BIPINCHANDRA GAMANLAL CHOKSHI AND ANOTHER A

v.

STATE OF GUJARAT AND OTHERS

(Civil Appeal No. 14352 of 2015)

DECEMBER 10, 2015 B

[JAGDISH SINGH KHEHAR AND ROHINTON FALI NARIMAN, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – ss. 3 and 12A – Detention under both the provisions – On the same date – On revocation of declaration u/s. 12A, the detenu was released u/s. 3 on the very same day – Thereafter initiation of proceedings u/s. 6 of SAFEMA Act on the basis of s. 2 of the SAFEMA Act – The detenu then challenged his detention u/s. 3 of COFEPOSA Act – High Court rejected the petition holding that the detenu was not allowed to challenge the detention order after its revocation – On appeal, held: Scope of challenge to detention u/s. 3 is wider than the scope of challenge u/s. 12A – Thus when the detention u/s. 3 is r/w s. 12A, the scope to challenge the detention is only on technical grounds – The detention of the detenu u/s. 3, in the present case, was althrough r/w. s. 12A – Thus there was no occasion for the detenu to challenge his detention under limited scope of s. 3 – Therefore the challenge to detention u/s. 3 can be allowed to be raised even after revocation of the detention – Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 – s. 2(2)(b) Proviso iv and s. 6 – Constitution of India, 1950 – Article 352(1). C D E F G

Allowing the appeal, the Court.

HELD: 1. The substantive challenge to an order of preventive detention when the order of detention is limited to the scope of Section 3 of the COFEPOSA Act, is far greater. After the declaration under Section 12A of H

A the COFEPOSA Act, the challenge is only on technical grounds of violation of procedure under Section 12A of the COFEPOSA Act. [Para 22] [1107-D-E]

2. The proviso (iv) to Section 2(2)(b) of SAFEMA Act cannot be an empty formality. It should be an effective right available to a detenu, so as to enable him to assail the order of his preventive detention. A detenu may be advised not to raise a challenge to his order of detention, while it subsists under the stringent conditions of Section 12A of COFEPOSA Act, on account of the fact that his remedy would be wider and the grounds available would be far more, when the order of detention is limited to the scope of Section 3 of the COFEPOSA Act. [Para 22] [1105-G-H; 1106-A-B]

3. In the facts and circumstances of the present case, it is apparent, that the order of detention under Section 3 of the COFEPOSA Act was passed on 11.6.1976. Immediately after the passing of the aforesaid order, on the same day, the Government of Gujarat issues a declaration under Section 12A, with reference to the detention of the appellant. Again, on the lifting of the emergency on 21.3.1977, the declaration under Section 12A ceased to be operative, with reference to the detention of the appellant. As soon as the declaration under Section 12A of the COFEPOSA Act was revoked, the appellant was ordered to be released. At the beginning of the order of detention, and at the time of revocation thereof, whilst the detention order subsisted only within the limited scope of Section 3 of the COFEPOSA Act read with Section 12A thereof, there was really no occasion for the appellant to assail the same thereafter, on any of the grounds as may have been available to him. [Paras 23 & 26] [1107-F-H; 1108-A; 1109-A]

4. Thus, the appellant had no occasion whatsoever to challenge the order of his detention, on the grounds available to him, while the detention order subsisted under the limited scope of Section 3 of the COFEPOSA Act read with Section 12A thereof after 21.3.1977, as the order under Section 3 could not have been the subject matter of challenge as the detenu was released on the same day. [Para 24] [1108-B-D]

5. Another reason to enable the appellant to raise a challenge to the order of his detention is, that three of his brothers who raised such a challenge, to the order of their preventive detention, were successful in having the same set aside. The appellant is possibly similarly situated as his three brothers, and if it is so, he should have the same right as was availed of by his three brothers. [Para 27] [1109-C-D]

6. Therefore, the determination rendered by the High Court in not allowing the appellant to raise a challenge to the order of his detention dated 11.6.1976, was wholly unjustified. The same is accordingly hereby set aside. The appellant is relegated back to the High Court, so as to enable him to press his claim, on the grounds as may be available to him (to assail the order of his detention dated 11.6.1976). It is only after the determination of the High Court, that it will be open to the authorities to proceed with the action taken against the appellant under Section 6 of the SAFEMA Act, and that too, if the appellant fails in his attempt, to successfully assail the order of his detention. [Para 28] [1109-E-G]

Attorney General of India v. Pranjivandas and Ors. JT 1994 (3) SC 583: 1994 (5) SCC 54: 1994 (1) Suppl. SCR 1 – distinguished.

