laid down by the proviso which says that nothing in sub-clause (a) of Clause (4) shall authorise the detention of any person beyond the maximum period D prescribed by any law made by Parliament under Clause (7). The question whether Parliament is itself bound to prescribe the maximum period of detention under Article 22(7)(b) of the Constitution in order that the proviso to Article 22(4)(e) might operate, is no longer *res-integra*. The issue was considered by a Constitution Bench of this Court in *Fagu Shaw, Etc. Etc.* v. *The State of West Bengal,* [1974] 2 S.C.R. 832, and authoritatively E answered. Since, I respectfully agree with the answer, I need not detain myself to deal with that issue any further.

To answer the question whether the period of detention would stand automatically extended by any period of parole granted to a detenu, we F need to examine the concept and affect of parole more particularly in a preventive detention case.

Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. G Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still H be exercised through the conditions of the bond secured from him. The

literal meaning of the word 'Bail' is surety. In *Halsbury's Law of England* 4th Ed., vol 11, para 166, the following observation succinctly brings out the effect of bail:

> "The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."

'Parole', however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. The dictionary meaning of 'Parole' is :

THE CONCISE OXFORD DICTIONARY - NEW EDITION

> "The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence, on the promise of good behaviour; such a promise, a word of honour."

BLACK'S LAW DICTIONARY - SIXTH EDITION

> "Release from Jail, prison or other confinement after actually serving part of sentence; conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order."

According to *The Law Lexicon P. Ramanatha Aiyar's The Law Lexicon with Legal Maxims, Latin Terms and Words & Phrases*; p. 1410., 'parole' has been defined as :

> "A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole."

According to *Words and Phrases (Permanent Edition)* vol. 31; pp. 164, 166, 167; West Publishing Co. :

A "'Parole' ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. People ex rel. *Rainone* v. *Murphy,* 135 N.E. 2d 567, 571, 1 N.Y. 2d 367, 153 N.Y.S. 2d 21, 26.

'Parole' does not vacate sentence imposed, but is merely a
B conditional suspension of sentence. *Wooden* v. *Goheen,* Ky., 255 S.W. 2d 1000, 1002."

"A 'parole' is not a 'suspension of sentence', but is a substitution, during continuance of parole, of lower grade of punishment
C by confinement in legal custody and under control of warden within specified prison bounds outside the prison, for confinement within the prison adjudged by the court. *Jenkins* v. *Madigan,* C.A. Ind., 211 F. 2d 904, 906.

"A 'parole' does not suspend or curtail the sentence originally
D imposed by the court as contrasted with a 'commutation of sentence' which actually modifies it."

In this country, there are no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure does not
E contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking an administrative action. The distinction between grant of bail and parole has been clearly brought out in the judgment of this Court in *State of Haryana* v. *Mohinder Singh* JT (2000) 1 SC 629, to which one of us (Wadhwa, J.)
F was a party. That distinction is explicit and I respectfully agree with that distinction.

Thus, it is seen that 'parole' is a form of "temporary release" from custody, which does not suspend the sentence or the period of detention,
G but provides conditional release from custody and changes the mode of undergoing the sentence. COFEPOSA does not contain any provision authorising the grant of parole by judicial intervention. As a matter of fact, Section 12 of COFEPOSA, which enables the administration to grant *temporary release* of a detained person expressly lays down that the *Government may direct* the release of a detenu for any specified period either
H without conditions or upon such conditions as may be specified in the order

granting parole, which the parolee accepts. Sub-section (6) of Section 12 lays down :

> "*Section 12(6)* - Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise."

Section 12(6) starts with a non-obstante clause and mandates that no person against whom a detention order made under COFEPOSA is in force shall be released 'whether on bail or bail bond or otherwise'. The prohibition is significant and has a purpose to serve. Since, the object of preventive detention is to keep a person out of mischief in the interest of the security of the State or public order, judicial intervention to release the detenu during the period an order of detention is in force has to be minimal. Under Section 12(1) or 12(1A), it is for the State to see whether the detenu should be released temporarily or not keeping in view the larger interest of the State and the requirements of detention of an individual. Terms and conditions which may be imposed while granting order of temporary release are also indicated in the other clauses of Section 12 for the guidance of the State. Clause (6) in terms prohibits the release of a detenu, during the period an order of detention is in force, '*on bail* or *bail bond* or *otherwise*'. The expression 'or otherwise' would include release of the detenu even on parole through judicial intervention.

