

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 5430 OF 2017

Mohammed Yunus Sajjad Pasha]
Peerzade, an Indian National,]
Age 53 years, residing at Laxmi]
Tower II, B-Wing, 503, Naya]
Nagar, Mira Road (East),]
Thane 401 107.]

**... Petitioner/Brother of
Detenu**

Ilyas Sajjad Pasha Peerzade]

... Detenu

Versus

1. The Union of India,]
Through the Director]
General, Central Economic]
Intelligence Bureau,]
6th Floor, B-wing, Janapath]
Bhawan, Janpath,]
New Delhi 110 001.]

2. P.V. Subba Rao,]
The Joint Secretary]
(COFEPOSA) Government of]
India, Ministry of Finance,]
Department of Revenue,]
Central Economic]
Intelligence Bureau,]
6th Floor, B-Wing,]
Janpath Bhawan,]
Janpath, New Delhi 110001.]

3. The Superintendent of]
Mumbai, Central Prison,]
Aurthur Road, Mumbai.]

4. The State of Maharashtra]

...Respondents

Mrs. Aisha Mohd. Zubair Ansari a/w Ms. Nasreen S.K. Ayubi for the Petitioner.

Mrs. Aruna Pai for the Respondent Nos. 1 and 2.

Mrs. M.H. Mhatre – AGP for State.

**CORAM : S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.**

DATE : APRIL 27, 2018.

JUDGMENT – (Per : Prakash D. Naik, J.) :-

1. This Petition under Article 226 of the Constitution of India has been filed by the brother of the detenu Mohammed Ilyas Sajjad Pasha Peerzade, who has been detained pursuant to the detention order dated 7th December, 2017 passed by the Joint Secretary to the Government of India, and detaining authority, in exercise of powers under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the COFEPOSA Act for short), with a view to prevent the detenu from abetting the smuggling of goods in future.

2. The detenu was served upon the grounds of detention dated 7th December, 2017 formulated by the detaining authority on the basis of which the impugned order of detention was issued. The grounds of

detention referred to the alleged activities committed by the detenu and others contravening the provisions of Indian Customs Act, 1962. The grounds of detention further mentions that the detaining authority is satisfied that the detenu and others are in the habit of regularly smuggling gold into India from abroad without declaring the same before the Customs Authorities and paying applicable duty and subsequently selling it in the market which amounts to “smuggling” in terms of Section 2 of the Customs Act, 1962. The underlying common thread is the propensity of the detenu to abet smuggling of gold for making illicit profit and putting the National economy into danger which needs to be curbed and it is necessary to prevent him from indulging in such activities further. It is further stated that the detaining authority is reasonably satisfied that the detenu have abetted activities amounting to smuggling in terms of Section 2(39) of Customs Act, 1962 and Section 2(e) of COFEPOSA Act, 1974 which have rendered the goods involved liable to confiscation under the Customs Act, 1962.

3. Mrs. Ansari the learned Advocate for the Petitioner submitted that, the order of detention will have to be set aside on the grounds of challenge referred to in paragraph 4(i), (ii) and (v). It is submitted that the documents mentioned in the list of documents which is annexed to the

Petition as (Annexure "C") were purported to be placed before the detaining authority for issuing the impugned order of detention. It is incumbent upon the detaining authority to disclose to this Court as to on what exact date the proposal for the detention of the detenu was mooted by the sponsoring authorities and on what exact date the same was placed before the Screening Committee and was cleared by the screening committee. The detaining authority should also disclose as to on what exact date the proposal was forwarded by the sponsoring authority to the detaining authority and that as to on what exact date the same was put up before the detaining authority and whether all the documents referred to in the list of documents (annexure 'C'), the copies of which have been furnished to the detenu and which runs into 687 pages were received by the detaining authority along with the proposal and if not, which documents were received alongwith the proposal and which documents received subsequently. It is further submitted that taking into account the paucity of time at the disposal of the detaining authority and the record covering 687 pages which was purported to have been placed before the detaining authority specially when last documents considered by the detaining authority was dated 27.11.2017 and 4.12.2017 and considering the fact that the order of detention was issued on 7.12.2017 the detaining authority could not have, at all, perused the said documents and material

