IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1065 OF 2007

Suresh Jumani, Age above 49, of Mumbai, Indian Inhabitant, residing of Plot No.214, Deepak Niwas, 10th Road, Khar (W), Mumbai -400 052.	]]]]]	…..Petitioner

Versus

1 Union of India, Mumbai.	]	
2. The Competent Authority, SAFEMA/ NDPS, having its office at Mittal Court, C Wing, 3rd floor, Nariman Point, Mumbai – 400 021.	]]]]]	…...Respondents

Mr. P. K. Dhakephalkar, senior advocate along with Ms. Simeen Shaikh, Ms. Suvarna, Mr. Dharam Samani i/b. M/s. S. K. Srivastav and Company, advocates for the petitioner.
Ms. Rebecca Gonsalvez, advocate for the respondent Nos. 1 and 2.

CORAM : RANJIT MORE & SMT.SADHANA JADHAV, JJ.

DATE OF RESERVING : 28th SEPTEMBER, 2017.

DATE OF PRONOUNCEMENT : 12th OCTOBER, 2017.

JUDGMENT : (Per Ranjit More, J.)

The petition was admitted by this Court by an order dated 8th October, 2007. In due course, the petition is now placed for final hearing before this Bench.

2. Mr. Dhakephalkar, learned senior advocate for the petitioner, at the outset, made a statement that he is not pressing the relief claimed in prayer clause (a) and is restricting this petition to the reliefs claimed in prayer clauses (b) and (c), which are reproduced hereinbelow :

> *"(b) issue a writ of certiorari or a writ in the nature thereof quashing or set-aside the impugned orders i.e. order dated February 23, 2007 passed by the ATPF, inter-alia dismissing the Application for condonation of delay, being Exhibit A to the Petition.*
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> *(c) issue a writ of certiorari or a writ in the nature thereof quashing or set-aside the Order of Forfeiture dated 23rd August 1999 passed by the Respondent No.2 as also the Show Cause notice dated 31st December 1996 issued by the Respondent No.2."*

3. Heard Mr. Dhakephalkar, learned senior advocate for the petitioner and Ms. Gonsalvez, learned counsel for the respondent Nos. 1 and 2.

4. The brief facts giving rise to the present petition are as follow:

By an order dated 16th November, 1995, the petitioner was ordered to be detained under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA). On 31st December, 1996, a show cause notice under section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (for short “the SAFEMA”) was issued against the petitioner and his wife. It is alleged by the petitioner that though the said notice was served upon his wife, the same was not served upon him. However, the said assertion is denied by the respondent No.2. The respondent No.2-competent authority, thereafter, on 23rd August, 1999, passed a forfeiture order under sections 7 and 19 of the SAFEMA in respect of eight properties, of which, the properties at serial Nos.(i) to (vii) belonged to the petitioner and the one mentioned at serial No.(viii) belonged to the petitioner's wife. The forfeiture order was served upon the petitioner by affixation on 9th September, 1999.

The petitioner's wife challenged the forfeiture order dated 23rd August, 1999 by filing an appeal viz. FPA-40/BOM/1999 before the Appellate Tribunal for Forfeited Property, New Delhi, (for short “the ATFP”). The said appeal was filed by the petitioner's wife in respect of her property at serial (viii) as well as on behalf of the petitioner in respect of the properties at serial (i) to (vii). The ATFP, by its order dated 8th February, 2000, held that the appeal filed by the petitioner's wife in respect of the petitioner's properties was not maintainable. This order was confirmed by the Bombay High Court by its order dated 6th April, 2000, passed in writ petition No. 653 of 2000. The petitioner's wife thereafter approached the Apex Court by filing criminal appeal

No.501 of 2001. However, the same was dismissed by the Apex Court on 4th May, 2001.

The petitioner's wife also challenged the detention order of the petitioner by filing writ petition No. 905 of 2000 in Delhi High Court. However, the same was also dismissed on 31st January, 2001.

