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NARENDER KUMAR

v.

UNION OF INDIA AND OTHERS

(Criminal Appeal No.1492 of 2009)

B

APRIL 08, 2019

[UDAY UMESH LALIT AND HEMANT GUPTA, JJ.]

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) : s.2(2)(b) and its proviso – Applicability of – Competent Authority under MISA directed detention of one ‘R’ on 5.11.1974 with a view to prevent him from dealing in smuggled goods prior to COFEPOSA came into force on 13.12.1974 – On 19.12.1974, the competent authority under COFEPOSA directed his detention with a view to prevent him from dealing in smuggled goods – Representation of detenu was rejected – On 29.4.1975, his son filed writ of habeas corpus and prayed for quashing of detention orders dated 5.11.1974 and 19.12.1974 – Proclamation of Emergency on 25.6.1975 – With effect from 1.7.1975, s.12A was inserted in COFEPOSA by Amendment Act of 1975 – s.10A was inserted on 12.12.1975 dealing with extension of period of detention – Later SAFEMA came into force w.e.f. 25.1.1976 – Emergency was lifted on 21.3.1977 – Next day, i.e. on 22.3.1977, detention orders in respect of 49 detenus including ‘R’ were revoked by the State Government and detenu was released – On 30.4.1977, Competent Authority under SAFEMA issued notice to detenu and his wife to show cause the source of their income or acts or by means of which they had acquired properties and why said properties be not declared illegally acquired and forfeited – Writ Petition for quashing of orders dated 5.11.1974 and 19.12.1974 which was alive and pending in High Court was disposed of as having become infructuous – After considering replies to the notices under SAFEMA, on 29.5.1978, the Competent Authority held that the property mentioned in the schedule to the order was illegally acquired and that it stood forfeited – Writ petition filed against the said order was dismissed holding that there was no revocation of detention before the expiry of the Emergency and as such provisions of s.2(2)(b) of SAFEMA would get attracted – On

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appeal, held: For the substantive provision under s.2(2)(b) to apply, the matter must not be covered under any of the four parts of the proviso – Part (i) of the proviso to s.2(2)(b) deals with cases to which s.9 or s.12A of COFEPOSA did not apply – In the instant case, there was neither any declaration under s.9 nor any proclamation under s.12A – Thus, s.9 and s.12A did not apply – In terms of Part (i) of the proviso, if the order of detention was not revoked under the conditions stipulated therein, the substantive provisions of s.2(2)(b) must apply – The order of detention was not revoked under any of the postulates of the proviso to s.2(2)(b) nor was it set aside by any competent court and as such the provisions of SAFEMA must apply – In terms of Part (i) of the proviso, if the order of detention was not revoked under the conditions stipulated therein, the substantive provisions of s.2(2)(b) must apply – In the instant case, there was no such revocation and in view of Part (i) of the proviso, the provisions of SAFEMA must apply – High Court rightly observed that the detention “had run right through the duration or continuance of the emergency” – Maintenance of Internal Security Act, 1971 (MISA) – s.3(2) – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA).

Dismissing the appeals, the Court

HELD: 1. An order of detention under Section 3(1) of COFEPOSA can be made against a person 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 indulging in activities mentioned in said Section 3(1). If the Advisory Board finds that there is sufficient cause for detention under Section 8(f), the period of detention under Section 10 could be one year or the “specified period” whichever expires later. In cases where a declaration under Section 9 was issued, the maximum period of detention in terms of said Section 10, upon approval being accorded by the Advisory Board, could be two years or the “specified period” whichever period expires later. Explanation to Section 10 states the “specified period” to be the period during which the proclamation of Emergency issued under Article 352 of the Constitution, inter alia, on 25.06.1975 would be in operation. If an order of detention was passed after the commencement of the

A Amendment Act of 1975 and the officer making the order of detention considered the detention of such person to be necessary for dealing effectively with the Emergency, a proclamation under Section 12A could be issued. [Para 22][503-C-F]

2. In terms of Section 2 of SAFEMA, the provisions of said Act would apply *inter alia* to every person in respect of whom an order of detention had been made under COFEPOSA, subject to proviso contained in Section 2(2)(b). Proviso to Section 2(2)(b) of SAFEMA then carves out four exceptions to the applicability of substantive provisions to Section 2(2)(b). First three parts of the Proviso deal with three kinds of orders of detention under COFEPOSA and stipulate that if the order was revoked during the period mentioned therein, the substantive provision would not apply. Part (iv) of the proviso get attracted where the order of detention is set aside by a court of competent jurisdiction. For the substantive provision under Section 2(2)(b) to apply the matter must not be covered under any of those four parts of the proviso. [Para 23][503-G-H; 504-A-C]

