IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3706 OF 2023

Mahesh Ramdas Jejurkar .. Petitioner

Versus

The Union of India & Ors. .. Respondents

...

Ms.A.M.Z. Ansari with Nasreen Ayushi for the Petitioner.

Mr.Sandesh Patil with Mr.Chintan Shah, Mr.Krishnakant Deshmukh, Mr.Shubhankar Kulkarni and Ms.Anusha Amin for the Respondent No.1/Union of India.

Mr.Advait M.Sethna with Poushali Roychoudhary and Raju R. Thakker for the Respondent No.4.

Mr.J.P.Yagnik, A.P.P. for the State/Respondent.

...

CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
DATED : 02nd JULY, 2024

JUDGMENT (Per Bharati Dangre, J.):-

1. Detenu-Rakesh Ramdas Jejurkar, detained by the Joint Secretary to the Government of India, under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, **"COFEPOSA Act"**) on 03/10/2023, has approached this Court through the Petitioner, his brother, seeking a Writ of Habeas Corpus or any other appropriate writ for quashing and setting aside the impugned order.

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2. Rule was issued on 10/11/2023 and by consent of the parties, we have taken the Petition for final hearing.

We have heard Ms.Ansari for the Petitioner and Mr.Sandesh Patil for the Respondent Nos.1, 2 and 4.

3. The Detaining Authority, being the Joint Secretary to the Government of India, in exercise of powers conferred under Section 3(1) of COFEPOSA Act, directed detention of the detenu, since he was satisfied that it was necessary to detain him, with a view to prevent him from smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future.

Pursuant to the order of detention being passed, the detenu was communicated the grounds for detention, which comprised of the report forwarded by the Sponsoring Authority i.e. the Directorate of Revenue Intelligence, Mumbai Zonal Unit. By referring to the material, the Detaining Authority arrived at the conclusion that the detenu is habitual offender and the material put forth by DRI, including seizure made and the confessional and corroborative statement, brought about sufficient material about his role as a key player in and being an organiser of smuggling of Areca nuts from Dubai in India. In a systematic manner, he was co-ordinating and arranging in conjunction with an overseas entity.

The Detaining Authority, from the material placed before him, took note of the manner in which the detenu meticulously planned the entire *modus operandi* of smuggling areca nuts by mis-declaring the same as other goods such as ‘quick lime

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lumps' or 'gypsum powder' and the smuggled areca nuts would get replaced by the declared goods, while in transit from the port to the CFS area and it was diverted into the domestic market.

4. The grounds of detention communicated to the detenu clearly set out as under :-

> "2. In view of the facts, circumstances, findings, corroborative evidences and your role in the whole operation, I am satisfied that Shri Rakesh Ramdas Jejurkar i.e. you are an important member of a well-organized smuggling syndicate involved in smuggling of huge quantity of Areca Nuts by way of mis-declaration of imported goods and fraudulently procuring IECs in the name of third persons. Your past record shows that your are a habitual offender and involved in such prejudicial activities in a repeated manner. The underlying common threat is your propensity to smuggle goods for making illicit profit and putting the national economy into danger which needs to be curbed and you need to be prevented from indulging in such activities further.
>
> 3. I am satisfied that Shri Rakesh Ramdas Jejurkar i.e. you have indulged in activities amounting to smuggling in terms of Section 2(39) of the Customs Act, 1962 read with Section 2(e) of COFEPOSA Act, 1974 and your acts of deliberate commissions and omissions have rendered the goods involved liable to confiscation under the Customs Act, 1962.
>
> 4. I am satisfied that, as evidenced above and as discussed in the foregoing paras that Shri Rakesh Ramdas Jejurkar i.e. you have shown a general habit and propensity to indulge in smuggling goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods at the cost of government revenue and national security and with the clear motive of enriching yourself with no concern to the general economy and the national security interests.
>
> 5. ....
>
> 9. I consider it to be against public interest to disclose the source of information at the relevant paragraphs of the Grounds above.

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> 10. While passing the Detention Order under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, I have relied upon the documents mentioned in the enclosed list, which are also being served to you along with the Grounds of Detention."

5. The aforesaid detention order is challenged by the Petitioner on various grounds and Ms.Ansari has specifically relied upon the following ground in the Petition.