The petitioner on 10th September, 2002, filed an appeal being FPA-78/BOM/2002 before the ATFP along with an application for condonation of delay being MPA/150/2002. The petitioner also challenged the detention order in Delhi High Court by filing criminal writ petition No. 511 of 2002. By an order dated 31st May, 2004, Division Bench of the Delhi High Court was pleased to dispose off the said criminal writ petition by directing the respondents to consider revocation of the petitioner's detention, if he makes balance payment of Rs.13.46 lakhs within two months. This judgment of the Delhi High Court was challenged by the respondents by filing SLP (cri) No.3294 of 2004. However, the same was dismissed by the Apex Court by its order dated 2nd August, 2004. On 6th August, 2004, the detention order of the petitioner was revoked by the Central Government under Section 11 of the COFEPOSA. Thereafter, by an order dated 23rd February, 2007, the ATFP passed an order upholding the forfeiture order and consequently, the appeal being FPA No.78/BOM/2002 filed by the petitioner as well as the appeal being FPA No.40/BOM/99 filed by the petitioner's wife came to be disposed off by a common order. The petitioner's appeal was dismissed as time barred. So far as the appeal of the petitioner's wife in respect of property at serial (viii) is concerned, the matter was remanded back.

5. Mr. Dhakephalkar, learned senior advocate for the petitioner, took us through the order dated 31st May, 2004, passed by the Division Bench of the Delhi High Court in criminal writ petition No.511 of 2002 and submitted that the detention order, similar to that of the petitioner, was also issued against six other persons including one Pawan Bhartiya. He further submitted that Pawan Bhartiya challenged the detention order initially before the High Court by filing writ petition, however, the same was dismissed and, therefore, he approached the Apex Court and the Apex Court allowed his SLP and thereby quashed his detention order on the ground that similar detention orders in respect of five other persons are revoked. Mr. Dhakephalkar submitted that so far as the petitioner is concerned, the Delhi High Court taking into consideration the facts that the petitioner has already deposited an amount of Rs.59,00,000/- directed the respondent authorities to reconsider revocation of his detention order on making balance payment of Rs.13.46 lakhs within two months. He submitted this this amount is deposited by the petitioner within the time prescribed.

Mr. Dhakephalkar contended that though the respondent authority passed revocation under Section 11 of the COFEPOSA, in fact, the same is in pursuance of the order dated 31st May, 2004 passed by the Delhi High Court in criminal writ petition No.511 of 2002 and, therefore, it should be construed that the detention order of the petitioner was quashed by the Delhi High Court. He, therefore, relied upon proviso (iv) to section 2(2)(b) of the SAFEMA and submitted that the detention order is a condition precedent and, since it was quashed, the forfeiture order passed under SAFEMA is non est.

6. Ms.Gonsalvez, learned counsel for the respondents, opposed the petition vehemently. She submitted that the petitioner's detention order was not revoked under any of the provisions of Section 2(2)(b) of the SAFEMA. However, the same was revoked under Section 11 of the COFEPOSA. She heavily relied upon a decision of the Apex Court in ***Union of India and others versus Mohanlal Likumal Punjabi and ors. (2004) 3 SCC 628*** and submitted that in such situation, the forfeiture order cannot be quashed. She submitted that the petitioner's appeal before the ATFP against the forfeiture order was rightly dismissed on the ground that the same was barred by law of limitation. Ms. Gonsalvez further submitted that there is distinction between “revocation of order” and “quashing of order” and, in the present case, since the petitioner's detention order was revoked under Section 11 of the COFEPOSA, he is

not entitled for the reliefs claimed in the petition. In this regard, she relied upon a decision of the Apex Court in ***Ibrahim Bachu Bafan versus State of Gujarat and ors. AIR 1985 SC 697.***

7. We have given our anxious thought to the rival contentions. We have also gone through the petition and the annexures thereto and also the decisions cited across the Bar. There is no dispute that by the order dated 16th November, 1995, issued by the Government of India, Ministry of Finance, Department of Revenue, under Section 3(1) of the COFEPOSA, the petitioner was ordered to be detained for his alleged involvement in customs fraud and smuggling activities in contravention of the provisions of the Customs laws. One Mr. Pawan Bhartiya, a person similarly situated with petitioner, was detained under the provisions of Section 3(1) of the COFEPOSA. Mr. Pawan Bhartiya challenged the detention order by filing criminal writ petition No. 341 of 2000 before the Delhi High Court and this petition was dismissed on 25th May, 2001. One of the grounds of challenge was that similar detention orders passed in other five cases were revoked by the respondents. Against the above said decision of the Delhi High Court, the said Pawan Bhartiya approached the Apex Court by filing SLP (Cri) No.2591/2000. The said SLP was granted and converted into appeal, which was ultimately allowed vide judgment dated 31st October, 2001.