3. Part (i) of the proviso to Section 2(2)(b) deals with cases to which Section 9 or Section 12A of COFEPOSA do not apply. In the instant case, there was neither any declaration under Section 9 nor was there any proclamation under Section 12A. The order of detention was also not passed after the Amendment Act of 1975 came into force. Thus, Section 9 and Section 12A did not apply. In terms of said Part (i) of the proviso, if the order of detention was not revoked under the conditions stipulated therein, the substantive provisions of Section 2(2)(b) must apply. In the instant case, there was no such revocation and going by the text of Part (i) of the proviso, the provisions of SAFEMA must apply in the instant case. Parts (ii) and (iii) of the proviso are cases where substantive orders of detention to which provisions of Section 9 and Section 12A respectively apply and as such they are not relevant for the present consideration. Part (iv) of the proviso which speaks of cases where order of detention is set aside by a court of competent jurisdiction, applies irrespective whether the matter comes under Section 3(1) simplicitor or comes under Section 9 or Section 12A. The order of detention was not set aside in the present matter and as such

Part (iv) is also inapplicable to the instant case. [Para 24] A
[504-C-F]

4. The order of detention in this case was not revoked under any of the postulates of the proviso nor was it set aside by any competent court and as such the provisions of SAFEMA must apply. The High Court was right in observing that the detention B
“had run right through the duration or continuance of the emergency”. Though the petition was pending during the length of this time and was taken up for hearing after the lifting of the emergency, no attempts were made to have the petition disposed of on merits. The notices under SAFEMA were issued to the C
detenu and his wife while the possibility that the SAFEMA proceedings could be premised on the validity of the detention order was very much alive and yet, the matter was chosen not to be agitated on merits. [Para 25][504-F-H; 505-A-B]

5. In the instant case, the representation dated 17.01.1975 D
was considered by the State on 11.02.1975 and the rejection was communicated to the detenu. Moreover, at no stage, any grievance was raised that the grounds of detention were not communicated to him in a language known to him. Similarly, the submission that the grounds of detention were identical, is also without any merit. Insofar as the order of detention under E
COFEPOSA was concerned, the grounds dealt with instances where the detenu had indulged in smuggling of goods, on the basis of which subjective satisfaction was arrived at as regards his propensity to deal in smuggled goods. In the said circumstances, the challenge to order of detention dated F
19.12.1974 passed under the provisions of COFEPOSA fail. Further, the Competent Authority and the Appellate Tribunal constituted under the provisions of SAFEMA had, after issuance of due notice and granting every opportunity to the noticees, arrived at findings that the properties mentioned in the schedules G
to the notices were illegally acquired and that they stood forfeited to the Central Government free from all encumbrances. All the prayers made in Civil Writ Petition No.509 of 1996 being meritless said Writ Petition deserved to be rejected and was rightly dismissed by the High Court. [Paras 26, 27][505-B-D; E-F]

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A *Attorney General for India and Others v. Amratlal Prajivandas and Others* (1994) 5 SCC 54: [1994] 1 Suppl. SCR 1 – relied on.

Union of India v. Haji Mastan Mirza (1984) 2 SCC 427 : [1984] 3 SCR 1 - Distinguished.

B Case Law Reference

[1994] 1 Suppl. SCR 1 relied on Para 10

[1984] 3 SCR 1 Distinguished Para 18

C CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1492 of 2009

From the Judgment and Order dated 02.05.2008 of the High Court of Delhi at New Delhi in Writ Petition (Crl.) No. 509 of 1996

D With

Criminal Appeal No. 1493 of 2009.

R.M. Bagai, Ms. Amita Singh Kalkal, Ms. Aditi Gupta, Amlan Kumar Ghosh, Advs. for the appellant.

E Aman Lekhi, ASG, Saurabh Mishra, R. Singh, B. K. Prasad, Mrs. Anil Katiyar, Saurabh Mishra, Ranvijay Singh, B.V. Balaram Das, Ms. Jaspreet Gogia, Advs. with him for the respondents.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

F CRIMINAL APPEAL NO.1492 OF 2009

1. This appeal questions the correctness of the judgment and order dated 02.05.2008 passed by the High Court of Delhi at New Delhi in Writ Petition (Criminal) No.509 of 1996.

G 2. In exercise of power under Section 3(2) of the Maintenance of Internal Security Act, 1971 ('MISA' for short), as amended by Section 6(6)(c) of Defence of India Act, 1971 and Section 2(1)(c)(iii) of Internal Security (Amendment) Ordinance, 1974, by order dated 05.11.1974, the Superintendent of Police, Amritsar directed that one Roshan Lal be detained with a view to prevent him from dealing in smuggled goods.

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3. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ('COFEPOSA' for short) came into force on 13.12.1974. Deputy Secretary to the Government of Punjab, Home Department, Chandigarh, passed an order on 19.12.1974 under Section 3 of COFEPOSA detaining said Roshan Lal with a view to prevent him from dealing in smuggled goods. In the grounds of detention in support of the detention order, it was *inter alia* stated that in the first week of July 1974 one Yusuf, resident of Lahore, Pakistan, a notorious smuggler in gold had contacted Roshan Lal who had agreed to purchase smuggled gold at the rate of Rs.600/- per tola; that Roshan Lal had purchased 50 smuggled gold biscuits and had paid Rs.3 lakhs; and that later he had also purchased 25 Gold biscuits of ten tolas each, that were smuggled on 18.08.1974 and paid Rs.1.5 lakhs.