> ".....The Petitioner says and submits that the detaining authority after considering the material placed before him can issue detention order against such person under various categories or some of the categories mentioned under Section 3(1) of the Cofeposa Act. The Petitioner says and submit that the detaining authority while issuing the impugned order of detention against the person should be sure for which category he wants to detained the person concern. The Petitioner says and submits that in the present case the detaining authority has issued detention order under Sections 3(1)(i), 3(1) (ii) and 3(1) (iii) of the Cofeposa Act. The Petitioner says and submits that U/s. 3(1) (iii) of Cofeposa Act there are various categories mentioned. The Petitioner says and submits that the detaining authority recording the is required satisfaction should while be conscious of the fact that under which category he wants to detained the detenu. The Petitioner says and submits that in the present case the detaining authority has used the disjunctive word "or" instead of conjunctive word "and" as the detaining authority was not sure for which category he wants issue impugned detention order against the detenu. The Petitioner says and submits that this shows non-application of mind on the part of detaining authority and a casual and cavalier exercise of the power of the detaining by the detaining authority. The Petitioner says and submits that the subjective satisfaction arrived at by the detaining authority is sham and unreal. The impugned order of detention based on such subjective satisfaction is malafide, null and void.

6. In assailing the order of detention, Ms.Ansari has submitted that the order expressing satisfaction lacks clarity

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as the Detaining Authority has exercised the satisfaction to detain the detenu under the COFEPOSA Act, 1974, with a view to prevent him from smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future and, since, the order itself refers to the distinct acts in disjunction, in absence of an opinion being formed as to which activity of the detenu is intended to be prevented by exercising the power under the COFEPOSA Act, the impugned order passed suffers from the vice of arbitrariness and cannot be sustained is her submission.

She would place reliance upon the decision of the Apex Court in the case of ***Kishori Mohan Bera Vs. The State of W.B.***[1], where a detenu detained under the Maintenance of Internal Security Act, 1971 was released, as the detention order recorded that his detention was necessary to prevent the detenu from acting in manner prejudicial to the "maintenance of public order or security of the State" and since it was noticed by the Apex Court that either the Magistrate was not certain whether the activities of the detenu endangered public order or security of the State or that he merely reproduced mechanically the language, and hence the order was invalid on that ground.

Another decision which followed the earlier law, laid down in the case of ***Akshoy Konai Vs. State of W.B.***[2], is also placed on record to substantiate her contention.

1 AIR 1972 SC 1749
2 AIR 1973 SC 300

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7. Mr.Sandesh Patil, representing UOI has opposed the ground on which the detention order is assailed and he would place reliance upon a decision of the Madras High Court in the case of ***Mrignaini Kanwar Vs. State of Tamil Nadu Rep. by the Joint Secretary to Govt., Public (S.C.) Department & Anr.***[3], where the same point arose for consideration, and somehow similar argument was advanced, that detaining authority was not certain, whether the alleged activities related to one of the acts falling under the clauses stipulated in section 3(1) of the COFEPOSA Act or that he did not seriously apply his mind on the question whether the said alleged activities fell under one head or the other or both and, hence, the order is bad in law.

The said argument, according to Mr.Patil, was turned down, by formulating the following issue for consideration:-

> "18. True, in the abovesaid paragraph, the disjunctive 'or' is used with reference to Cl.(iii) presumably copying down the exact words used in the said clause. The question for consideration is whether the use of the disjunctive 'or' instead of the conjunctive 'and' would in this case spell out that the detaining authority had not at all applied his mind with regard to the specific activity or activities of the detenu, in respect of which the detenu was sought to be prevented, but mechanically used the language rendering the preventive order bad."

8. By referring to the various authoritative pronouncements, an inference was drawn that the use of disjunctive 'or' will not lead to an inference that the detaining authority, without applying mind, has passed the impugned order with an element of casualness, by mechanically reproducing the language used in Section 3(1) of the Act and,

3 1984 SCC OnLine Mad 478

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therefore, the challenge to the order on the said ground is rejected.

In addition, Mr.Patil has also placed reliance upon a view adopted by the Karnataka High Court in the case of ***G.K.Kantharaja Setty Vs. State of Karnataka & Anr.***[4], where the Division Bench, by relying upon ***Kishori Mohan Bera*** (supra) did not accept the argument, but made the following pertinent observations :-

> "41. It is needless to state that the smuggling activity involves clandestine operations and for its successful functioning various links are necessary; not only bringing of the contraband goods into India but also aiding the subsequent operations so that the goods may reach the purchasers or the consumers, successfully; are necessary. Whoever knowingly partakes in any of the activities will have to be prevented from indulging in such an activity so that the object of the Act can be achieved. It is in this background the word 'dealing' used in S.3(1)(iv) will have to be construed and if so construed, it will net in any activity by which the contraband goods are carried for ??? illegal purposes."