8. It is also relevant to mention at this stage that during the period between 1993 and 1995, when the detention order was passed against the petitioner under COFEPOSA, similar detention orders were also issued against six more persons including Pawan Bhartiya for mis-declaration of quantity in export of fabrics. All these shipments were done between 1993 and 1995 through the same clearing agent – Mr. Ashok Pokharkar of Amol Shipping. The respondent No.2 had recommended for revocation of such detention orders against five persons. The detention orders of those persons were accordingly revoked. Such recommendation for revocation was, however, not made in the case of Mr.Pawan Bhartiya and the petitioner. As mentioned above, Mr. Pawan Bhartiya challenged the detention order on the ground that he was meted with discriminatory treatment inasmuch as detention orders were revoked in other cases and not in his case. This contention of Pawan Bhartiya found favour with the Supreme Court and while quashing the detention order, the Supreme Court made the following observation:

> *"At the time of hearing of this matter learned counsel for the appellant pointed out that similar detention orders were passed against six persons during the period from 7-12-1995 to 12-8-1996. He pointed out that five out of six detention orders were revoked by the competent authority on the ground that the custom duty which was required to be paid was paid by them before the execution of the*

detention orders. Despite this fact the detention order passed against the appellant was not revoked even though he has also paid the custom duty as demanded. It has also been pointed out that the sponsoring authority submitted its report before the detaining authority to revoke the detention order which was passed against the appellant. He has also pointed out that after the detention order was passed the appellant surrendered his licence and had ceased all economic activities of exporting or importing of goods.

In response to the contention raised by the appellant the detaining authority-Joint Secretary to the Govt. of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau has filed an affidavit wherein it is admitted that similar five detention orders were revoked. However, it is stated that at the relevant time when the detention orders were revoked, the perception of the Central Government was, the fact of payment of duty in the cases detected against these persons may act as a deterrent against their chance of indulging in similar prejudicial activities in future since this may adversely affect their financial backbone. Following the said line of thinking Central Government had revoked the detention orders issued against those five persons. However, subsequently that perception was changed and according to the view of the detaining authority there was no necessity of revoking the detention order before its execution.

In our view, there is no reason to discriminate the appellant and the reason given by the authority in not revoking the

> *detention order could hardly be justified. It is true that normally before the execution of the detention order the same is not required to be quashed and set-aside. However, considering the peculiar facts and circumstances of the case, in our view, no purpose will be served by continuing the detention order. It is pointed out that the appellant has ceased his activities in the field of import or export. He has already paid the tax with penalty as demanded by the authority. There is nothing on record that since last five years the appellant has indulged in any such activity. It is to be noted that the purpose of passing the detention order is to prevent the detenu from continuing his prejudicial activity but not to punish him.*
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> *Hence, in view of the facts and circumstances of the present case, the impugned order dated 30th July, 1998, passed by the Joint Secretary to the Government of India under Section 3(1) of the COFEPOSA is quashed and set-aside. The appeal is allowed accordingly."*

9. So far the petitioner's case is concerned, the Delhi High Court noted that the petitioner from time to time, on respondent No.2's demand, deposited an amount of Rs.59.28 lakhs in different instalments. The Delhi High Court also noted that the claim of the respondent No.2 against the petitioner for evasion of custom duty along with penalty was Rs.77.74 lakhs and thus, the balance amount payable to the respondent No.2 was Rs.18.46 lakhs. The Division Bench of the Delhi High Court noted that the petitioner had deposited an amount of Rs.5,00,000/-

before the Customs, Excise, Gold Control Appellate Tribunal(for short "CEGAT") on 11th January, 1999. The Delhi High Court adjusted this amount of Rs.5,00,000/- towards the claim of the respondents and ultimately directed them to consider revocation of the petitioner's detention order, in case, the petitioner makes payment of balance amount of Rs.13.46 lakhs and pass appropriate order **on the lines passed in other cases.**

The above order of the Delhi High in criminal writ petition No.511 of 2002 was challenged by the respondent No.2 by filing SLP (Cri) No.3294 of 2004. However, the same was dismissed on 31st May, 2004. The respondents, thereafter, revoked the petitioner's detention order under section 11 of the COFEPOSA on 6th August, 2004.