Thus, parole, *stricto-senso* may be granted by way of a temporary release as contemplated by Section 12(1) or 12(1A) of COFEPOSA by the Government or its functionaries, in accordance with the Parole Rules or administrative instructions, framed by the Government which are administrative in character and shall be subject to the terms of the Rules or the instructions, as the case may be. For securing release on parole, a detenu has, therefore, to approach the Government concerned or the jail authorities, who may impose conditions as envisaged by Section 12(2) etc. and the grant of parole shall be subject to those terms and conditions. The Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in clause (6) of Section 12. Temporary release of a detenu can only be ordered by the Government or an Officer subordinate to the

A Government whether Central or State. I must, however, add that the bar of judicial intervention to direct temporary release of a detenu would not effect the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Articles 32, 136 or 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified B period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the court leaves it to the administrative or jail authorities to prescribe the conditions and C terms on which parole is to be availed of by the detenu.

Since, release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted D towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instruc- E tions, has to be *included* as a part of the total period of detention because of the very nature of parole. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period - it does not interrupt the period of detention - it only changes the mode of detention by restraining the movement of the detenu in F accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this period of G temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody. Thus, cases which are covered by Section 12 of COFEPOSA, the period of temporary release would be governed by the conditions of release whether contained in the H order or the rules or instructions and where the conditions do not prescribe

it as a condition that the period during which the detenu is out of custody, should be excluded from the total period of detention, it should be counted towards the total period of detention for the simple reason that during the period of temporary release the detenu is deemed to be in constructive custody. In cases falling outside Section 12, if the interruption of detention is by means not authorised by law, then the period during which the detenu has been at liberty, cannot be counted towards period of detention while computing the total period of detention and that period has to be excluded while computing the period of detention. The answer to the question, therefore, is that the period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention.

Coming now to the next question and the other observations made in *Adam Kasam Bhuya's* (supra) case, viz., "if he has served a part of the period of detention, he will have to serve out the balance".

The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court. A detenu need not be sent back to undergo the remaining period of detention after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there *still* exists a proximate temporal nexus between the period of detention prescribed when the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of 'further' or 'continued' detention. Where, however, long time has *not* lapsed or the period of detention initially fixed in the order of detention has also not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the Appellate Court considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an

A erroneous order should be excluded while computing the total period of detention as indicated in the order of detention, though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a 'set off' against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescrip-
B tion of the statute.

The summary of my conclusions by way of answer to the questions posed in the earlier portion of this order are :

C 1. Personal liberty is one of the most cherished freedoms, perhaps more important than the other freedoms guaranteed under the Constitution. It was for this reason that the Founding Fathers enacted the safeguards in Article 22 in the Constitution so as to limit the power of the State to detain a person without trial, which may otherwise pass the test of
D Article 21, by humanising the harsh authority over individual liberty. In a democracy governed by the Rule of Law, the drastic power to detain a person without trial for security of the State and/or maintenance of public order, must be strictly construed. However, where individual liberty comes into conflict with an interest of the security of the State or public order,
E then the liberty of the individual must give way to the larger interest of the nation;

2. That Section 10 of COFEPOSA prescribes not only the maximum period of detention but also the method of computation of that period and on a plain reading of the section, the period of detention is to be computed
F from the date of *actual detention* and not from the *date of the order* of detention;

3. That parole, *stricto-senso* may be granted by way of a temporary release as contemplated by Section 12(1) or 12(1A) of COFEPOSA by the
G Government or its functionaries, in accordance with the Parole Rules or administrative instructions, framed by the Government which are administrative in character. For securing release on parole, a detenu has, therefore, to approach the Government concerned or the jail authorities, who may impose conditions as envisaged by Section 12(2) etc. and the grant
H of parole shall subject to those terms and conditions;

4. That the Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in Clause (6) of Section 12. The bar of judicial intervention to direct temporary, release of a detenu would not, however effect the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Articles 32, 136, 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised it is appropriate that the court leaves it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu;

5. That parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise;

6. The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court.

A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there *still* exists a proximate temporal nexus between the period of detention indicated in the order by which the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of 'further' or 'continued' detention;

7. That where, however, long time has *not* lapsed or the period of detention initially fixed in the order of detention has not expired, the

A detenu may be sent back to undergo the balance period of detention. It is open to the Appellate Court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention though normally the period during which the detenu was free on the basis of such B an erroneous order may not be given as a 'set off' against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute.