A *Krishna Murari Aggarwala v. Union of India* **AIR 1975 SC 1877: 1976 (1) SCR 16 – referred to**

Case Law Reference

1976 (1) SCR 16	**referred to.**	**Para 22**
B **1994 (1) Suppl. SCR 1**	**distinguished.**	**Para 25**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 14352 of 2015

From the Judgment and Order dated 06.12.2012 of the C Division Bench of High Court of Gujarat in Letters Patent Appeal No. 478 of 1997

C. A. Sundaram, Shirish H. Sanjanwala, Shimik Sanjanwala, Zafar Inayat, Rohini Musa, Abhishek Gupta, D Kailash Pandey, Ranjeet Singh (for K. V. Sreekumar) for the Appellants.

K. Radhakrishnan, Sunita Rani Singh, R. K. Verma (for Binu Tamta), Hemantika Wahi, Jesal for the Respondents.

E The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. The State of Gujarat on 11.6.1976 ordered the detention of the appellant – Bipinchandra Gamanlal Chokshi, F under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the 'COFEPOSA Act'). Section 3, whereunder the above order of detention was passed, is being extracted hereunder:

G "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 H

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

(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 & Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Ordinance, 1988 (J&K Ordinance 1 of 1988).]

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

A (3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five
B days, and in exceptional circumstances and for reasons to be recorded in writing not later than fifteen days, from the date of detention."

3. The revocation of an order passed under Section 3 of
C the COFEPOSA Act, is contemplated inter alia under Section 8 of the COFEPOSA Act. Section 8, which is also relevant in the determination of the present controversy, is also reproduced hereunder:

"

D

8. Advisory boards.- For the purposes of sub-clause (a) of clause (4), and sub-clause (c) of clause (7), of Article 22 of the Constitution,-

E (a) the Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a chairman and two other persons possessing the qualifications specified in sub-clause (a) of clause (4) of Article 22 of
F the Constitution;

(b) save as otherwise provided in section 9, the appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory
G Board constituted under clause (a) to enable the Advisory Board to make the report under sub-clause (a) of clause (4) of Article 22 of the Constitution;

(c) the Advisory Board to which a reference is made under
H clause (b) shall after considering the reference and the

materials placed before it and after calling for such further information as it may deem necessary from, the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desired to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;

(d) when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;

(e) a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential;

(f) in every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

A 4. Proclamation of emergency under Article 352(1) of the Constitution of India was declared on 25.06.1975. Based on the above, the State of Gujarat issued a declaration under Section 12A of the COFEPOSA Act, that the detention of the appellant was necessary for dealing effectively with the B emergency contemplated under section 12(A)(2) of the COFEPOSA Act.

5. Section 12A provides for a procedure, separate and distinct from the procedure contemplated for revocation of an C order passed under Section 3 of the COFEPOSA Act. Section 12A is being reproduced hereunder:

"12A. Special provisions for dealing with emergency.- (1) Notwithstanding anything contained in this Act or any D 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 E 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.

(2) When making an order of detention under this Act F 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 G 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 H 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 to that effect and communicate a copy of the declaration to the person concerned: A B

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. C

(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, that Government may revoke the declaration. D E

(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. F G

(5) It shall not be necessary to disclose to any person detained under a detention order to which the provisions H

A 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 sub- section in is force, and, accordingly, such period shall not be taken into account for the purpose of sub-section (3) of section
B 3.

(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
C been made thereunder, the period during which such declaration is in force shall not be taken into account for the purpose of computing-

(i) the periods specified in clauses (b) and (c) of section
D 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"
E specified in sub-section (3) of section 9.]"

6. It is apparent, that under sub-section (2) of Section 12A of the COFEPOSA Act, every detention order has to be reviewed within fifteen days. It is in consonance with sub-
F section (2) aforementioned, that the detention order passed against the appellant was reviewed on 26.6.1976. The Competent Authority arrived at the conclusion in the above review, that the detention of the appellant should continue. Under Section 12A of the COFEPOSA Act, every detention
G order is to be reviewed before the expiry of every four months. The instant review is contemplated under sub-section (3) of Section 12A of the COFEPOSA Act. In compliance with Section 12A(3) of the COFEPOSA Act, the first review contemplated under sub-section (3) took place on 04.10.1976.
H Yet again, the order of detention of the appellant was affirmed.

Still further, the second review under Section 12A(3) of the COFEPOSA Act, was held on 9.2.1977. Yet again, the Competent Authority arrived at the conclusion, that the detention of the appellant should be continued.

7. Emergency declared under Article 352 of the Constitution of India, was revoked by the President of India, on 21.3.1977. On the same day, as the revocation of the emergency, i.e., on 21.3.1977 itself, the State of Gujarat, revoked the order of detention passed against the appellant.

8. It is sufficient to record herein, that the appellant Bipinchandra Gamanlal Chokshi assailed the order of his detention dated 11.6.1976, by filing Special Civil Application No. 1276 of 1977. It is apparent, that the aforesaid challenge was made by the appellant, well after the order of his detention (dated 11.6.1976), had been revoked (by the order dated 21.3.1977). Further details in this behalf, shall be referred to at a later juncture.