9. In all fairness, Mr.Patil has also invited our attention to the decision of the Division Bench of this Court in the case of ***Naresh Kumar Sachadeva Vs. The State of Maharashtra & Ors. (Writ Petition No.2530 of 2010 decided on 09/09/2010***), where similar contention received acceptance in the wake of the authoritative pronouncement of the Apex Court in the case of ***Kishori Mohan Bera*** (supra).

10. We have considered the rival submissions in light of the specific provision under the COFEPOSA Act 1974, which permit detention of an accused to prevent him from smuggling

4 1987 SCC OnLine Kar 396

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goods in exercise of power under Section 3(1) of the Act and also perused the impugned order as well as the affidavit in reply placed on record by the respondents authorities.

Article 21 of the Constitution of India in clear and explicit terms provide that no one shall be deprived except in accordance with the procedure established by law.

In the backdrop of this right being available, when a detenu is detained preventively, by means of preventive detention, the safeguards provided and specifically enumerated in Article 22(4) and (5) must necessarily be adhered to. The burden of showing that the detention is in accordance with the procedure established by law is always on the detaining authority, as it is he, who is allowed to form an opinion based on the material placed before him that the detenu has to be detained, as his activities have affected or likely to affect the public order.

It is trite position of law the subjective satisfaction reached by the detaining authority must be based upon the material placed before him and burden is cast upon the authority to pass an order, after taking into consideration the relevant material, which is also furnished to the detenu. It is incumbent upon the authority passing an order to act in a responsible manner, as it has an effect of depriving a person of his liberty, the most cherished value and, therefore, he is expected to act with care and caution and see that the detention of the person is in the larger interest, and strictly for the purpose, which the detention law aim to achieve. He is expected to act with a sense of responsibility necessarily, when a citizen is deprived of his liberty, by shortcircuting the

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process of trial by applying his mind to the material placed before him and exercising the power conferred upon him, by keeping in mind the safeguards available to the detenu under Article 22 of the Constitution of India.

11. The impugned order of detention passed by the Joint Secretary to the Government of India, has exercised the power conferred under sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and Section 3, which is an enabling power for detaining a person with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange, also contemplates distinct situations, when exercise of the power is justified.

Section 3 of the COFEPOSA Act deserve reproduction and reads thus :-

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

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(iii) engaging in transporting or concealing or keeping smuggled goods, or

(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or

(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,

it is necessary so to do, make an order directing that such person be detained :

Provided that no order of detention shall be made on any of the grounds specified in this sub-section on which an order of detention may be made under section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 or under section 3 of the Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (J. & K. Ordinance 1 of 1988)."

12. A bare reading of the above provision, would clearly reveal that the power to detain a person shall be exercised by an officer of a particular designation and the purpose for which the power is to be exercised is with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to prevent him from committing any of the activities specified in clauses (i) to (v), as being separated by disjunctive word 'or'. As far as category (iii) is concerned, it has contemplated three acts; engaging in transporting or concealing or keeping smuggled goods. Even in category (iv) and (v), disjunctive word 'or' is used so as to distinguish between one activity to the other and for preventing a person from indulging himself in any of the activities set out therein, he can be detained, so as to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange.

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13. When the order of detention fail to segregate the activities of the detenu, the question is, whether it affects the subjective satisfaction of the detenu, as the detention order direct his detention on several grounds, “with a view to prevent him from smuggling of goods, abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future”.

The argument advanced on behalf of the Petitioner is, the detaining authority is not clear as to what activity of the detenu he intended to prevent, whether it was the activity of smuggling of goods or activity of abetting the smuggling of goods and engaging in transporting or concealing or keeping smuggled goods in future.

A similar question arose while detaining a person under the Maintenance of Internal Security Act, 1971 in ***Kishori Mohan Bera*** (supra), where the detention order passed by the District Magistrate, Hooghly on 24/09/1971, directed the Petitioner’s detention, being satisfied that it was necessary to do so, “ with a view to prevent him from acting in manner prejudicial to “maintenance of public order or security of State”.

The same was challenged as the detaining authority has failed to apply its mind with any seriousness either to the acts alleged in the grounds of detention or to the question whether they fell within the purview of the expression “the security of the State ‘or’ the maintenance of public order” or both.