C The above is not a summary of the judgment but shall have to be read along with the judgment.

Consequently, the writ petitions are allowed and the special leave petition is disposed of in terms of the above order.

D **G.T. NANAVATI, J.** A short but a question of law of general importance that arises for consideration in this case is whether the period of detention is a fixed period running from the date specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu.

E The Gujarat High Court allowed the Writ Petition of Sunil Fulchand Shah (Petitioner in S.L.P. (Crl.) No. 1492 of 1988) partly and quashed the notification under Section 9(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short refer to as 'COFEPOSA Act'), but upheld the order of detention and directed that F the detenu shall have to undergo detention for a period of one year from the date of his arrest in pursuance of the order of detention, excluding the period during which he was out as a result of its earlier order quashing the detention. He has, therefore, filed S.L.P. (Criminal) No. 1492 of 1988 challenging the said direction. In Writ Petition (Criminal) No. 248 of 1988 filed by him under Article 32 of the Constitution he has challenged his G continued detention as illegal on the ground that the one year period which had started running from 4.7.1986, the date on which he was detained pursuant to the detention order, expired on 3.7.1987 and his detention thereafter is without any authority of law. Sanjeev Kumar Agarwal is the petitioner in Writ Petition (Criminal) No. 831 of 1990. He has challenged H the order passed by the Central Government rejecting the representation

made by his wife for his release on 23.7.1990 on completion of one year from the date of his detention and not to extend his detention till 20.12.1990 by adding the period for which he was on parole. After hearing the writ petition and S.L.P. filed by Sunil, a three Judge Bench of this Court on 1.5.1989 ordered that as the matter is of great public importance, these cases may be referred to a Bench of five Hon'ble Judges. Two learned Judges constituting the Bench (Pathak, CJI and M.N. Venkatachaliah, J.) referred to the four decisions of this Court in *State of Gujarat* v. *Adam Kasam Bhaya,* [1981] 4 SCC 216, *State of Gujarat* v. *Mohd. Ismail Juma,* [1981] 4 SCC 609, *Poonam Lata* v. *M.L. Wadhawan,* [1987] 3 SCC 347 and *Pushpadevi M. Jatia* v. *M.L. Wadhawan,* [1987] 3 SCC 367, which support the view that the period of detention intended by the detention order is not a fixed period but can be correspondingly extended if the detenu absconds before he can be apprehended and detained or the period of detention is interrupted by erroneous judgment of the High Court and the detenu is set free or the detenu is released on parole. They found some difficulty in accepting that view as correct. They further observed : "it seems to us *prima facie* that one possible view can be that if parole is granted the period of parole should be counted within the total period of detention and not outside it". The third learned Judge (L.M. Sharma, J.) agreed with the views expressed in *Adam Kasam Bhaya's* case and the other three cases referred to above; yet, he also agreed that in view of the great public importance of the point involved these cases deserve to be heard by a Bench of five Hon'ble Judges. As question raised in the writ petition filed by Sanjeev Kumar is also the same, it has been ordered to be heard with Writ Petition (Criminal) No. 248 of 1988 filed by Sunil. That is how these three cases are placed for hearing before a five Judge Bench of this Court.

Section 3 of the COFEPOSA Act confers power on the Central Government, State Government and their officers if specially empowered, to make an order for detention against a person engaged in certain prejudicial activities specified in that section. Section 10 prescribes the maximum period for detention. It provides that the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 do not apply, shall be one year from the date of detention and the maximum period for which any person may be detained in pursuance of any detention order to which the provisions of Section 9 apply, shall be two years from the date of detention. Section 11 of the Act confers power on the State Government and the Central

A Government to revoke or modify the detention order. Sub-section 2 of that section, however, provides that the revocation of a detention order shall not bar the making of another detention order under Section 3 against the same person. Section 12 authorises the Government to release the person detained for any specified period either without conditions or upon such conditions as that person accepts. The Government has the power under B that section to cancel his release. The person so ordered to be released may be required to enter into a bond with sureties for the due observance of the conditions on which he is released. If the person so released fails without sufficient cause to surrender himself, he becomes liable to be punished with imprisonment for a term which may extend to two years, or C with fine, or with both. Notwithstanding anything contained in any other law, Section12 prohibits release of a person against whom a detention order is made, whether on bail or bail bond or otherwise.