9. The grievance of the appellant in assailing the order of his detention (passed under Sections 3 read with 12A of the COFEPOSA Act) assumed significance, on account of a show cause notice issued to the appellant on 28.4.1977, under Section 6 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (hereinafter referred to as 'SAFEMA Act'). The short show cause notice issued to the appellant, is extracted hereunder:

> "Shri Bipinchandra Gamanlal Choksy,
> Nanavat Main Road,
> Surat.
>
> Whereas, I S.N. Sastri, being the competent Authority Under Section-5 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (13 of 1976), have, on the basis of relevant information and relevant material available to me, reason to believe

A that the properties described in the schedule enclosed hereto which are held by you or on your behalf, are illegally acquired properties within the meaning of clause (c) of sub-section (1) of section-3 of the said Act.

B 2. Now, therefore, in pursuance of sub-section (1) of section-6 of the said Act, I hereby call upon you by this notice to indicate to me within 35 days of service of this notice, the sources of your income, earnings or assets, out of which or by means of which you have acquired the C aforesaid properties, the evidence on which you rely and other relevant information and particulars and to show cause why the aforesaid properties should not be declared to be illegally acquired properties and forfeited to the Central Government under the said Act.

D Sd/-
(S.N. Sastri)
Competent Authority
Bombay"

E 10. It would be relevant to mention, that the initiation of proceedings under the SAFEMA Act against the appellant, were based on Section 2 of SAFEMA Act. During the course of hearing, learned counsel for the rival parties agitated their claims, on the basis of the interpretation of Section 2(2)(b) of F the SAFEMA Act. Whilst, it was the contention of the learned counsel for the appellant, that proceedings could not be initiated against the appellant, under clause (b) of sub-section (2) of Section 2 of the SAFEMA Act, it was the contention of the learned counsel representing the Competent Authority, as well G as, the State of Gujarat, that the mandate of Section 2(2)(b)is clear and explicit. Because the appellant does not fall in any of the exceptions contemplated through provisos (i) to (iv) thereof, the proceedings initiated against the appellant were well within the justification of law. Section 2(2)(b) of the H

SAFEMA Act is extracted below:

"Section 2(2)(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

(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 sub-section (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

(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

(iv) such order of detention has not been set aside by a Court of competent jurisdiction."

11. In order to complete the sequence of facts, it is essential to notice, that one of the brothers of the appellant,

A namely, Niranjan Dahyabhai Chokshi approached the High Court, so as to assail a similar order of detention, as was also passed against him. The challenge was raised through Special Criminal Application Nos. 289, 704 and 723 of 1990, and 745, 747 and 748 of 1991. The challenge to the detention of B Niranjan Dahyabhai Chokshi was raised on the ground of the law declared by this Court in Krishna Murari Aggarwala v. Union of India AIR 1975 SC 1877, wherein it was held, that recording of the grounds of detention is an essential prerequisite, before the passing of the order of detention. Accordingly it was held, C that if the grounds of detention are not recorded and signed, before passing an order of detention, the "satisfaction" of the concerned Government or the concerned officer, contemplated under Section 3 of the COFEPOSA Act, would be purely illusory, and such order of detention would be liable to be set D aside. Having arrived at the finding, that the grounds of detention were not formulated at the time of passing of the order of detention, the High Court of Gujarat concluded, that the detention order, clearly violated the constitutional mandate E contained in Article 22(5), and as such, set aside the order of detention of Niranjan Dahyabhai Chokshi (the appellant's brother). Simultaneously with the setting aside of the above order, proceedings initiated against Niranjan Dahyabhai Chokshi under Section 6 of the SAFEMA Act were also set F aside as unsustainable.

12. Two other brothers of the appellant – Bipinchandra Gamanlal Chokshi, namely, Rameshchandra Gamanlal Chokshi and Pravinchandra Kikabhai Choksy had likewise G approached the High Court of Gujarat by filing Special Criminal Application Nos. 331 and 332 of 1992 respectively, to likewise assail the orders of their detention under the provisions of COFEPOSA Act, and initiation of proceedings under Section 6 of the SAFEMA Act. Yet again, the High Court by its order

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dated 12.04.1993 set aside their orders of detention, based on the decision rendered by this Court in Krishna Murari Aggarwala's case (supra). The High Court concluded similarly as in the other brother's case, that their orders of detention had been passed, before the grounds of detention were prepared and signed by the authorities concerned. Accordingly, proceedings initiated against these two brothers of the appellant, under Section 6 of the SAFEMA Act were also set aside.