10. The question which we are called upon to decide is whether on revocation of the petitioner's detention order under section 11 of the COFEOSA, the forfeiture order under SAFEMA in respect of the petitioner's properties becomes non est and cannot be acted upon.

Mr. Dhakephalkar, in this regard, asserted that the petitioner's case falls under proviso (iv) to Section 2(2)(b) of the SAFEMA. Ms. Gonsalvez, on the contrary, submitted that none of the provisions including proviso (iv) to Section 2(2)(b) of the SAFEMA would be applicable to the present case as the detention order is revoked under

Section 11 of the COFEPOSA.

Section 2 of the SAFEMA reads as under :

"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:—

(a) every person—

(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

(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

(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

(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;

(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 12-A 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 12-A 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 12-A, of that Act; or

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

(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."

Reading of the provisions of the above section, makes it abundantly clear and which fact even Mr. Dhakephalkar does not dispute that the petitioner's case does not fall under provisions (i) (ii) and (iii) of section 2(2)(b) of the SAFEMA. The relevant issue which deserves consideration is whether, in the present case, proviso (iv) to section 2(2)(b) of the SAFEMA applies or section 11 of the COFEPOSA applies.

Therefore, we have to see the effect and purport of the decision of the Delhi High Court in criminal writ petition No.511 of 2002. As stated above, the Delhi High Court disposed off the petitioner's criminal writ petition No.511 of 2002 on the basis of the decision of the

Apex Court in SLP(Cri) No.2591 of 2000 filed by Pawan Bhartiya. The Apex Court quashed the detention order issued against the petitioner on the ground that detention orders in respect of five other similarly situated persons are revoked. It is apparent from the record that the detention order of the five persons were revoked by the respondents on the ground that the custom duty which was required to be paid was paid by those persons and so far as Pawan Bhartiya is concerned, it was quashed by the Apex Court on the ground that since the custom duty along with penalty was already paid by him, the respondents cannot discriminate between persons similarly situated. So far as the present petitioner is concerned, the Delhi High Court in criminal writ petition No.511 of 2002 directed the respondents to consider revocation of the petitioner's detention order on similar principles of discrimination and only after the petitioner deposited the entire amount of Rs. 77.74 lakhs towards excise duty and penalty. Out of which, the petitioner has already deposited the amount of Rs.59.28 lakhs plus Rs.5 lakhs. Thus in short, the Delhi High Court directed the respondents to consider the revocation of the petitioner's detention order on petitioner depositing balance amount of Rs. 13.46 lakhs within a period of two months. What is important to note is that the Delhi High Court directed the respondents to consider the petitioner's case and pass appropriate orders on the lines passed in other cases. The respondents initially did not accept this order and challenged the same by filing SLP(Cri) 3294 of 2004 in the Apex Court. As stated above, the said SLP was dismissed and the respondents were left with no option but to revoke the petitioner's detention order. As a matter of fact, the Delhi High Court directed the respondents to revoke the detention order on petitioner's depositing an amount of Rs. 77.74 lakhs.

Thus, it is clear from the above discussion that the respondent-authority passed detention order against similarly situated seven persons under section 3(1) of the COFEPOSA. The detention orders of five persons were revoked by the respondent-authority after payment of excise duty plus penalty. So far as the sixth person viz. Pawan Bhartiya is concerned, the Apex Court quashed his detention order as he was similarly situated with the other five persons and he cannot be meted with discriminatory treatment. As far as the petitioner is concerned, record revealed that time and again the respondent-authority asked him to pay excise duty and he has complied with the directions. The petitioner was also informed that if he did not pay the excise duty along with the penalty, proceedings under SAFEMA would be initiated against him. It is clear that the petitioner, in pursuance of these directions, had already deposited the amount of Rs.59.28 lakhs and Rs.5 lakhs with the CEGAT. The Division Bench of the Delhi High Court has left no course open to the respondent-authority but to revoke the detention order of the petitioner on his depositing the balance amount of Rs.13.46 lakhs within the stipulated time and the petitioner has already complied with the said condition.