and could not have formulated the grounds of detention in such a short span of time. The detaining authority has thus verbatim adopted the draft grounds or the contents of the proposal placed before him as the grounds of detention for issuing the order of detention. The order of detention suffered from vice of non-application of mind and a casual and cavalier exercise of the statutory power by the detaining authority rendering the impugned order of detention malafide, and null and void. The detaining authority should also disclose as to how many other orders of detention including other co-detenus were issued by him between the period when he received the proposal in the instant case and 07.12.2017 when the impugned order of detention was issued. It was not possible for the detaining authority to himself peruse and scan the documents and the material and formulate the grounds of detention within short span of time. The learned Advocate further submitted that the documents at pages 648 to 657 were dated 24.11.2017, 29.11.2017 and 27.11.2017 respectively and the documents at pages 684 to 686 were dated 14.11.2017 and 24.11.2017 respectively. The document at Sr. No. 6A at page 46 is a statement of Shri. Mushtaq Sayed dated 4.12.2017 and the document at Sr. No. 30 is the statement of Shri. Karnaram Choudhary dated 24.11.2017 which were considered by detaining authority. The detaining authority should disclose as to on or which date the said statements and documents

covering into 687 pages were placed before the detaining authority and the time taken for scanning and perusing the said statements and documents along with other documents and for formulating the grounds of detention. She further submitted that assuming that the detaining authority had himself scanned all the documents and the entire material and had himself formulated the grounds of detention. It is necessary to disclose to this Court as to whether the detaining authority had considered all the documents and entire material together at one and the same time, and whether the detaining authority had received any additional documents after he had received the proposal. It is incumbent upon the detaining authority to disclose as to whether after the receipt of the additional documents at a later date the detaining authority had rescinded the grounds of detention which were earlier formulated and whether the same were re-formulated once again by reconsidering the documents already considered along with additional documents received at a later date or dates together at one and the same time. The detaining authority could not have issued the impugned order of detention by considering in piecemeal the documents purported to have been placed before him.

4. The learned Counsel for the Petitioner relied upon the following decisions in support of her submissions;

(1) Decision dated 20.12.1985 of Supreme Court in Criminal Appeal No. 878 of 1985, in the case of *Shri. Umeshchandra Verma Vs. Union of India*.

(2) *Smt. Kirti Sujit Satam Vs. State of Maharashtra*¹

(3) Judgment of the Bombay High Court dated 13.08.2008 delivered in Criminal Writ Petition No. 678 of 2008, in the case of *Anuj Bajaj Vs. State of Maharashtra*.

5. Mrs. Pai, learned Counsel representing Respondent No. 1 and 2 submitted that the grounds of challenge raised by the Petitioner are devoid of merit. The detaining authority has taken into consideration the documents in proper perspective and issued the order of detention. The impugned order does not suffer from vice of non application of mind. It is submitted that the proposal of the detenu alongwith co-detenus were forwarded by the SIIB Customs, Mumbai on 12th October, 2017 to Joint Secretary (COFEPOSA). The said proposals were placed before the Screening Committee in its meeting dated 16.10.2017. The minutes of the Screening Committee recommending preventive detention of the detenu and the co-detenus were conveyed to the detaining authority on 20th October, 2017. The detaining authority have acted promptly and vigilantly and issued the order of detention at the earliest after arriving at subjective

1 2008 ALL MR (Cri) 774

satisfaction. The documents placed before the detaining authority which were running into about 687 pages were perused by him while issuing the order of detention against the detenu and co-detenus. Mrs. Pai further submitted that it cannot be said that there was non-application of mind and there was casual and cavalier exercise of statutory power by the detaining authority while issuing the order of detention against the detenu. She further submitted that it is not incumbent upon the detaining authority to state as to how many other orders of detention were issued by him before the present order of detention was issued against the detenu and other co-detenus. The detaining authority have himself perused, scanned the material and formulated the grounds of detention. There was sufficient time for the detaining authority to peruse, scan and formulate the grounds of detention and contemporaneously issue the order of detention against the detenu and the co-detenus. It is therefore submitted that the detaining authority has not considered the documents in piecemeal and has issued the order of detention on the basis of the material on record and on the basis of the documents placed before him which were relied upon for issuing the order of detention.

6. Mrs. Pai relied upon the following decisions in support of the order of detention; *Maya Ajit Satam Vs. State of Maharashtra & Ors.*¹ ;

1 2012 (114) Bom. LR 2969

A.K. Gopalan Vs. Govt. of India & Anr¹ ; Zahoor Ahmed Peshimam Vs. The Union of India & Ors² ; Prakash C Mehta Vs. Commissioner & Secretary Govt. of Kerala & Ors³

Mrs. Pai relied upon the contents of the affidavit in reply filed by the detaining authority dated 19th February, 2018 and the affidavit in reply filed by Deputy Director, Directorate of Mumbai Intelligence, Mumbai (Sponsoring Authority) dated 20th February, 2018.