4. On 17.01.1975 Roshan Lal preferred a representation against the order of detention dated 19.12.1974 addressed to State of Punjab, through Superintendent of Police, Patiala. The representation was rejected by the State on 11.02.1975. On or about 29.04.1975 Om Prakash, son of Roshan Lal filed Writ Petition No.138 of 1975 in the High Court of Punjab and Haryana seeking writ of habeas corpus and praying for quashing of aforesaid detention orders dated 05.11.1974 as well as 19.12.1974.

5. With effect from 01.07.1975 Section 12A titled "Special Provisions for dealing with Emergency" was inserted in COFEPOSA by Amendment Act of 1975¹. Shortly thereafter, Amendment Act of 1976², which came into force on 12.12.1975 inserted Section 10A titled "Extension of Period of Detention". Later, the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 ('SAFEMA' for short) came into force with effect from 25.01.1976.

6. The Emergency which came into force as a result of proclamation issued by the President on 25.06.1975, was lifted on 21.03.1977. On the very next day i.e. on 22nd March, 1977 detention orders in respect of 49 detenus, including Roshan Lal, were revoked by the State Government.

¹ Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act (35 of 1975)

² Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act (20 of 1976)

A 7. A notice under Section 6(1) of SAFEMA was issued by the Competent Authority to Roshan Lal on 30.04.1977 calling upon him to show the source of his income, earnings or acts or by means of which he had acquired properties mentioned in the schedule to said notice and to show cause why said properties be not declared to be illegally acquired properties and forfeited to the Central Government under the provisions of SAFEMA. A similar notice was also issued to Smt. Sheelawati, wife of Roshan Lal under the provisions of Section 6(1) of SAFEMA on 11.01.1978 to show cause why the properties mentioned in the schedule to the notice be not declared to be illegally acquired properties and forfeited to the Central Government under the provisions of SAFEMA.

C 8. Writ Petition No.138 of 1975 came up before the High Court of Punjab and Haryana at Chandigarh on 24.02.1978 and on the statement of the counsel for the Writ Petitioner that the petitioner had been released from custody which had come about in pursuance of the order of detention, it was observed that the petition had become infructuous and was, therefore, dismissed.

E 9. After considering the replies to the notices under Section 6(1) of SAFEMA submitted by Roshan Lal and after considering the material on record, an order under Section 7(1) of SAFEMA was passed by the Competent Authority on 29.05.1978. It was held that the property mentioned in the Schedule to the order was illegally acquired and that it stood forfeited to the Central Government free from all encumbrances. Similar order was passed in the matter arising out of notice issued to Sheelawati. Appeals, being F.P.A. No.41/78-79 and F.P.A. No.42/78-79, preferred by Roshan Lal and Sheelawati were dismissed by the Appellate Authority by its separate orders dated 02.02.1979 and the view taken by the Competent Authority was affirmed.

G 10. Roshan Lal approached this Court by filing Writ Petition No.220 of 1979 under Article 32 of the Constitution of India and challenged the aforesaid orders passed by the Competent Authority and the Appellate Tribunal. The Writ Petition was taken up along with certain similar matters including Transfer Petitions filed by the Attorney General for India. All these matters were disposed by a Bench of nine Judges of this Court on 12.05.1994 vide its decision in *Attorney General for India and Others vs. Amratlal Prajivandas and Others*³. The conclusions arrived at by this Court and the directions issued were as under:-

H ³(1994) 5 SCC 54

“56. To summarise:

(1) Parliament was perfectly competent to enact both the COFEPOSA and the SAFEMA.

(2) For the reasons given in the body of this judgment, we do not express any opinion on the validity of the 39th and 40th Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. We assume them to be good and valid. No arguments have also been addressed with respect to the validity of 42nd Amendment Act to the Constitution either.

(3) (a) An order of detention made under Section 3 of COFEPOSA, which was governed by Section 12-A thereof is yet an order of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA. Since the President had issued an order under Article 359(1) suspending Articles 14, 21 and 22, it became competent for Parliament, by virtue of clause (1-A) of Article 359 to enact Section 12-A of COFEPOSA for the duration of and limited to the period for which the Presidential Order was in force. It was meant to achieve the purposes of emergency. Once Section 12-A is held to be a competent piece of legislation, orders of detention made thereunder (i.e. orders of detention to which the said provision applied) cannot be held to be not amounting to orders of detention for the purpose of and within the meaning of Section 2(2)(b) of SAFEMA, particularly in view of the express language of Section 2(2)(b) [including proviso (iii) thereto] — and the protection enjoyed by both the enactments by virtue of their inclusion in the Ninth Schedule to the Constitution.