13. Insofar as the challenge raised by the appellant herein, to the order of his detention dated 11.6.1976, as well as, the order of initiation of proceedings under Section 6 of the SAFEMA Act on 28.4.1977 is concerned, the claim raised by the appellant was rejected by a learned Single Judge of the High Court (while disposing of Special Civil Application No. 3716 of 1995) on 27.2.1997 by holding as under:

"Special Civil Application No. 3716 of 1995:

This Special Civil Application has been filed by Bipinchandra G. Choksi - detenu as appellant No. 1, Smt. Jayashree Bipinchandra Choksi, wife of appellant No. 1 and Bipinchandra Ramanlal Choksi, H.U.F. as appellant No. 3. The appellants have challenged the order of detention dated 11-6-1976 and declaration under Section 12-A of the COFEPOSA Act dated 11-6-1976 and the notice issued under Section 6(1) of SAFEMA Act - Annexure "D". This petition was initially registered as Special Criminal Application No. 1499 of 1994. It was subsequently, on conversion, registered as Special Civil Application No. 3716 of 1995. The petition appears to have been not affirmed. A non-affirmed affidavit filed is dated 24-8-1993. However, it is signed by the learned Advocate on 7-10-1994. The petition appears to have

A been filed on 10-10-1994. The necessary facts are that the appellant No. 1 was detained under the provisions of COFEPOSA Act by the order of detention dated 11-6-1976. Simultaneously, a declaration under Section 12-A was issued on the same day declaring that it was
B necessary to detain the detenu for dealing effectively with the Emergency which was then proclaimed. Upon the Emergency being lifted, the order of detention was revoked by the State Government under a wireless message dated 21-3-1977. The notices under Section
C 6(1) of SAFEMA Act dated 28-4-1977 were issued. The appellants have challenged the order of detention as well as the SAFEMA Act notices by way of filing Special Criminal Application No. 1276 of 1977. However, the said
D writ petition was dismissed as withdrawn by the order of the Division Bench of this Court on 9-8-1994. The order reads as follows:

> "The challenge to the Constitutional validity of SAFEMA Act and COFEPOSA Act no longer survives,
E in view of the decision of the Supreme Court in the case of Attorney General of India v. Pranjivandas and Ors., reported in JT 1994(3) SC 583. The learned Advocate for the appellant, however, wishes to
F withdraw the writ petition. He wishes to file fresh petition in the light of the said judgment raising such contention, as may be open to the appellant in accordance with law. Mr. J.N. Patel, learned Addl. Central Government Standing Counsel appearing for
G the respondent states that all the questions had been answered by the Supreme Court and nothing survives. As the appellant is wanting to withdraw this writ petition with a view to file fresh petition, we express no opinion on any of the questions on merit. Permission to
H withdraw the petition is granted. The petition stands

disposed of as withdrawn. The interim relief order stands vacated."

Mr. J.N. Patel, learned Addl. Central Government Standing Counsel has raised two preliminary objections - firstly that since the appellant did not challenge the order of detention during the subsistence of Emergency in view of the judgment of the Apex Court in Attorney General of India's case (supra), he cannot be permitted to challenge the order of detention. Secondly, that the present Special Civil Application is barred by the principles of res judicata, inasmuch as that in his earlier petition being Special Civil Application No. 1276 of 1977, he had challenged the order of detention as well as the notice under SAFEMA Act and the same has been disposed of by the order of the Division Bench of this Court dated 9-8-1994.

18. Mr. R.S. Sanjanwala, learned Advocate for the appellants submits that the 9-Bench judgment of the Supreme Court in Attorney General of India's case (supra) has been explained in subsequent judgment in the case of Smt. Gangadevi v. Union of India & Ors.. It is held in Gangadevi's case (supra) that where there has been no pronouncement by any Court upon the validity of the order of detention, the detenu is entitled to challenge the validity of the detention order as the same is being made foundation for forfeiting the properties under SAFEMA Act. The learned Advocate has placed reliance on the observations of the Supreme Court in para 12 which reads as follows:

"There has been no pronouncement by any Court upon the validity of the detention order dated 12-9-1975. The appellant is entitled to challenge the validity of the aforesaid order because it is now being made

A foundation for forfeiting her properties under SAFEMA Act."

I cannot agree with the submissions made by Mr. Sanjanwala, learned Advocate for the appellant. Smt. B Gangadevi's case (supra) does not advance the case of the appellant. The observations quoted above by the Apex Court cannot be read in isolation. In the said case, the order of detention was challenged by the detenu Sreekrishna Gopilal Solanki. The writ petition was C admitted and notices were issued to the State. On 11-3-1976, notices under Section 6 of the SAFEMA Act were issued. On May 1,1976, the said detenu-Sreekrishna Gopilal Solanki died while under detention. Another notice under Section 6 of the SAFEMA Act was issued D to the widow of the detenu, i.e., Gangadevi on April 17, 1977. The writ petition filed by detenu Sreekrishna Solanki was dismissed as infructuous on a representation made by the Public Prosecutor appearing for the State that the detenu has been released. The Apex E Court found that it was an incorrect representation as the detenu expired while he was in detention. In that context, the Apex Court said that the order of detention was challenged by detenu Sreekrishna Solanki himself and unless the challenge is repealed, it cannot be made F basis of the proceedings under SAFEMA Act against the wife of the detenu.