7. In pursuance to the affidavit in reply by the Respondents, the Petitioner has submitted the affidavit in rejoinder dated 15th March, 2018 disputing the contents of the reply filed by Respondents.

8. During the course of hearing of this Petition on 12th April, 2018 our attention was invited to the affidavit in reply of the Deputy Director, Directorate of Revenue Intelligence, Mumbai (Zonal Unit) and the statement made in paragraph 4 thereof and on our query, Mrs. Pai learned Counsel representing Respondents sought time to produce the original files which was granted and the Petition was posted for hearing today. Mrs. Pai has tendered the file which was perused by us.

1 AIR 1966 SCC 816

2 1998 ALL MR (Cri) 601

3 1985 (Supp) SCC 144

9. The submission of the learned Counsel for the Petitioner revolves around the fact that documents were forwarded to the detaining authority from time to time till 4th December, 2017 and the order of detention was issued on 7th December, 2017. It is also pointed out that similar orders were also issued against 3 other co-detenus. The list of documents refers to 687 pages of documents and the detaining authority was required to peruse the documents of all the 4 detenus, formulate the grounds of detention and issue order of detention. In these circumstances, practically it was not possible for the detaining authority to consider all documents within short span of time and issue order of detention on 7th December, 2017. The documents cannot be considered in piecemeal. The order of detention is challenged primarily on the ground and it suffers from vice of non-application of mind.

10. We have perused the grounds of detention, list of documents and the file produced by the Respondents. The list of documents is annexed to the Petition as Annexure "C". The said document indicates that it is a list of relied upon documents in respect of detention order issued against the detenu dated 7.12.2017. The list refers to 65 documents bearing total number of 687 pages. The document at Sr. No. 6A is statement of Mushtaq Abubaker dated 4.12.2017 recorded under Section

108 of The Customs Act, 1962. The document listed at Sr. No. 59 and 64 refers to the letter dated 27.11.2017 recording journeys performed by Peerzada Mohammed Iliyas Sajjad Pasha, and others and the Retraction application dated 14.11.2017 filed by Sayed Mushtaq Abubaker along with letter dated 27.11.2017 filed by sponsoring authority. The affidavit in reply filed by the detaining authority states that the additional documents which have been relied upon for issuing the order of detention, which are 687 pages in total, were received vide sponsoring authorities letters dated 01.11.2017, 04.11.2017, 17.11.2017, 22.11.2017, 27.11.2017, 28.11.2017 and 4.12.2017. The said plea creates confusion and reflects non-application of mind. The list of documents at Annexure "C" referred to the documents, relied upon by the detaining authority for issuing order of detention, running into 687 pages. However, the affidavit indicates that the detaining authority has relied upon additional documents for issuing order of detention which are 687 pages in total and the same were received on the dates mentioned therein. The reply thus denotes that there were additional documents in or beyond the total number of documents relied upon by the detaining authority for issuing order of detention. In this scenario it was incumbent upon the detaining authority to make it clear as to which documents were forwarded to the detaining authority at the earlier point of time and which were forwarded subsequently. The

affidavit in reply is apparently silent in that regard. It is difficult to accept that the detaining authority has applied its mind to the documents for issuing orders of detention against all the detenus which were issued on the same date i.e. 7th December, 2017. The affidavit in reply tendered by the sponsoring authority further compounds the casual approach and the non-application of mind on the part of the detaining authority. Paragraph 4 of the said affidavit in reply dated 20.02.2018 reads as follows.

“4. With reference to Para 4(i) of the petition, I say that on 12.10.2017 the proposal for issuing the order of detention against the detenue along with other co-detenue were forwarded by the SIIB, Customs to the Joint Secretary (COFEPOSA). The Screening Committee meeting was held on 16.10.2017, after going through the said proposal it forwarded its minutes of the meeting on 20.10.2017 to SIIB, Customs. It is stated that thereafter the copy of proposal and documents were forwarded to the Detaining Authority by SIIB, Customs on 01.11.2017 from Serial No.1 to 118 documents. Thereafter DRI (Sponsoring Authority) took over the investigation and also forwarded the documents to the Detaining Authority. It is stated that on 04.11.2017, 17.11.2017, 22.11.2017, 27.11.2017, 28.11.2017 and 04.12.2017, the DRI (Sponsoring Authority) forwarded the remaining documents to the Detaining Authority. The rest of the contents of the said para referred to the Detaining Authority hence the affidavit of the Detaining Authority may kindly referred to.”