A bare reading of Section 10 makes it clear that the maximum period D for which a person can be preventively detained under the COFEPOSA Act is one year from the date of detention. But if a declaration is made under Section 9(1) of the Act, then the maximum period for which he can be detained is two years from the date of detention. The period of one year or two years, as the case may be, has to be counted from the date of detention and from the date of the detention order. Though the Act E permits revocation of the detention order and making of another detention order against the same person, it does not specifically provide what shall be the maximum period of detention in such a case. But it has been held that the total period of detention cannot exceed one year or two years, as the case may be. Section 12 which confers power on the Government to F release temporarily a person detained does not specifically provide as to how that period is to be counted while computing the maximum period of detention.

The question as to the date from which the period of detention has to be counted was raised for the first time before this Court in *Adam* G *Kasam Bhaya's* case. In that case the detenu was detained under COFEPOSA pursuant to order of detention dated May 7, 1979. The High Court of Gujarat quashed the order of detention. The State preferred an appeal to this Court and when it came up for hearing on September 15, 1981, a preliminary objection was raised on behalf of the detenu that, as H the maximum period of detention permitted under Section 10 had expired,

the appeal had become infructuous. Dealing with that objection this Court held as under :

> "In our opinion, the submission has no force. In Section 10, both in the first and the second part of the section, it has been expressly mentioned that the detention will be for a period of one year or two years, as the case may be, from the date of detention, and not from the date of the order of detention. If the submission of learned counsel be accepted, two unintended results follow : (1) a person against whom an order of detention is made under Section 3 of the Act can successfully abscond till the expiry of the period and altogether avoid detention; and (2) even if the period of detention is interrupted by the wrong judgment of a High Court, he gets the benefit of the invalid order which he should not. The period of one or two years, as the case may be, as mentioned in section 10 will run from the date of his actual detention, and not from the date of the order of detention. If he has served a part of the period of detention, he will have to serve out the balance. The preliminary objection is overruled."

A similar preliminary objection was raised in the case of *Mohd. Ismail Jumma's* case (supra) and following the decision in *Adam Kasam Bhaya* it was overruled.

In *Poonam Lata* a contention was raised that the period of parole cannot be added to the period of detention. The reasons put forward in support of this contention were : (1) as there is no provision authorising interruption of running of the period of detention, release on parole does not bring about any change in the situation; (2) preventive detention is not a sentence by way of punishment and, therefore, the concept of serving out which pertains to punitive jurisprudence cannot be imported into the realm of preventive detention and (3) even though grant of parole to a detenu amounts to a provisional release from confinement; yet the detenu continues to be under restrains as he would still be subject to restrictions imposed on free and unfettered movement. Dealing with the first reason this Court observed :

> "Since in our view release on parole is a matter of judicial determination, apparently no provision as contained in the Code of Criminal Procedure relating to the computation of the period of bail was thought necessary in the Act."

A Dealing with the other two reasons this Court held as under :

"The key to the interpretation of Section 10 of the Act is in the words 'may be detained'. The subsequent words 'from the date of detention' which follow the words 'maximum period of one year' B merely define the starting point from which the maximum period of detention of one year is to be reckoned in a case not falling under Section 9. There is no justifiable reason why the word 'detain' should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, Vol. 1, p.531, the word 'detain' means "to keep in confinement or custody". Webster's C Comprehensive Dictionary, International Edition at p.349 gives the meaning as "to hold in custody". The purpose and object of Section 10 is to prescribe a maximum period for which a person against whom a detention order under the Act is made may be held in actual custody pursuant to the said order. It would not be violated D if a person against whom an order of detention is passed is held in actual custody in jail for the period prescribed by the section. The period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, for in such a case he was not in actual custody. The order of detention prescribes the place where the E detenu is to be detained. Parole brings him out of confinement from that place. Whatever may be the terms and conditions imposed for grant of parole, detention as contemplated by the Act is interrupted when release on parole is obtained. The position would be well met by the appropriate answer to the question "how long has the detenu been in actual custody pursuant to the order?" F According to its plain construction, the purpose and object of Section 10 is to prescribe not only for the maximum period but also the method by which the period is to be computed. The computation has to commence from the date on which the detenu is taken into actual custody but if it is interrupted by an order of G parole, the detention would not continue when parole operates and until the detenu is put back into custody. The running of the period recommences then and a total period of one year has to be counted by putting the different period of actual detention together. We see no force in Shri Jethmalani's submission that the period during which the detenu was on parole has to be taken into H consideration in computing, the maximum period of detention

authorised by Section 10 of the Act." A

In *Pushpa Devi* this Court reiterated the same view with some more elaboration. With respect to the first reason this Court observed:

> "It will not be out of place to point out here that in spite of the Criminal Procedure Code providing for release of the convicted B offenders on probation of good conduct, it expressly provides, when it comes to a question of giving set off to a convicted person in the period of sentence, that only the actual pre-trial detention period should count for set off and not the period of bail even if bail had been granted subject to stringent conditions. In contrast, C insofar as preventive detentions under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, are concerned, the Act specifically lays down that a person against whom an order of detention has been passed shall not be released on bail or bail bond or otherwise [vide Section 12(6) of the Act] and that any revocation or modification of the order of detention D can be made only by the government in exercise of its powers under Section 11. Incidentally, it may be pointed out that by reason of sub-section (6) of Section 12 of the Act placing an embargo on the grant of bail to a detenu there was no necessity for the legislature to make a provision similar to sub-section (4) of Section E 389 of the Code of Criminal Procedure,1973 [corresponding to sub-section (3) of Section 426 of the Code] for excluding the period of bail from the term of detention period."

As regards the status of the detenu who is released on parole this Court observed as under : F

> "Even if any conditions are imposed with a view to restrict the movements of the detenu while on parole, the observance of those conditions can never lead to an equation of the period of parole with the period of detention. One need not look far off to see the G reason because the observance of the conditions of parole, wherever imposed, such as reporting daily or periodically before a designated authority, residing in a particular town or city, travelling within prescribed limits alone and not going beyond etc. will not prevent the detenu from moving and acting as a free agent H

A during the rest of the time or within the circumscribed limits of travel and having full scope and opportunity to meet people of his choice and have dealings with them, to correspond with one and all and to have easy and effective communication with whomsoever he likes through telephone, telex etc. Due to the spectacular B achievements in modern communication system, a detenu, contacts with all his relations, friends and confederates in any part of the country or even any part of the world and thereby pursue his unlawful activities if so inclined. It will, therefore, be futile to contend that the period of parole of a detenu has all the trappings C of actual detention in prison and as such both the periods should find a natural merger and they stand denuded of their distinctive characteristics. Any view of the contrary would not only be opposed to realities but would defeat the very purpose of preventive detention and would also lead to making a mockery of the preventive detention laws enacted by the Central or the States."

D

With respect to the object and purpose of the preventive detention this Court observed that :

"The entire scheme of preventive detention is based on the boun- E den duty of the State to safeguard the interests of the country and the welfare of the people from the canker of anti national activities by anti-social elements affecting the maintenance of public order or the economic welfare of the country. Placing the interests of the nation above the individual liberty of the anti-social and dangerous F elements who constitute a grave menace to society by their unlawful acts, the preventive detention laws have been made for effectively keeping out of circulation the detenus during a prescribed period by means of preventive detention. The objective underlying preventive detention cannot be achieved or fulfilled if the detenu is granted parole and brought out of detention."

G

In *Poonam Lata* case this court referred to its two earlier orders passed in *Harish Makhija* v. *State of U.P.*, [1987] 3 SCC 432 and *Amritlal Channumal Jain Etc.* v. *State of Gujarat & Ors.*, in W.P. Nos. 1342-43, 1345-48, 1567/82 and 162/83. The order passed in *Harish Makhija's* case on H 11.2.1985 was as under :

"It is obvious that the period of parole cannot be counted towards the period of detention. The petitioner should surrender and serve out remaining period of 141 days' detention." A

A three Judge Bench thereafter on 10.7.1985 in *Amritlal Channumal Jain's* case directed that B

"In-so-far as these cases are concerned, the period during which the petitioners were on parole shall be taken into account while calculating the total period of detention. The order of detention was passed more than two and half years ago." C

Rejecting the contention that the ratio laid down by the larger Bench in *Amritlal Channumal Jain's* case has to prevail and must be taken as binding, this Court observed as under :