19. In the present case, it is not in dispute that the order of detention was never challenged during the subsistence G of Emergency. In Attorney General of India's case (supra), it is held that the person who could have challenged the order of detention yet does not choose to do so, cannot be allowed to do so when such order of detention is made the basis of applying SAFEMA Act to him. In view of this H

clear position of law, the appellant cannot be permitted now to challenge the order of detention. It is next contended by Mr. Sanjanwala that since the order of detention has been made foundation for SAFEMA Act proceedings, it is open for the relatives and friends of the detenu to challenge the order of detention. This question has also been decided by the Apex Court in Attorney General's case (supra). It is held that a person who do not challenge either by himself or through his best friends, the order of detention challenged but failed, cannot be allowed to challenge the order of detention, when action is taken against him under SAFEMA Act. Thus, this contention also fails. It is lastly contended by Mr. Sanjanwala that the order of detention has been revoked by the wireless message dated 21-3-1977 - Annexure "C" and as such the very foundation of SAFEMA Act notices disappears. This aspect I have dealt with in my earlier part of the judgment and in view of that this contention also does not survive and it is accordingly rejected."

(emphasis is ours)

14. A perusal of the order passed by the High Court reveals, that the High Court relied on the decision rendered by a nine-Judge Bench of this Court, in Attorney General for India and others vs. Amratlal Prajivandas and others (1994) 5 SCC 54.

15. Dissatisfied with the order passed by the learned Single Judge, the appellant preferred LPA No. 478 of 1997. The said appeal came to be dismissed by a Division Bench of the High Court on 06.12.2012. The orders passed by the learned Single Judge in Special Civil Application No. 3716 of 1995, and by the Division Bench in LPA No. 478 of 1997, have been impugned by the appellant before this Court.

A 16. The primary question that arises for our consideration is, whether in view of the judgment rendered by this Court in Attorney General for India's case (supra), the right of the appellant to assail the order of his detention dated 11.6.1976 stood foreclosed. This is indeed, the contention before us by B the learned counsel representing the respondent. Whereas, the submission of the learned counsel for the appellant is, that he had been deprived of the right to assail/impugn the order dated 11.6.1976, which was a valuable right, and the same could not have been taken away, so as to expose him to C extremely harsh consequences. In order to determine the above submission, it will be imperative for us to examine, whether or not the claim of the appellant had been rightfully determined by the High Court, on the basis of the judgment rendered by this Court in Attorney General for India's case D (supra). In examining the instant aspect of the matter, it is essential to notice that this Court (in Attorney General for India's case) while adjudicating upon the issues raised before it, had framed six questions. Question No.2 was to the following E effect:

> "(2) Whether an order of detention under Section 3 read with Section 12-A of COFEPOSA Act made during the period of emergency proclaimed under Article 352(1) of F 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 G Act 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 Act, even though the said order of H 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 Act?"

While determining question no.2, this Court noticed the factual position as under:

"24.These questions arise this way. The orders of detention concerned herein were made on or after the date of the proclamation of emergency to which Section 12-A was applicable. None of theme are, what may be called, 'normal' orders of detention. For that reason, the detenus were neither supplied with the grounds of detention, nor were they given an opportunity to make a representation against their detention nor does it appear that their cases were referred to the Advisory Board – not at any rate within the period prescribed by Section 8, or for that matter, Section 9. They were released on or within a day or two of the date on which the emergency was lifted. In this sense, the order of detention has worked itself out. But that order of detention is now being made the foundation, the basis for taking action under SAFEMA Act against the detenus, their relatives and their associates. SAFEMA Act is made applicable to them by virtue of Section 2(2)(b) read with clauses (c), (d) and (e) of sub-section (2). The appellants say that since the order of detention under COFEPOSA Act is made the basis for action under SAFEMA Act against them, they are entitled to challenge the validity of the order of detention. They may not have been able to question the

A validity of detention during their detention by virtue of Section 12-A of COFEPOSA Act (non-supply of grounds and non-reference to Advisory Board) and also because their right to move the court for enforcement of the rights guaranteed to them by Articles 14, 21 and 22 was B suspended during the period of emergency by an order made by the President of India under Article 359 (1) of the Constitution – even Article 19 did not avail them by virtue of Article 358 – but when the said orders of detention are sought to be made the bases of action C under SAFEMA Act, after the lifting of emergency, they are now entitled to question them. They point out that by virtue of the order made under Article 359(1), the fundamental rights guarateed to them by Articles 14,21 and 22 were not suspended, but only the right to move D for their enforcement was suspended. If so, they say, the detention orders made against them are invalid and illegal for violation of clauses (4) and (5) of Article 22. They may have been barred from enforcing their rights under Article 22,21 and 19 because of the said order of E the President, but that did not render the orders of detention valid. Such invalid, indeed void orders, they say, cannot serve as the basis or as the foundation of action under SAFEMA Act. They also stress the drastic F nature of the provisions of SAFEMA Act. On the other hand, the learned Additional Solicitor General relies upon the provisions of clause (1-A) of Article 359 and submits that the validity of the said detention orders has to be judged with reference to the law then obtaining and not G with reference to the law obtaining on the date of issuance of notice under Section 6 of SAFEMA Act. At any rate, he submits, clause (1-A) of Article 359 saves all such orders. Suspension of remedy, he says,, is tantamount to suspension of the right itself since one H cannot conceive of a right without a remedy. There is no

distinction, he says, between Article 358 and an order under Article 359(1) in this regard. He places strong reliance upon the observations (SCR at p. 812) of the decision in *Makhan Singh* v. *State of Punjab.*" A