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14. Considering the power available to the executive to detain a person without recourse to the ordinary laws of the land and to a trial by courts, on the grounds specified, the Apex Court clearly observed as under :-

> "5. Section 3 of the Act empowers the authorities specified therein to detain a person on the specific grounds laid down therein, namely, preventing the person concerned from acting in a manner prejudicial to (i) the Defence of India, relations of India with foreign powers or the security of India, or (ii) the security of the State or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community. We are not concerned with a foreigner, to whom cl. (b) of the section also would apply, and therefore, that clause need not detain us. Section 3 thus clearly lays down that the power of detention conferred thereunder can be exercised on any one or more of the said grounds. Obviously, therefore, if the power is exercised on a ground not enumerated there, or in respect of activities which are not germane to any one of those grounds, such exercise would be beyond the jurisdiction of the detaining authority, and therefore, invalid.
>
> 6. As aforesaid, the District Magistrate detained the petitioner, as the impugned order recited, on the ground of preventing him from acting in any manner prejudicial to "the maintenance of public order or the security of the State", here the State of West Bengal. He was satisfied of the necessity of detaining the petitioner from the activities alleged against him in the grounds of detention set out earlier. The Act nowhere defines the expressions 'public order' and 'the security of the State', but by a series of decisions, to some of which only we need recall attention, the connotation and the area of each of them has been defined and the meaning to be attached to each of them has by now been well crystalised. So that the authority passing an order of detention can very well know the danger, or the likely danger to any one or more of the objects set out in S.3 from the activities of the person concerned."

15. Further recording that since the impugned order was based on satisfaction of the detaining authority, which was expressed in disjunctive and not conjunctive grounds, meaning that the District Magistrate was not certain, whether he has reached the subjective satisfaction, as to the necessity

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of exercising his power of detention on the ground of danger to the public order or danger to the security of the State. It was held that as the order stands, it would appear that either he was not certain whether the alleged activities of the petitioner endangered public order or the security of the State, or he did not seriously apply his mind on the question whether the said alleged activities fell under one head or the other and merely mechanically reproduced the language of Section 3(1)(a)(ii).

The impact of this confusion was succinctly noted in the following observation :-

> "When such equivocal language is used in an order and the detenu is not told whether his alleged activities set out in the grounds of detention fell under one head or the other, or both, it is not difficult to appreciate that a detenu might find it hard to make an adequate representation to Government and the Advisory Board."

It is in these circumstances, impugned order being couched in a language which demonstrated an element of casualness with which it was made, was quashed and set aside.

16. It is a settled position of law that if a statutory enactment confers an extraordinary power on the executive, to detain a person without recourse to the ordinary laws of land and by surpassing the stage of trial, exercise of such power places the personal liberty of such a person in extreme peril, as he has very limited right to raise a challenge to such an order and, therefore, it is necessary that such a law has to be strictly construed and the power to be exercised with extreme care, scrupulously within the bounds laid down by the statute.

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Any casual approach may deprive a citizen of his most precious fundamental right, his freedom and liberty and, therefore, it is always expected that exercise of the power to detain a person preventively shall be balanced against the injustice to a person, who is detained, and hence, the necessary safeguards contemplated under Article 22 must therefore be ensured to a detenu, one of which include a right to make representation.

For making effective representation, it is necessary that the detenu is able to understand the grounds on which he has been detained and it is imperative for the detaining authority to communicate him such grounds.

If statute permits detention on the specific grounds and as under the COFEPOSA Act, to prevent a detenu from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from smuggling goods, or abetting the smuggling of goods, or engaging in transporting or concealing or keeping smuggled goods etc., all the acts being separated and distinct must receive its connotation and the detenu must be tested against the prevented acts, as specified in the COFEPOSA Act.

17. When one keep in mind this objective, the observations of the Apex Court in ***Kishori Mohan Bera*** (supra), gain prominence, as the inference drawn by the detaining authority in the order of detention, indicated the detention to be necessary so as to prevent the detenu from acting in manner prejudicial to the "maintenance of public order or security of

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the State". It was concluded, that there was no certainty as to in which of the category, the alleged activity of the detenu fall and, hence, the detention order was found to be invalid.