"We find it difficult from the observations made by a three Judge Bench in *Amritlal Channumal Jain's* case to infer a direction by this Court that a period of parole shall not be added to the period of detention. The words used 'shall be taken into account' are susceptible of an interpretation to the contrary. We find that an order made by a bench of two Judges of this Court in *Harish Makhija's* case (supra) unequivocally laid down that the period of parole cannot be counted towards the period of detention. This accords with the view taken by this Court in a Bench of two Judges in *State of Gujarat* v. *Adam Kasam Bhaya,* [1981] 4 SCC 216 and *State of Gujarat* v. *Ismail Juma,* [1981] 4 SCC 609. In view of these authorities which appear to be in consonance with the object and purpose of the Act and the statutory provisions and also having regard to the fact that the direction made in *Amritlal Channumal Jain's* case is capable of another construction as well, do not find Shri Jethmalani's contention on this score as acceptable." D E F

With respect to the orders we may observe that no reasons were given in support of the view taken in those cases. Therefore, it is not necessary to go into the controversy whether this Court laid down any law on the point in *Harish Makhija's* case or that the order passed in the case of *Amritlal Channumal Jain's* case was binding and ought to have been followed by this Court while deciding *Poonam Lata* case. G H

A We may also state that in Adam Kasam Bhaya case the only question that had arisen for consideration was whether the maximum period of detention starts running from the date of the order of detention or the date of actual detention. How the maximum period is to be counted when it is interrupted by a Court's invalid order or by an order of parole was not the B question raised or decided in that case. The observation that "if he has served a part of period of the period of detention he will have to serve out the balance" was made in that context only and it cannot be taken as laying down that if the prescribed period of detention is thus interrupted then the detenu has to serve out the balance period of detention.

C

It was contended by the learned Attorney General that Section 10 and particularly the words 'may be detained' have to be read in the context of Article 22(7)(b) of the Constitution and if they are so read, also keeping in mind the object and purpose of the Act, then correctly interpreted they D would mean 'may be actually detained'. He submitted that Article 22(7)(b) is permissive, it being not obligatory on Parliament to prescribe the maximum period of detention. Mr. Harish N. Salve, learned Solicitor General appearing for the State of Gujarat, also submitted that the Constitution thus contemplates longer period of detention in the sense that in absence of any limit prescribed by the Parliament detention can be for a E period longer than one or two years. It is true that Article 22(7)(b) has been held permissive and, therefore, there can be a preventive detention legislation which does not provide for the maximum period of detention and a person can be detained thereunder for a period longer than one or two years. That, however, cannot justify the view that the provision F prescribing maximum period of detention should be construed liberally. When the Parliament has chosen to fix the maximum period, the question as to how the said period is to be computed will have to be decided by considering the object of the legislation and the relevant provision, the words used in that provision and without being influenced by the nature of power conferred by Article 22(7)(b). COFEPOSA, like all other preventive G detention laws, has been regarded as a Draconian Law as it takes away the freedom and liberty of the citizen without a trial and on mere suspicion. It is tolerated in a democracy governed by the rule of law only as a necessary evil. Though the object of such legislation is to protect the nation and the society against anti national and anti social activities, the nature of action H permitted is preventive and not punitive. The distinction between preven-

tive detention and punitive detention has now been well recognized. Preventive detention is qualitatively different from punitive detention/sentence. A person is preventively detained without a trial but punitive detention is after a regular trial and when he is found guilty of having committed an offence. The basis of preventive detention is suspicion and its justification is necessity. The basis of sentence is the verdict of the Court after a regular trial. When a person is preventively detained his detention can be justified only so long as it is found necessary. When a person is sentenced to suffer imprisonment it is intended that the person so sentenced shall remain in prison for the period stated in the order imposing sentence. The term specified in the order of sentence is intended to be actual period of imprisonment. On the other hand, preventive detention being an action of immediate necessity has to be immediate and continuous if it is to be effective and the purpose of detention is to be achieved. The safeguards available to a person against whom an order of detention has been passed are limited and, therefore, the Courts have always held that all the procedural safeguards provided by the law should be strictly complied with. Any default in maintaining the time limit has been regarded as having the effect of rendering the detection order or the continued detention, as the case may be, illegal. The justification for preventive detention being necessity a person can be detained only so long as it is found necessary to detain him. If his detention is found unnecessary, even during the maximum period permissible under the law then he has to be released from detention forthwith. It is really in this context that section 10 and particularly the words 'may be detained' shall have to be interpreted.