(b) An order of detention to which Section 12-A is applicable as well as an order of detention to which Section 12-A was not applicable can serve as the foundation, as the basis, for applying SAFEMA to such detenu and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b). If such detenu did not choose to question the said detention (either by himself or through his next friend) before the Court during the period when such order of detention was in force, — or is unsuccessful in his attack thereon — he, or his relatives and associates cannot attack or question its validity when it is made the basis for applying

- A SAFEMA to him or to his relatives or associates.
- (4) The definition of “illegally acquired properties” in clause (c) of Section 3 of SAFEMA is not invalid or ineffective.
- (5) The application of SAFEMA to the relatives and associates [in clauses (c) and (d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment. The position of ‘holders’ dealt with by clause (e) of Section 2(2) is different as explained in the body of the judgment.
- (6) Section 5-A of COFEPOSA is not invalid or void. It is not violative of clause (5) of Article 22.
- D (7) Petitioners have failed to establish that any of the provisions of SAFEMA are violative of Articles 14, 19 or 21 — apart from the protection they enjoy by virtue of the inclusion of the Act in the Ninth Schedule to the Constitution.
- E **57.** All the writ petitions, transferred cases and appeals are disposed of accordingly. The court and authorities before whom proceedings are pending under SAFEMA shall proceed to dispose them of in accordance with law and in the light of this judgment. It is in the interest of all concerned that the proceedings are concluded with all deliberate speed.”
- F 11. Thereafter, Civil Writ Petition No.509 of 1996 was filed on 12.08.1996 by the present appellant, as son of late Shri Roshan Lal, seeking to challenge the order of detention dated 19.12.1974 as aforesaid as well as the order dated 29.05.1978 passed by the Competent Authority. The prayers in the petition were :-
- G “(a) Quash the detention order dated 19.12.1974 passed by respondent No.3 under Section 3(1) of COFEPOSA Act.
- (b) Quash the order dated 29.05.1978 passed by the respondent No. 2 under Section 19(1) of Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976.
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(c) Restrain the respondent from acquiring/dispossessing the petitioners of the said properties, namely, house property municipal No.1115/X-5, Dhab Khatika, RB Seindas Road, Amritsar and factory premises bearing No.76, 78-Min Private, Khewat/Khatauni No.31, Khasra No.745, Jawahar Nagar, Batala Road, Amritsar along with some machinery installed therein.

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(d) Issue such other writ, order or direction as this Hon'ble Court may deem just and equitable on the facts and in the circumstances of the present case."

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12. The High Court found that the dismissal of Writ Petition No.138 of 1975 against the order of detention not having been challenged by Roshan Lal, Writ Petition No.509 of 1996 was barred by principles of *res judicata*. A challenge was raised to the correctness of said decision of the High Court by filing Criminal Appeal No.1046 of 1997 in this Court by the appellant. The Appeal was allowed by this Court by its order dated 24.02.2004. While setting aside the decision of the High Court, the matter was remanded back to the High Court for fresh disposal of the Writ Petition on merits. During the course of its order, this Court observed:-

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"... ..It is relevant to note that correctness or merit of the grounds of detention and the validity of the detention order was not adjudicated upon.

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... .. We think since the proceedings under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, has very serious consequences, the appellant should have an opportunity of establishing the fact that the detention of his father was not in accordance with the law."

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13. The matter was, therefore, reheard by the High Court and by its judgment and order dated 02.05.2008 said Writ Petition was dismissed. It was observed that the detention of Roshan Lal had run right through the duration or continuance of the Emergency and that there was no revocation of detention before the expiry of the Emergency and as such provisions of Section 2(2)(b) of SAFEMA would get attracted. The High Court, thereafter, considered the challenge to the detention order on the grounds as were urged. The submissions that the detention order

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A was passed on the same material as was relied upon in the order passed under the provisions of MISA; that the representation dated 17.01.1975 was not considered; that the documents demanded in said representation were not supplied and that a report in terms of Section 3(2) of COFEPOSA was not forwarded by the State Government to the Central Government, were found to be without any substance and merit. The Writ Petition was thus dismissed by the High Court which decision is presently under appeal.

B 14. We heard Mr. R.M. Bagai, learned advocate for the appellant and Mr. Aman Lekhi, learned Additional Solicitor General for the respondents.

C 15. It was submitted by Mr. Bagai, learned advocate that though the matter was specifically remanded to the High Court for disposal on merits, the judgment under appeal had virtually overruled the order dated 24.02.2004 passed by this Court. It was further submitted that the detention order suffered on account of following infirmities:-

D a) The relevant assertions in the grounds of detentions were identical and were repeated from the earlier order passed under MISA and as such, the detention order suffered from non-application of mind.

E b) The grounds of detention were not framed in a language known to the detenu.

c) The representation dated 17.01.1975 was not considered at all.

F 16. Mr. Lekhi, learned Additional Solicitor General, on the other hand, submitted that the view taken by the High Court was quite correct and that the so-called infirmities, as alleged, did not exist at all. It was submitted that the order did not suffer from non-application of mind; that the representation dated 17.01.1975 was rejected by the State on 11.02.1975, the rejection was communicated to the detenu and that at no stage any grievance was raised that the grounds of detention were not communicated to the detenu in a language known to him.

G 17. In *Amratlal*¹ following questions were framed by this Court, the answers to which were summarised in paragraph 56 as extracted above. The questions were framed in para 8 as under:-

H “8. The counsel appearing for the petitioners urged several contentions all of which have been contested by Shri Altaf Ahmed,

learned Additional Solicitor General. The issues arising from the rival contentions urged at the bar may be formulated in the shape of questions. They are to the following effect:

(1) Whether Parliament was not competent to enact COFEPOSA and SAFEMA?