The said reply states that the copy of the proposal forwarded to the detaining authority by SIIB Customs on 01.11.2017 contained documents from Sr. No. 1 to 118. Thereafter, the sponsoring authority took over the investigation and also forwarded the documents to the detaining authority. On 04.11.2017, 17.11.2017, 22.11.2017, 27.11.2017, 28.11.2017 and 04.12.2017, the sponsoring authority forwarded the remaining documents to the detaining authority. Thus, the reply refers to 118 documents forwarded to the detaining authority on 01.11.2017 which is followed by the additional documents on the respective dates reflected therein. The list of documents refers to 65 documents and 687 pages which were purportedly relied upon by the detaining authority for issuing order of detention. The aforesaid reply however refers to 118 documents and it also indicates that additional documents were forwarded on the subsequent dates. The said reply is therefore contradicting the stand of the detaining authority. The reply further creates confusion and depicts non-application of mind and cavalier approach on the part of authorities while dealing with the preventive detention. In this regard we have perused the file which was placed before us by the learned Counsel for the Respondents. It is apparent from the file that the proposal was dated 12.10.2017. The proposal and documents forwarded on 01.11.2017 were 37 documents running into 118 pages, the documents dated 04.11.2017

were 60 documents bearing 211 pages, the documents dated 17.11.2017 were 409 pages and 28 documents, documents dated 27.11.2017 were 28 documents having 237 pages, documents dated 28.11.2017 were 3 documents having 18 pages, documents dated 04.12.2017 were 23 documents having 61 pages apart from that the file also indicates that the documents were scanned and emailed to the detaining authority on 07.12.2017. The calculation of the pages of these documents as stated above shows that there were 1054 pages which were forwarded to the detaining authority. In these circumstances it was expected from the detaining authority to come out with a clear explanation and details as to which documents were forwarded and in what number to the detaining authority from time to time. It is pertinent to note that the affidavit is silent in that regard. The entire approach of the detaining authority shows total non-application of mind and it is apparent that the orders of detention were issued against 4 detenus in most casual and cavalier manner. The exercise of powers under the law of preventive detention cannot be in such a lighthearted manner.

11. In paragraph 6 of the affidavit in reply the detaining authority has denied that the grounds were formulated in piecemeal and in paragraph 2 of the affidavit in reply the dates are set out on which the

sponsoring authority has sent 687 pages documents from 01.11.2017 to 04.12.2017. In the reply the detaining authority has not said specifically as to which documents and how many were received along with the proposal but only referred to the additional documents which run into 687 pages sent by sponsoring authority from 01.11.2017 to 04.12.2017 but deliberately not mentioned as to what dates the documents were received by him and it is also not clear as to which documents and how many pages were received by him on which date or dates. Non disclosure of documents along with the proposal as well as non disclosure of date of receipt of the additional documents and their particulars, support the contentions of the Petitioner that the detaining authority has adopted most casual approach while issuing the order of detention and has mechanically adopted the proposal sent by sponsoring authority. In the affidavit in rejoinder filed by the Petitioner it has been contended that on 9th February, 2018 at the time of meeting of Advisory Board the detaining authority has submitted time chart showing chronological sequence of events in respect of detenu and co-detenus in which it is stated that on 06.11.2017 the detaining authority received additional documents. The said time chart showing chronological sequence of events in respect of detenus is annexed to the rejoinder.

12. Pertinently, there is no denial of this statement and the filing of the time-chart. Thus, there is no sur-rejoinder or further affidavit of either of the Respondents. On perusal of the same it is apparent that at Sr. No. 27 the office of the detaining authority has received further copies of additional and/or relied upon documents generated during investigation received from sponsoring authority and similarly on 30.11.2017, 04.12.2017 and even on 07.12.2017 additional in puts received in the case, viz, call data analysis, the statement of Mohammed Sayed recorded under the Customs Act, 1962, the documents regarding Bail applications, Panchanama, Release Memo etc., the statement of Mushtaq Abubaker and further pending relied upon documents were received. It is clear that the detaining authority has lastly received the relied upon documents on 07.12.2017 and on the very same date the detaining authority has formulated the grounds of detention and issued the orders of detention in respect of 4 detenues.