Having given our thoughtful consideration to the issue in hand, we are satisfied, that insofar as the factual position is concerned, the present case is apparently similar to the one adjudicated in Attorney General for India's case (supra), on account of the apparent similarity herein within the factual position recorded in paragraph 24, extracted hereinabove. Thus viewed, the conclusions on the issue, should ordinarily follow the determination rendered by this Court in Attorney General for India's case (supra). B C

17. In order to wriggle out of the determination rendered by this Court in Attorney General for India's case (supra), learned counsel for the appellant has placed reliance on the findings recorded in respect to question no.2 (extracted hereinabove), in paragraphs 39 to 41. The same are relevant, and are accordingly being reproduced hereunder: D E

"39. Proviso (iii) expressly treats "an order (of detention)to which the provisions of Section 12-A of the said Act apply" and which "has not been revoked before the expiry of time for, or on the basis of, the first review under sub- section (3) of that section (Section 12-A) or on the basis of the report of the Advisory Board under Section 8,read with sub-section (6) of Section 12-A, of that Act", as an order of detention for the purpose of and within the meaning of clause (b) of Section 2(2) of SAFEMA Act. In view of the fact that SAFEMA Act as well as COFEPOSA Act are included in the Ninth Schedule by the 39th and 40th (Amendment) Acts to the Constitution, clause(b) of Section 2(2) of SAFEMA Act [including proviso (iii) appended to it] are beyond F G H

A constitutional reproach. One has to take the said provisions as they stand and they stand solidly against the appellants' contentions. On this single ground, we hold, as we must, that an order of detention made under COFEPOSA Act, to which the provisions in Section 12-
B A applied, is an order of detention within the meaning of and for the purposes of Section 2(2)(b) of SAFEMA Act and can, therefore, constitute the basis for applying SAFEMA Act to such person.

C 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[11] rendered by a Bench of three Judges. The respondent therein was first detained under Maintenance of Internal
D 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 Act. The grounds of detention were served on him on 23-12-1974. On 25-6-
E 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
F SAFEMA Act 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
G clearly and 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
H Court. Varadarajan, J. speaking for the Bench referred

to the provisions of Sections 2, 6 and 7 of SAFEMA Act and observed thus: (SCC p. 432, para 10) A

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

41. From the facts stated above, it is clear that the order of detention was made long prior to the proclamation of emergency 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 Act 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 Act. 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 Act D E F G H

A is taken against him for action under SAFEMA Act 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 B 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 Act is taken, the challenge must be confined to grounds which C 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(1A). Hence, we say that a person who did not choose to challenge such an order of detention during the D 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 Act to him. In either of the two situations mentioned E above, i.e., whether the challenge is made during the period of detention or later when proceedings under SAFEMA Act are taken against him, the grounds of challenge and scope of judicial scrutiny would be the same. Failure to challenge the detention directly when F he was detained, precludes him from challenging it after the cessation of detention, where it is made the basis for initiating action under SAFEMA Act."

(emphasis is ours}

G 18.Our pointed attention was drawn to the factual position depicted in paragraph 41, namely, that the detenu therein, had an opportunity to assail the impugned order of detention under COFEPOSA Act, and it is therefore, that this Court arrived at the conclusion, that a challenge having not H been raised by the respondent in the above case, it would not

now be open to him to raise such a challenge, after the detention order stood revoked. Insofar as the present controversy is concerned, learned counsel wishes us to believe, that there was no opportunity whatsoever for the appellant to assail the impugned order of detention dated 11.6.1976. Insofar as the instant aspect of the matter is concerned, it was the submission of the learned counsel, that immediately on the passing of the order of detention on 11.6.1976 under Section 3 of the COFEPOSA Act, a declaration came to be issued under Section 12A thereof. It was submitted, that the challenge to an order of detention under section 3 of the COFEPOSA Act read with section 12A is extremely limited, inasmuch as, the challenge would be sustainable only if the procedure contemplated under Section 12A had not been followed. The remedy would be limited to the above technical challenge. It was submitted that as against the above, the challenge to an order of detention passed under Section 3 of COFEPOSA Act, can be based on a variety of reasons, wherein it is open to the appellant to assail the non-compliance of the procedure contemplated under Section 8, and also, any infirmity or illegality, on the basis and reasons which constitute the ground(s) of detention.