(2) Whether an order of detention under Section 3 read with Section 12-A of COFEPOSA made during the period of emergency proclaimed under Article 352(1) of the Constitution of India, — with the consequent ‘suspension’ of Article 19 and during which period the right to move the court to enforce the rights conferred by Articles 14, 21 and 22 was suspended — can form the foundation for taking action under Section 6 of SAFEMA against the detenu, his relatives and associates? And if it does, can the validity of such order of detention be challenged by the detenu and/or his relatives and associates, when proceedings are taken against him/them under SAFEMA, even though the said order of detention has ceased to be operative and was not either challenged — or not successfully challenged — during its operation? (3) If the answer to Question 1 is in the affirmative, should the validity of the order of detention be tested with reference to the position of law obtaining at the time of making the said order and during its period of operation *or* with reference to the position of law obtaining on the date of issuance of the show-cause notice under Section 6 of SAFEMA?

(4) Whether the definition of “illegally acquired property” in clause (c) of Section 3(1) of SAFEMA is violative of the fundamental rights of the petitioners guaranteed by Articles 14, 19 and 21 and whether the inclusion of SAFEMA in the Ninth Schedule to the Constitution cures such violation, if any?

(5) Whether the application of SAFEMA to the relatives and associates of detenus is violative of Articles 14, 19 and 21? Whether the inclusion of the said Act in the Ninth Schedule cures such violation, if any?

(6) Whether Section 5-A of COFEPOSA is violative of clause (5) of Article 22?

For a proper appreciation of the aforesaid questions, it is necessary to briefly refer to the relevant provisions of both the enactments.”

A 18. While dealing with questions 2 and 3, this Court considered decision of this Court in *Union of India vs. Haji Mastan Mirza*⁴ rendered by a Bench of three learned Judges in paragraphs 40-41. Said paragraphs were:-

B “40. At this juncture, it would be appropriate to deal with two decisions of this Court brought to our notice. The first one is in *Union of India v. Haji Mastan Mirza*² rendered by a Bench of three Judges. The respondent therein was first detained under Maintenance of Internal Security Act (MISA) under an order dated 17-9-1974. On 19-12-1974 the said order was revoked but simultaneously an order of detention was made under Section 3(1) of COFEPOSA. The grounds of detention were served on C him on 23-12-1974. On 25-6-1975, emergency was proclaimed under Article 352(1) on the ground of internal disturbance, which continued to be in force up to 21-3-1977. The respondent was released on 23-3-1977. Notice under Section 6(1) of SAFEMA D was issued to him, his relatives and associates whereupon he filed a writ petition in the Bombay High Court challenging the validity of the order of detention dated 19-12-1974 on the ground inter alia that he was not supplied with the documents clearly and E unmistakably relied upon for arriving at the requisite satisfaction and which documents were also referred to in the grounds of detention served upon him. The Bombay High Court allowed the writ petition, against which the Union of India appealed to this Court. Varadarajan, J. speaking for the Bench referred to the provisions of Sections 2, 6 and 7 of SAFEMA and observed thus: (SCC p. 432, para 10)

F “Therefore, a valid order of detention under COFEPOSA is a condition precedent to proceedings being taken under Sections 6 and 7 of SAFEMA. If the impugned order of detention dated 19-12-1974 is set aside for any reason, the proceedings taken G under Sections 6 and 7 of SAFEMA cannot stand. Therefore, we have to consider whether the impugned order of detention dated 19-12-1974 under COFEPOSA is void and has to be quashed.”

41. From the facts stated above, it is clear that the order of detention was made long prior to the proclamation of emergency

H ⁴(1984) 2 SCC 427

on 25-6-1975. He was served with the grounds of detention but not the documents relied upon therein. It does not appear from the judgment whether a declaration under Section 12-A of COFEPOSA was made with respect to the said respondent, though it can be so presumed from the fact that his detention was continued up to 23-3-1977. In the above circumstances, this Court said that it was open to the respondent-detenu to question the validity of the order of detention when proceedings are taken against him under Sections 6 and 7 of SAFEMA. It is not possible to agree with the reasoning of the decision. There are two ways of looking at the issue. If it is a normal order of detention [not governed by Section 12-A nor protected by an order under Article 359(1) suspending the enforcement of Article 22] and if the detenu does not challenge it when he was deprived of his liberty, or challenges it unsuccessfully, there is no reason why he should be allowed to challenge it when action under SAFEMA is taken against him — for action under SAFEMA is not automatic upon the fact of detention but only the starting point. On the other hand, if it is an order of detention governed by Section 12-A [or by a Presidential Order under Article 359(1) suspending Article 22], it perhaps could still be challenged even during the period of emergency on grounds not barred by the said provisions. Secondly, even if such an order is allowed to be challenged when action under SAFEMA is taken, the challenge must be confined to grounds which were open or available during the period of emergency; otherwise there would be no meaning behind the concluding words in Article 358(1) and Article 359(1-A). Hence, we say that a person who did not choose to challenge such an order of detention during the emergency when he was detained, or challenged it unsuccessfully, cannot be allowed to challenge it when it is sought to be made the basis for applying SAFEMA to him. In either of the two situations mentioned above, i.e., whether the challenge is made during the period of detention or later when proceedings under SAFEMA are taken against him, the grounds of challenge and scope of judicial scrutiny would be the same. Failure to challenge the detention directly when he was detained, precludes him from challenging it after the cessation of detention, where it is made the basis for initiating action under SAFEMA.”