Following the aforesaid interpretation, when the terms are disjunctively used in a particular Act, permitting a detenu to be detained when the power was exercised under Section 3(1) of the COFEPOSA Act by the Government of Maharashtra, a similar question arose in ***Naresh Kumar Sachadeva*** (supra), where the order of detention before the Division Bench read thus :-

> "...Whereas I, Medha Gadgil, Principal Secretary (Appeals & Security) to the Government of Maharashtra, Home Department, Specially empowered under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) vide Government Order, Home Department (Special) No. MIS-2009/CR-113/SPL-3(A), dated the 30th September, 2009, am satisfied with respect to the person known as Shri Naresh Kumar Sachadeva (Age 40 years) residing at GD-81, Ground Floor, Pritampura, New Delhi, that with a view to preventing him in future **from engaging in transporting or concealing or keeping smuggled goods and dealing in smuggled goods** it is necessary to make the following order:"

18. Somehow similar argument was advanced before the Court that the detention order is couched in a manner that it demonstrates the element of casualness and, therefore, it is vitiated on account of non-application of mind. The argument was opposed by the State, by submitting that the detention order not only refer to the activities indulged in by the petitioner of transporting, but also of concealing and keeping smuggled goods and, therefore, it covers all the three activities, in which the petitioner indulged. Reliance was also placed upon the decision of the Apex Court in the case of

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Jagannath Mishra Vs. State of Orissa[5], and it was recorded as below:-

> 5. Having considered the rival submissions, we would think it appropriate to advert to the decision of the Apex Court in the case of Jagannath Mishra (supra). In that case the detention order was passed against the Petitioner under Rule 30(1)(b) of the Defence of India Rules. While considering the challenge of the petitioner to the detention order, suffering from non-application of mind, the Apex Court in Paragraph-7 of the said decision has expounded as follows:-
>
> > "7. There is another aspect of the order which leads to the same conclusion and unmistakably shows casualness in the making of the order. **Where a number of grounds are the basis of a detention order, we would expect the various grounds to be joined by the conjunctive "and" and the use of the disjunctive "or" in such a case makes no sense.** In the present order however we find that the disjunctive "or" has been used, showing that the order is more or less a copy of S. 3(2)(15) without any application of the mind of the authority concerned to the grounds which apply in the present case....."
> >
> > (Emphasis supplied)
>
> 6. It may be useful to advert to the dictum in Paragraph 8 of the same decision which reads thus:-
>
> > "8. ..... It is the duty of the authority to see that the order of detention is in accordance with what the authority was satisfied about. If it is not so, the inference of casualness is strengthened and the Court would be justified in coming to the conclusion that the order was passed without the application of the mind of the authority concerned".

19. Paragraph 8 of ***Kishori Mohan Bera*** (supra), which we have referred above, was also reproduced by the Division Bench and we must also reproduce the pertinent observations, when a conclusion was derived as regards the effect of disjunctive words.

> "9.....The Court has observed that if the activities of detenue have such potentiality or impact so as to affect more than one

5 AIR 1966 SC 1140

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> activity, the conjunctive word 'and' and not disjunctive word 'or' would be the appropriate word. In absence of using the conjunctive word 'and' it would clearly demonstrate the element of casualness with which the order was made. These observations apply on all fours to the case on hand. The order of detention, as aforesaid, uses the disjunctive word 'or'. If the Detaining Authority intended to invoke detention remedy against the petitioner for different activities including for transporting, concealing, keeping smuggled goods and dealing with any smuggled goods, it ought to have used the conjunctive expression 'and' or could have used punctuation "comma" to mean that the proposed action against the Petitioner was for all the activities in respect of which material was made available before it. We may place on record that the original filed was produced before us. The note of the Detaining Authority dated 8th June, 2010 as can be discerned from the said file merely states that he has considered the proposal of sponsoring Authority and the documents submitted and was convinced and satisfied that detention order needs to be issued. The fact remains that the detention order as has been issued and initialed by the Detaining Authority used the disjunctive word 'or'."

Recording that the activities of detenu, though being classified as serious and social evil, it was held that irrespective of enormity and gravity of the allegations, the Court will have to intervene and, therefore, the impugned detention order was quashed and set aside, and the Petitioner was directed to be set at liberty forthwith.

20. The Madras High Court in ***Mrignaini Kanwar*** (supra), while dealing with Section 3(1) of the COFEPOSA Act, while considering the argument advanced on behalf of the detenu, to the effect that the satisfaction of the Detaining Authority was on the disjunctive and not on the conjuctive grounds, and, hence, the Detaining Authority was not certain, as to the necessity of exercising his power of detention, on the ground of

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any one specific and particularised acts enumerated in clause (ii) to (iv) of Section 3(1) of the Act.

The argument was advanced in the wake of the decision in ***Kishori Mohan Bera*** (supra), but the observations therein were held not to be applicable, in a situation where the activities mentioned in various clauses of Section 3(1) of the COFEPOSA Act are the activities, which are so inter-related and inter-connected with each other as they would often overlap and could be carried out in the course of the same transaction.