11. Mr. Dhakephalkar asserted and Ms. Gonsalvez does not dispute that except petitioner and his wife, SAFEMA proceedings were not initiated against other six persons including Pawan Bhartiya whose detention orders are already revoked by the respondent-authority or quashed by the Apex Court.

12. In our considered opinion, if the forfeiture order against the petitioner and his wife under the SAFEMA is allowed to stand then that would amount to violation of the provisions of Article 14 of the Constitution of India as the petitioner and his wife are entitled to same treatment which was given to other six persons who were similarly situated. In these peculiar facts and circumstances of the case, the action of the respondent-authority in forfeiting the properties of the petitioner and his wife under SAFEMA would be discriminatory.

13. Though respondent-authority revoked the petitioner's detention order under Section 11 of the COFEPOSA, the same was under express direction of the Delhi High Court. As stated above, the Delhi

High Court did not give any option to the respondents but to revoke the petitioner's detention order. Thus, in our considered view, the Delhi High Court in fact quashed the detention order issued to the petitioner under Section 3(1) of the COFEPOSA. If that be so, the petitioner's case would be covered by proviso (iv) to section 2(2)(b) of the SAFEMA and section 11 of the COFEPOSA would have no application though it is purportedly shown that the petitioner's detention order was revoked under the said section.

14. Once we have held in peculiar facts and circumstances of the case that the petitioner's detention order was in fact quashed by the Delhi High Court then in view of the proviso (iv) to Section 2(2)(b), of the SAFEMA, the proceedings under SAFEMA against the petitioner and his wife have become non est as the detention order under COFEPOSA is a condition precedent for proceedings under SAFEMA.

15. Before parting with this order, we must deal with the decisions cited at Bar by Ms.Gonsalvez.

In ***Mohanlal Likumal Punjabi and ors.(supra),*** the Apex Court considered the proviso (i) to Section 2(2)(b) of the SAFEMA. The Apex Court held that exception provided by the said proviso will operate when the order of detention is the one to which the provisions of section 9 or 12-A of the COFEPOSA do not apply. The Apex Court dealt with the first situation envisaged in proviso (i) to section 2(20(b) of the SAFEMA and held that if the revocation is passed on the report of the Advisory Board, then, the said proviso would be applied. It was also held that the revocation was done by the Central Government in terms of Section 11 of the COFEPOSA and the same was unrelated to a report of Advisory Board. In ***Mohanlal Likumal Punjabi and ors.(supra),*** the Apex Court did not consider the scope of proviso (iv) to section 2(2)(b). Under the said clause, the provisions of SAFEMA, are not applicable if the detention order is set-aside by a Court of competent jurisdiction. In the facts of the present case, since we came to the conclusion that the Delhi High Court in effect quashed the detention order, the decision in ***Mohanlal Likumal Punjabi and ors.(supra)*** has no application to the facts and circumstances of the present case.

Ms. Gonsalvez cited the decision of the Apex Court in ***Ibrahim Bachu Bafan (supra)*** to point out that there is distinction between “revocation of detention order” and “quashing of detention order” by the competent Court. There is no dispute regarding the proposition that there is difference between the two phrases viz. “revocation” and “quashing”. However, in the present case, on facts, since we have came to the conclusion that the Delhi High Court in fact quashed the detention order of the petitioner, there should not be any dispute on any proposition laid down by the Apex Court and, therefore, the ratio of this decision has no application to the facts and circumstances of the present case.

16. Taking totality of the facts and circumstances into consideration, in our view, the petition must succeed. The Rule is, accordingly, made absolute in terms of prayer clauses (b) and (c) and the petition is disposed off as such.

[SMT. SADHANA JADHAV, J.] **[RANJIT MORE, J.]**