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- A 19. Question No.2 framed in *Amratlal*¹ related to cases where orders of detention under Section 3 read with Section 12A of COFEPOSA were made during the period of Emergency proclaimed under Article 352(1) of the Constitution of India. The decision in *Haji Mastan Mirza*² which was considered in paras 40 and 41, however, pertained to different factual scenario. In *Haji Mastan Mirza*², as indicated in para 41 in the decision of *Amratlal*¹, the order of detention was made long prior to the proclamation of emergency on 25.6.1975. The Bench of nine Judges in *Amratlal*¹ found that it was not possible to agree with the view taken in *Haji Mastan Mirza*². It was observed that the matter could be considered from two perspectives; First, if it was an order of detention to which Section 12A of COFEPOSA did not apply and if the detenu did not challenge the order of detention or challenged it unsuccessfully, there was no reason why he should be allowed to challenge it when action under SAFEMA was taken against him. Secondly, if the order of detention was governed under Section 12A, such order of detention could still be challenged during the period of Emergency and the challenge could be confined to grounds which were open or available during the period of Emergency. In the concluding part of the paragraph it was observed that failure to challenge the detention directly when he was detained, precluded the detenu from challenging it after the cessation of detention where such detention was made the basis for initiating action in SAFEMA.
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- In the present case the order of detention under COFEPOSA was passed on 19.12.1974 and the petition challenging the detention was filed on 29.04.1975 i.e. before the proclamation of emergency was issued on 25.06.1975. The detenu was released after the lifting of the emergency. All through, the Writ Petition was alive and pending in High Court and it was disposed of as having become infructuous on the statement made by the counsel for the Writ Petitioner on 24.02.1978. The instant case is thus covered by para 41 of the decision of this Court in *Amratlal*¹. However, since the matter was remitted by this Court on 24.02.2004, to be disposed of on merits, we now proceed to consider whether merits were rightly considered.
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20. We may at this stage quote the relevant provisions of COFEPOSA and SAFEMA.

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A] Sections 10, 10A and 12A of COFEPOSA are as under:- A

“10. Maximum period of detention. – 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 which has been confirmed under clause (f) of section 8 shall be a period of one year from the date of detention or the specified period, whichever period expires later 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 and which has been confirmed under clause (f) of section 8 read with sub-section (2) of section 9 shall be a period of two years from the date of detention or the specified period, which ever period expires later: B
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Provided that nothing contained in this section shall affect the power of the appropriate Government in neither case to revoke or modify the detention order at any earlier time. D

Explanation.- In this section and in section 10A, “specified period” means the period during which the Proclamation of Emergency issued under clause (1) of article 352 of the Constitution on the 3rd day of December, 1971 and the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, are both in operation E

“10A. Extension of period of detention. – (1) Notwithstanding anything contained in any other provision of this Act, the detention of every person detained under a detention order which has been confirmed under clause (f) of section 8 before the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976, and which is in force immediately before such commencement shall, unless his detention has been continued by the appropriate Government under the said clause for a period shorter than one year from the date of his detention, continue until the expiry of a period of one year from the date of his detention under such order or until the expiry of the specified period, whichever period expires later: F
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Provided that nothing contained in this sub-section shall affect the power of the appropriate Government to revoke or modify such detention order at any earlier time. H

- A (2) Notwithstanding anything contained in any other provision of this Act, the detention of every person detained under a detention order which has been confirmed under clause (f) of section 8 read with sub-section (2) of section 9 before the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976, and which is in force immediately before such commencement, shall, unless his detention has been continued by the appropriate Government under the said clause (f) read with the said sub-section (2), for a period shorter than two years from the date of his detention, continue until the expiry of a period of two years from the date of his detention under such order or until the expiry of the specified period, whichever period expires later:
- C Provided that nothing contained in this sub-section shall affect the power of the appropriate Government to revoke or modify such detention order at any earlier time.”
- D “**12A. Special provisions for dealing with emergency.** (1) Notwithstanding anything contained in this Act or any rules of natural Justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd day of December 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of [twenty-four months] from the 25th day of June, 1975, whichever period is the shortest.
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- F (2) When making an order of detention under this Act against any person after the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration
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to that effect and communicate a copy of the declaration to the person concerned: A

Provided that where such declaration is made by an officer, it shall be reviewed by the appropriate Government within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by that Government, after such review, within the said period of fifteen days. B

(3) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, the Government may revoke the declaration. C D

(4) In making any consideration, review or reconsideration under sub-section (2) or (3), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned. E