The counter argument that the activities of smuggling of goods have a common thread running through it, being the 'smuggled goods' and the various activities are linked in different clauses of Section 3(1) of the Act and, therefore, the decision in the case of ***Kishori Mohan Bera*** (supra) was held to be not applicable. Reliance was placed upon an earlier decision in the case of ***H. Askran Gulecha Vs. Union of India (Writ Petition No.774 of 1978),*** which had taken a view that various activities particularised in Section 3(1) constitute inter-related or lined activities flowing from the same fountain.

A similar view is expressed by the Karnataka High Court in ***G.K.Kantharaja Setty*** (supra) when ground No.(2) specifically pleaded that the detention order was vitiated on account of non-application of mind, as the Detaining Authority was uncertain as to the grounds of the detention. Once again the decision of ***Kishori Mohan Bera*** (supra) was cited in the background and the argument advanced on behalf of the State through the learned Advocate General that Section3(1)(iv) cannot result in making the order vague, it was ruled that the

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three aspects of engaging in smuggled goods are referred in Section 3(1)(iii), being transporting, concealing or keeping smuggled goods through there may be other categories coming within the concept of dealing in smuggled goods, which would fall in sub-clause (iv).

21. We are unable to subscribe to the said view, since it is the primary duty of the Court to give effect to the intention of the legislature and when Section 3 of the COFEPOSA Act is perused and read keeping in mind the intention of the lawmakers, to provide for preventive detention in certain cases for the purpose of conservation and augmentation of foreign exchange and prevention of smuggling activities, the various contingencies stipulated in the said provision, which the legislature indicated disjunctively will have to be read as indicated in the statute.

With a view to prevent any person acting in any manner prejudicial to the conservation and augmentation of foreign exchange or with a view to prevent him from the five stipulations, specifically carved out, each being stipulated in disjunction of the other and, particularly, when a look at sub-clause (iii), which contemplate an action to prevent a person from engaging in, transporting or concealing or keeping smuggled goods; each activity being described in disjunction with the other.

Upon being satisfied that a person is either engaged in transporting or concealing or keeping the smuggled goods in future, each act described therein indicative of a distinct

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activity and it is not clear to the detenu as to what act of his is attempted to be prevented by detaining him and whether it is his act of engaging in transporting or concealing or keeping the smuggled goods.

Drawing parlance with Section 3 of the Maintenance of Internal Security Act, 1971 (for short, **"MISA Act"**), where Section 3 is the power conferred to make orders for detaining certain persons on being satisfied with respect to any person, with a view to prevent him from acting in any manner prejudicial to (i) defence of India, the relations of India with foreign powers or the security of India (ii) security of the State or the maintenance of public order, or (iii) maintenance of supplies and services essential to the community.

The Apex Court in ***Kishori Mohan Bera*** (supra) was confronted with the order of detention, which necessitated the action of detention to prevent the detenu from acting in any manner prejudicial to the security of the State or maintenance of the public order and it was concluded that there was no certainty as to whether the detention was necessary to prevent him from acting in any manner prejudicial to the security of the State or for the maintenance of the public order.

In a similar situation, when clause (iii) of Section 3(1) has clubbed three activities in relation to the smuggled goods i.e. either its transport or its concealment or keeping the smuggled goods, it was imperative for the Detaining Authority to specify to the detenu as to which of these activities or all of the activities in which the detenu was engaged, were necessary to be prevented, as the act was prejudicial to the conservation or augmentation of foreign exchange.

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In absence of such a clarity being offered to the detenu, who had a right to prefer a representation, being aggrieved thereof and had a right to get a decision thereon, the detention order is vitiated by non-application of mind and, hence, it cannot be sustained.

Since, we are satisfied on this ground raised in the Petition and, since, we are inclined to set aside the detention order on this ground, we need not delve into the other grounds, on which the impugned order of detention is challenged.

22. In the result, Rule made absolute in terms of prayer clause (a), which reads thus :-

> (a) The Petitioner therefore prays that That this Honourable Court be pleased to issue to Writ of Habeas Corpus or any other appropriate writ, order or direction quashing and setting aside the said order of detention bearing F.No.PD-12001/05/2023-COFEPOSA dtd. 03.10.2023 and pleased to direct that the detenu Shri Rakesh Ramdas Jejurkar, by set at liberty."

No order as to costs.

(MANJUSHA DESHPANDE,J.) **(BHARATI DANGRE, J.)**

M.M.Salgaonkar

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