13. The Supreme Court in the case of *Umesh Chandra Verma* has observed that the detaining authority could not have possibly applied mind to the voluminous documentary evidence which was placed before him and for that reason the order of detention has to be quashed. In that case the detenu was arrested on 13th June, 1985 at about 6 P.M. The same night

the detention order was made by the detaining authority. It was thus contended that the detaining authority could not have applied its mind to the several documents and issued the order on the same day. In the decision of this Court in the case of *Smt. Kirti Satam (Supra)* this Court by relying upon the decision of the Supreme Court referred to above and the other judgments has observed that the detaining authority had passed the order within 12 hours of receipt of papers. It was not physically possible to peruse 1712 pages within short time and hence, the order was liable to be quashed on account of non-application of mind. Similar issue was considered in another decision of this Court in the case of *Anuj Bajaj (Supra)*. In this case it was observed that it is difficult to understand as to how detaining authority had taken into consideration documents which were comprising 7419 pages. Even if it is accepted that the authority had 10 days before passing the order, although that is not proved by the record, the said period of 10 days was not sufficient for considering several documents.

14. In the case of *Maya Satam (Supra)* decided by this Court similar contention was rejected. Mrs. Pai has strongly relied upon the said decision. It is submitted that this Court has referred to the decisions of *Smt. Kirti Satam (Supra)* relied upon by the counsel for the Petitioner as

well as the decision of the Supreme Court in the case of **Umeshchandra Verma** which is also relied by the Petitioners Advocate. The Petitioner in the said decision had submitted that the detaining authority has considered the proposal in piecemeal manner on different dates, and the detaining authority was under obligation to formulate the grounds and pass the detention order after considering all the material together and at the time. The detaining authority could not have formulated the grounds of detention in short span of time of two days, considering the voluminous record of about 2965 pages. In Paragraph 85, 86 and 87 of the said decision it was observed that the detaining authority continued to receive documents until 12th March, 2012 and the order of detention was issued on 14th March, 2012. This Court observed that there is nothing wrong if the detaining authority insisted on supply of further generated documents. After receipt of the final proposal and only after being fully satisfied that it was imminent to issue order of preventive detention against the detenu, the detaining authority is expected to exercise powers conferred under the COFEPOSA Act to prevent the detenu from indulging in smuggling in future. That is the process of consideration and merely because the file was handled on different occasions does not mean that the subjective satisfaction has been recorded on piecemeal basis. There is nothing to suggest that there was possibility of the grounds of detention having been

formulated by the detaining authority in piecemeal manner. The detaining authority, on affidavit, has stated that the grounds were formulated by her contemporaneously while recording her subjective satisfaction about the necessity to issue the preventive detention order against the detenu, upon considering all the materials placed before her, including all the further generated documents. The fact that there was several documents and the grounds of detention were formulated in two days' time, by itself, cannot be the basis to hold that the subjective satisfaction recorded by the detaining authority is questionable. It was further observed that once the detaining authority has scrutinized the documents which were placed before her alongwith proposal including the further generated documents and was completely abreast of the contents thereof, it is incomprehensible that such grounds of detention could not have been formulated in two days. In the light of the aforesaid observations, it is clear to us that the said decision can be distinguished and it will have to be held that the decision in *MAYA SATAM (SUPRA)* was delivered in the facts of that particular case. It is also apparent that in the affidavit in reply filed by the detaining authority, it was categorically stated that the grounds were formulated contemporaneously while recording the subjective satisfaction about necessity of detention and upon considering all the materials placed before the detaining authority including the further generated documents.