19. It was the vehement contention of the learned counsel, that the order of detention under section 3 read with section 12A of the COFEPOSA Act, subsisted from 11.6.1976 when the order of detention under Section 3 was passed, till the order of detention was revoked on the lifting of the emergency on 21.3.1977. It was submitted, that Section 12A is invoked merely by a declaration, whereas, the substantive order of detention is passed under Section 3 of COFEPOSA Act. It was contended, that as soon as the emergency was lifted on 21.3.1977, the original position stood revived, inasmuch as, the order of detention would thereafter be an order under Section 3 of COFEPOSA Act without a Section 12A

A declaration super-added, and as such, was assailable in terms of the grounds available to a detenu under Section 8, and the other grounds referred to above. It was the assertion of the learned counsel, in the present case, that the order under section 3 of the COFEPOSA Act, could not be assailed by the B appellant as he was released on the same day, i.e., on 21.3.1977. There was therefore no occasion for the appellant, to assail the order of his detention, based on pleas and contentions, as would have been available to the appellant, under Section 8 of the COFEPOSA Act, and the other grounds C expressed above.

20. Learned counsel for the appellant, in order to substantiate his claim, placed emphatic reliance on Section 2 (2)(b) of the SAFEMA Act. It was asserted, that the right to D assail an order of preventive detention is a valuable right, and has been recognised in proviso (iv) to Section 2(2)(b)(extracted above). It was the assertion of the learned counsel for the appellant, that an order of detention under the COFEPOSA Act, would inter alia constitute the basis for initiation of E proceedings under Section 6 of the SAFEMA Act. However, every detenu has the right to assail the same, and if the challenge raised against an order of detention under Section 3 of COFEPOSA Act, results in the setting aside of the F detention order, proceedings cannot be initiated against him under Section 6 of the SAFEMA Act.

21. The question that arises for our consideration, is based on the assertion, that the appellant did not raise any such challenge to the order of his preventive detention, during G the subsistence of the order of his detention. It is clear, that the appellant came to be released on 21.3.1977, and Special Civil Application No. 1276 of 1977 was filed by him for the first time on 19.09.1977. According to the learned counsel, that however should make no difference whatsoever. In order to substantiate H

his instant contention, he placed reliance on proviso (iii) of Section 2(2)(b) of the SAFEMA ACt, which provides for two further eventualities, wherein proceedings under the SAFEMA Act cannot be initiated, despite the detention of an individual under the COFEPOSA Act. Firstly, when an order of detention has been revoked under Section 12A of the COFEPOSA Act. And secondly, where such an order of detention was revoked under Section 8 thereof. Learned counsel seeks to emphasise, that a closer examination of proviso (iii) of Section 2(2)(b) indicates, that for computing the periods mentioned in Section 8, the period during which a declaration under Section 12A is in force shall not be taken into account. For this, reference has been made to Section 12A(6), which expressly finds mention in proviso (iii) of Section (2)2(b) of SAFEMA Act. It is the submission of the learned counsel, that proviso (iii) expressly postulates the possibility of a revocation of an order of detention, even after the declaration under Section 12A ceases to operate, under section 8 of the COFEPOSA Act. It is submitted, that this right which was available to the appellant after the declaration under Section 12A came to be revoked, was really not available to him, because the appellant came to be released on 21.3.1977. Therefore, the appellant could not have availed of the right to challenge his order of detention, for the simple reason, that on the revival of the order of detention within the framework of Section 3 of the COFEPOSA Act, the appellant came to be released forthwith, namely, on the same day.

22. We find merit in the contention of the learned counsel for the appellant. The proviso (iv) to Section 2(2)(b) cannot be an empty formality. It should be an effective right available to a detenu, so as to enable him to assail the order of his preventive detention. A detenu may be advised not to raise a challenge to his order of detention, while it subsists under the stringent conditions of Section 12A, on account of the fact that his

A remedy would be wider and the grounds available would be far more, when the order of detention is limited to the scope of Section 3 of the COFEPOSA Act. Illustratively it may be mentioned, that on passing of an order of detention under Section 3 of the COFEPOSA Act, a detenu must be B communicated the grounds on which the detention order was made within five days, and in exceptional circumstances (for reasons to be recorded in writing), within fifteen days of the passing of the order of detention (refer to Section 3(3) of the COFEPOSA Act). Accordingly, non-maintenance of the C aforesaid procedural parameters would be a justifiable ground to assail the order of detention. Additionally, the grounds on which an order of detention has been passed under Section 3 of the COFEPOSA Act, have to be furnished to the detenue. The non-communication of the grounds could constitute the D basis to assail an order of detention. In case the grounds furnished to the detenu are either vague or irrelevant, and even if they can be shown to be patently false and incorrect, a detenu can successfully challenge an order of his preventive detention. A detenu can also assail an order of his detention, if he is in a E position to establish, that the grounds of his detention had not been recorded and signed before the order of detention was passed (as in Krishna Murari Aggarwala v. Union of India, AIR 1975 SC 1877). The above grounds are not available, in case a declaration is issued (as in the instant case), under Section F 12A of the COFEPOSA Act, wherein it is not essential to furnish grounds of detention to the detenue (refer to Section 12A(5) of the COFEPOSA Act). In case an order of detention is passed under Section 3 of the COFEPOSA Act, the G Government ordering the detention, has to make a reference to the Advisory Board within five weeks (in terms of Section 8(b) of the COFEPOSA Act). On receipt of a reference from the Government, the Advisory Board has to submit a report within eleven weeks from the date of detention (under Section H 8(c) of the COFEPOSA Act). And, an order passed by the