(5) It shall not be necessary to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that subsection is in force, and, accordingly, such period shall not be taken into account for the purposes of sub-section (3) of section 3. F G

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person in respect of whom a declaration has been made thereunder, the period during which such declaration is in force shall not be taken into account for the purpose of computing- H

- A (i) the periods specified in clauses (b) and (c) of section 8;
(ii) the periods of “one year” and “five weeks” specified in sub-section (1), the period of “one year” specified in sub-section (2)(i), and the period of “six months” specified in subsection (3) of section 9”.
- B B] Section 2 of SAFEMA is as follows:-
“2. Application. (1) The provisions of this Act shall apply only to the persons specified in sub-section (2).
(2) The persons referred to in sub-section (1) are the following, namely: -
- C (a) every person-
- D (i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of a value exceeding one lakh of rupees ; or
- E (ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or
- F (iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts ; or
- G (iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts ;
- H (b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):
- Provided that-
- (i) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of

the Advisory Board or before making a reference to the Advisory Board; or A

(ii) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under subsection (3) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9, of the said Act ; or B

(iii) such order of detention, being an order to which, the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12A, of that Act ; or C

(iv) such order of detention has not been set aside by a court of competent jurisdiction ; D

(c) every person who is a relative of a person referred to in clause (a) or clause (b) ;

(d) every associate of a person referred to in clause (a) or clause (b);

(e) any holder (hereafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration. E F

Explanation 1.—For the purposes of sub-clause (i) of clause (a), the value of any goods in relation to which a person has been convicted of an offence shall be the wholesale price of the goods in the ordinary course of trade in India as on the date of the commission of the offence. G

Explanation 2.—For the purposes of clause (c), “relative”, in relation to a person, means-

(i) spouse of the person;

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- A (ii) brother or sister of the person;
(iii) brother or sister of the spouse of the person;
(iv) any lineal ascendant or descendant of the person;
(v) any lineal ascendant or descendant of the spouse of the person;
- B (vi) spouse of a person referred to in clause (ii), clause (iii), clause (iv) or clause (v);
(vii) any lineal descendant of a person referred to in clause (ii) or clause (iii).
- C **Explanation 3.**-For the purposes of clause (d), “associate”, in relation to a person, means-
- (i) any individual who had been or is residing in the residential premises (including outhouses) of such person;
- D (ii) any individual who had been or is managing the affairs or keeping the accounts of such person;
- (iii) any association of persons, body of individuals, partnership firm, or private company within the meaning of the Companies Act, 1956 (1 of 1956), of which such person had been or is a member, partner or director;
- E (iv) any individual who had been or is a member, partner or director of an association of persons, body of individuals, partnership firm or private company referred to in clause (iii) at any time when such person had been or is a member, partner or director of such association, body, partnership firm or private company;
- F (v) any person who had been or is managing the affairs, or keeping the accounts, of any association of persons, body of individuals, partnership firm or private company referred to in clause (iii);
(vi) the trustee of any trust, where- (a) the trust has been created by such person; or (b) the value of the assets contributed by such person (including the value of the assets, if any, contributed by him earlier) to the trust amounts, on the date on which the contribution is made, to not less than twenty per cent. of the value of the assets of the trust on that date ;
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(vii) where the competent authority, for reasons to be recorded in writing, considers that any properties of such person are held on his behalf by any other person, such other person. A

Explanation 4.—For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events (including any conviction or detention) which occurred or took place before the commencement of this Act. B

22. An order of detention under Section 3(1) of COFEPOSA can be made against a person 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 indulging in activities mentioned in said Section 3(1). If the Advisory Board finds that there is sufficient cause for detention under Section 8(f), the period of detention under Section 10 could be one year or the “specified period” whichever expires later. In cases where a declaration under Section 9 was issued, the maximum period of detention in terms of said Section 10, upon approval being accorded by the Advisory Board, could be two years or the “specified period” whichever period expires later. Explanation to Section 10 states the “specified period” to be the period during which the proclamation of Emergency issued under Article 352 of the Constitution, *inter alia*, on 25.06.1975 would be in operation. If an order of detention was passed after the commencement of the Amendment Act of 1975 and the officer making the order of detention considered the detention of such person to be necessary for dealing effectively with the Emergency, a proclamation under Section 12A could be issued. The effect of such order passed under Section 3 read with Section 12A of the Act was primarily the subject matter of consideration in the case in *Amratlal*¹. Thus, orders of detention under COFEPOSA can be of three kinds; (a) under Section 3(1) simplicitor, or (b) one passed under Section 3(1) followed by Declaration under Section 9 or (c) one passed under Section 3(1) and Section 12A. C
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23. In terms of Section 2 of SAFEMA, the provisions of said Act would apply *inter alia* to every person in respect of whom an order of detention had been made under COFEPOSA, subject to proviso contained in Section 2(2)(b). Proviso to said Section 2(2)(b) of SAFEMA then carves out four exceptions to the applicability of substantive provisions H

- A to Section 2(2)(b). First three parts of the Proviso deal with three kinds of orders of detention under COFEPOSA as stated above and stipulate that if the order was revoked during the period mentioned therein, the substantive provision would not apply. Part (iv) of the proviso get attracted where the order of detention is set aside by a court of competent jurisdiction. For the substantive provision under Section 2(2)(b) to apply
- B the matter must not be covered under any of those four parts of the proviso. We now see whether the instant matters come within any of those parts of the proviso.