The object of enacting the COFEPOSA Act is to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith. The Act was enacted as violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State. The power to detain is to be exercised on being satisfied with respect to any person that with a view to preventing him from including in any prejudicial activity specified in Section 3, it is necessary to make an order for his detention. The satisfaction of the detaining authority must be genuine. It has, therefore, been held that there must be a live and proximate link between the grounds of detention and the purpose of detention. Unreasonable delay in making of an order

A of detention may lead to an inference that the subjective satisfaction of the authority was not genuine as regards the necessity to prevent the person from indulging in any prejudicial activity and to make an order of detention for that purpose. So also long and unexplained delay in execution of the order has been held to lead to an inference that satisfaction was not
B genuine. Once the detaining authority is satisfied regarding the necessity to make an order of detention a quick action is contemplated, and if detention is to be effective then it has to be continuous. Section 8(b) requires the appropriate Government to make a reference to the Advisory Board within five weeks from the date of detention of the person under a detention order, in cases where Section 9 does not apply. Considering the
C object of this provision it can be said that the period of five weeks will have to be counted from the date of detention and it cannot get enlarged or extended because the detenu is provisionally released either by the Court or by the Government during that period. Once an order of detention is made and the person is detained pursuant thereto, then suspension is not
D contemplated and it can only be revoked or modified. That the detention can be effective only if it is not interrupted is indicated by Section 12(6) which provides that notwithstanding anything contained in any other law, no person against whom a detention order is in force shall be released whether on bail or otherwise. However, the power has been conferred upon the Government to release the detenu for any specified period. In our
E opinion, all these provisions clearly indicates the intention of the legislature that once detention starts it must run continuously and that the power to release on bail or otherwise has been taken away as it does not want the period of detention to be curtailed in any manner. I, therefore, see no justification for taking the view that the words 'may be detained' in
F Section 10 contemplate actual detention for the maximum period. If the word 'detain' is interpreted to mean actually detained for the maximum period, then it will partake the character of punitive detention and not preventive detention.

G The reason given by this Court in *Poonam Lata* case that the period during which the detenu is on parole cannot be said to be a period during which he has been held in custody pursuant to the order of his detention, because he was not in actual custody then, does not appear to be sound. The learned Attorney General also contended that the said observation requires reconsideration as it is possible to take the view that a person
H temporarily released under Section 12 is in constructive custody. The

learned Solicitor General also submitted that in spite of an order under Section 12 it can be said that the detenu is not a free person during that period as his freedom and liberty would be subject to the conditions imposed by the Government. A temporary release under Section 12 of the person detained does not change his status as his freedom and liberty are not fully restored. Therefore, the period of temporary release on parole cannot be excluded from the maximum period of detention. Though the purpose and object of Section 10 is to prescribe not only the maximum period of detention but also for the method of computation of the period as contended by the learned Attorney General, the only inference that can be drawn therefrom is that the period of detention has to be computed from the date of actual detention and not from the date of the order of detention. Since Section 10 does not prescribe any other method, it is not proper to draw a further inference that the maximum period of detention is to be computed by excluding the period during which the detenu was released on parole. It was also contended by the learned Attorney General that the detenu cannot be permitted to take advantage of an order of parole or an invalid judgment of the Court. In such a case, there is not the question of extending the period of detention but ensuring that the original period of one year is worked out. It will not amount to punishing the detenu for any wrong done by the Court but it would amount to not permitting the detenu to take advantage of an order of parole or a wrong judgment or order of the Court. For the reasons already stated above, even this contention cannot be accepted. The Act contemplates continuous period of detention. If in spite of that any interruption is made in the running of that period then the only effect it can have is to curtail the period of detention. Taking the contrary view that the detenu must serve out the balance period of detention would render the detention punitive after the period of one or two years, as the case may be, counted from the date of detention comes to an end.

I, therefore, hold that *Harish Makhija, Poonam Lata* and *Pushpa Devi* do not lay down the correct law on the point. I further hold that if the period of detention is interrupted either by an order of provisional release made under Section 12 or by an order of the Court, then the maximum period of detention to that extent gets curtailed and neither the period of parole nor the period during which the detenu was released pursuant to the order of the court can be excluded while computing the

A maximum period of detention.

In the result, I allow both the Writ Petitions and also dispose of the Special Leave Petition in terms of the view that we have taken in this judgment.

B T.N.A. W.P. allowed and SLP disposed of.