Advisory Board opining that there was "... no sufficient cause for the detention of the person concerned..." has to be released forthwith (under Section 8(f) of the COFEPOSA Act Act). A detenu whose order of detention has been passed only under Section 3, without there being a declaration under Section 12A of the COFEPOSA Act, would therefore be entitled to seek revocation of an order of detention, if the procedure contemplated under Section 8 was not complied with, and/or even if the detenu was not released, despite the opinion expressed by the Advisory Board, that the order of detention was not passed on sufficient cause. Or even if it can be shown that the grounds of detention are vague, irrelevant, false or incorrect. None of these grounds are available to a detenu, where a declaration has been issued under section 12A of the COFEPOSA Act. The substantive challenge to an order of preventive detention when the order of detention is limited to the scope of Section 3 of the COFEPOSA Act, are far greater. This, because after the declaration under Section 12A of the COFEPOSA Act, the challenge is only on technical grounds of violation of procedure under Section 12A of the COFEPOSA Act, as expressed above.

23. In the facts and circumstances of the present case, it is apparent, that the order of detention under Section 3 of the COFEPOSA Act was passed on 11.6.1976. Immediately after the passing of the aforesaid order, on the same day, the Government of Gujarat issues a declaration under Section 12A, with reference to the detention of the appellant. Again, on the lifting of the emergency on 21.3.1977, the declaration under Section 12A ceased to be operative, with reference to the detention of the appellant. At the beginning of the order of detention, and at the time of revocation thereof, whilst the detention order subsisted only within the limited scope of Section 3 of the COFEPOSA Act read with Section 12A thereof, there was really no occasion for the appellant to assail

A the same thereafter, on any of the grounds as may have been available to him.

24. We are satisfied, that in the facts and circumstances of this case, specially the position highlighted by the learned B counsel for the appellant, as has been noticed hereinabove, the appellant had no occasion whatsoever to challenge to the order of his detention, on the grounds available to him, while the detention order subsisted under the limited scope of Section 3 of the COFEPOSA Act read with Section 12A C thereof after 21.3.1977, as the order under Section 3 could not have been the subject matter of challenge as the detenu was released on the same day.

25. The factual position depicted in paragraph 41 of the D order passed by this Court in Attorney General for India's case (supra) deals with a situation where the appellant had ample opportunity to assail the order of detention, but had chosen not to do so. In paragraph 41, this Court in Attorney General for India's case (supra) held "...If it is a normal order of detention E (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 F SAFEMA Act is taken against him..." The High Court recorded "...In Attorney General for India's case (supra), it was held that the person who could have challenged the order of detention yet does not choose to do so, cannot be allowed to do so when such order of detention is made the basis of applying G SAFEMA Act to him..."

26. In the present controversy, the appellant had no opportunity whatsoever to assail the order of his detention, after his release. As soon as the declaration under Section H 12A of the COFEPOSA Act was revoked, the appellant was

ordered to be released. His release undoubtedly was a release from detention under Section 3 of the COFEPOSA Act. The factual position taken into consideration in Attorney General for India's case(supra), as highlighted in paragraph 41 (extracted above), in our considered view, would clearly not be applicable to the controversy in hand.

27. We are even otherwise persuaded to accept the contention of the appellant, to enable him to raise a challenge to the order of his detention, for the simple reason, that three of his brothers who raised such a challenge, to the order of their preventive detention, were successful in having the same set aside. The appellant is possibly similarly situated as his three brothers, and if it is so, he should have the same right as was availed of by his three brothers.

28. In the above view of the matter, we are of the view, that the determination rendered by the High Court in not allowing the appellant to raise a challenge to the order of his detention dated 11.6.1976, was wholly unjustified. The order passed by the High Court is therefore liable to be set aside. The same is accordingly hereby set aside. The appellant is relegated back to the High Court, so as to enable him to press his claim, on the grounds as may be available to him (to assail the order of his detention dated 11.6.1976). It is only after the determination of the High Court, that it will be open to the authorities to proceed with the action taken against the appellant under Section 6 of the SAFEMA Act, and that too, if the appellant fails in his attempt, to successfully assail the order of his detention.

29. The instant appeal is allowed in the above terms.

Kalpana K. Tripathy Appeal allowed.