24. Part (i) of the proviso to Section 2(2)(b) deals with cases to which Section 9 or Section 12A of COFEPOSA do not apply. In the
- C present case there was neither any declaration under Section 9 nor was there any proclamation under Section 12A. The order of detention was also not passed after the Amendment Act of 1975 came into force. Thus, Section 9 and Section 12A do not apply in the present matter. In terms of said Part (i) of the proviso, if the order of detention was not
- D revoked under the conditions stipulated therein, the substantive provisions of Section 2(2)(b) must apply. In the instant case there was no such revocation and going by the text of Part (i) of the proviso, the provisions of SAFEMA must apply in the instant case. Parts (ii) and (iii) of the proviso are cases where substantive orders of detention to which
- E provisions of Section 9 and Section 12A respectively apply and as such they are not relevant for the present consideration. Part (iv) of the proviso which speaks of cases where order of detention is set aside by a court of competent jurisdiction, applies irrespective whether the matter comes under Section 3(1) simplicitor or comes under Section 9 or Section 12A. The order of detention was not set aside in the present matter and
- F as such Part (iv) is also inapplicable to the present case.

25. The order of detention in this case was not revoked under any of the postulates of the proviso nor was it set aside by any competent court and as such the provisions of SAFEMA must apply. The High Court was right in observing that the detention “had run right through the
- G duration or continuance of the emergency”. Though the petition was pending during the length of this time and was taken up for hearing after the lifting of the emergency, no attempts were made to have the petition disposed of on merits. Pertinently, the notices under SAFEMA were issued to Roshan Lal and his wife Sheelawati while the possibility that the SAFEMA proceedings could be premised on the validity of the
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detention order was very much alive and yet, the matter was chosen not to be agitated on merits. The criticism of Mr. Bagai, learned Advocate that the High Court had overruled the order dated 24.02.2004 passed by this Court, is totally incorrect. Nonetheless, we proceed to consider the submissions raised by Mr. Bagai, learned Advocate regarding challenge on merits. A

26. In the present case, the representation dated 17.01.1975 was considered by the State on 11.02.1975 and the rejection was communicated to the detenu. Moreover, at no stage, any grievance was raised that the grounds of detention were not communicated to him in a language known to him. Similarly, the submission that the grounds of detention were identical, is also without any merit. Insofar as the order of detention under COFEPOSA was concerned, the grounds dealt with instances where the detenu had indulged in smuggling of goods, on the basis of which subjective satisfaction was arrived at as regards his propensity to deal in smuggled goods. Having considered the factual aspects of the matter, the grounds raised by Mr. Bagai, learned Advocate are without any substance and merit. We, therefore, affirm the view taken by the High Court and dismiss said submission. B C D

27. In the aforesaid circumstances, the challenge to order of detention dated 19.12.1974 passed under the provisions of COFEPOSA in respect of Roshan Lal must fail. Further, the Competent Authority and the Appellate Tribunal constituted under the provisions of SAFEMA had, after issuance of due notice and granting every opportunity to the noticees, arrived at findings that the properties mentioned in the schedules to the notices were illegally acquired and that they stood forfeited to the Central Government free from all encumbrances. All the prayers made in Civil Writ Petition No.509 of 1996 being meritless said Writ Petition deserved to be rejected and was rightly dismissed by the High Court. E F

28. We, therefore, see no reason to take a different view in the matter and this Criminal Appeal is dismissed.

CRIMINAL APPEAL NO.1493 OF 2009

29. In this Appeal, an order of detention was passed against the appellant on 14.08.2002 under Section 3(1) of COFEPOSA. The appellant came to be detained on 17.12.2002. Criminal Writ Petition No.296 of 2003 preferred by the appellant was dismissed by the High Court of Punjab and Haryana on the ground that said High Court had no H

- A jurisdiction to entertain the petition. The appellant, thereafter, filed Writ Petition (Criminal) No. 997 of 2003 in the High Court of Delhi on 21.08.2003. The appellant was released on completion of one year on 17.12.2003. After such release, proceedings under SAFEMA were initiated by the Competent Authority on 29.03.2005. Writ Petition (Criminal) No. 997 of 2003 was dismissed by the High Court of Delhi on 02.05.2008 against which present appeal has been preferred by the appellant. The appeal was tagged with the earlier appeal viz. Criminal Appeal No. 1492 of 2009.
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30. The detention order was sought to be assailed before the High Court *inter alia* on the grounds of non-supply of documents; delay in passing the order of detention and supply of illegible documents. Those grounds were found to be without any substance by the High Court and the challenge so raised was negated. Having gone through the record, we do not find any error in the view taken by the High Court. We, therefore, dismiss this Appeal.
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Devika Gujral

Appeals dismissed.