The affidavit in reply in the present case is however silent and does not make similar assertion. On the contrary the affidavit creates confusion and shows total non-application of mind as stated hereinabove. It is true that this Court in the aforesaid decision has made reference to the decision in the case of *Umeshchandra Verma* as well as the decision in the case of *Kirti Satam (Supra)*. The said decisions were distinguished on the basis of the factual aspects involved in the said matters. In the decision of *Kirti Satam (Supra)*, reference was made to the decision in the case of *Shital Manoj Gore Vs. State of Maharashtra*¹ of the Supreme Court which was relied upon by the Respondents in the said Petition in support of the order of detention. It is contended by the Counsel for the Respondent in the present Petition that even the said decision has been adverted to while deciding the case of *Maya Satam (Supra)*. We have observed hereinabove that the said decision pertains to the factual aspects involved in the said matter and cannot be made applicable, in the present case more particularly in the light of the explanation tendered by the detaining authority in the affidavit in reply. The other decision relied upon by Mrs. Pai, the Counsel for the Respondents was in the case of *A.K. Gopalan (Supra)*. The Supreme Court had considered the arguments advanced at the instance of detenus that there was no application of mind by the Government of India before the orders in question were passed, for as

1 2006 ALL MR (Cri) 3553

many as 140 orders were passed on the same day which shows that the mind could not have been applied to each individual case before several orders were passed all at once on one day. The Supreme Court rejected the said contention on the ground that the reply was tendered by the Government of India wherein it was stated that the question as to the detention of the persons who were ordered to be detained on 4th March, 1965 was under consideration of the Government of India for quite sometime and that only the detention orders were passed on one day. It was also stated by the detaining authority that it was satisfied with respect to each individual person ordered to be detained that the detention was necessary for reasons already set out and it was after such satisfaction that the orders were passed though they happened to be passed on the same day. The Court therefore did not accept from the simple fact that as many as 140 orders were passed on the same day that there was no satisfaction of the Government of India with respect to each individual case. Thus, on perusal of the said observation it is apparent that the detention was under consideration for quite sometime and the affidavit in reply had made assertion in that regard and it was also disclosed that the detaining authority was satisfied with regard to each individual that it was necessary to detain such person. Thus, on facts this decision cannot be made applicable. The other judgment pressed into service by the learned Counsel

for the Respondents in the case of ***Zahoor Peshimam Vs. Union of India and Ors. (Supra)***, also cannot be made applicable in the facts of this case. The Petitioners had submitted that the detaining authority could not have applied its mind to the documents due to paucity of time as the volume of material was sent from time to time by the sponsoring authority in Mumbai to its head office in Delhi from where it was forwarded to the detaining authority. It was observed that the movement of documents from one office to another and to the detaining authority would clearly show that the authority had ample time to apply its mind to the question of expediency of making an order of detention. The Court relied upon the decision in the case of ***A.K. Gopalan (Supra)***. It was further observed that it is not as if the entire exercise of sifting and scanning material, drawing the conclusions therefrom and formulation of the grounds takes place on one and the same day. The process was initiated much earlier when the papers were sent by the sponsoring authority in Mumbai to its head office. It is only a few pages, namely 29 pages, were sent subsequently on different dates as set out in the affidavit of the sponsoring authority. The Court therefore rejected the contention of the Petitioners that there was non application of mind on the part of the detaining authority. Even this decision is peculiar to the facts which is apparent from the observations made by the Court for not accepting the contention of the Petitioners. Mrs.

Pai then relied upon the decision in the case of ***Prakashchandra Mehta (Supra)*** to point out the observations of the Supreme Court that there is no rule of law that commonsense should be put in cold storage while considering constitutional provisions for safeguards against misuse of powers by authorities though these constitutional provisions should be strictly construed. In paragraph 81 and 82 of the said decision it was observed that there was evidence before the authorities that 60 gold biscuits of foreign origin without any explanation of their importation were found in the possession of the detenu. No explanation was given for possession the goods which were smuggled. The statement of Object and Reasons states that smuggling of foreign exchange and related activities have a deleterious effect on the national economy and thereby a serious adverse effect on the security of state. The society must be protected from that social menace by immobilizing the persons by detention of the persons engaged in those operations and to disrupt the machinery established for further smuggling and foreign exchange manipulations. Preventive detention unlike punitive detention which is to punish for the wrong done, is to protect the society by preventing wrong being done. Though such powers must be very cautiously exercised not to undermine the fundamental freedoms guaranteed to our people, the procedural safeguards have to be ensured that, these must be looked at from a

pragmatic and commonsense point of view. The learned Counsel for the Respondent submitted that in the light of the aforesaid observation, a pragmatic view is required to be adopted in the present proceeding. It is submitted that from the affidavit in reply filed, in the present case, it is clear that the detaining authority has applied its mind to the documents placed before him and considering the involvement of the detenu and the nature of the crime committed by the detenu, the Court should consider the issue from the commonsense point of view. The commonsense cannot be put in cold storage while considering the constitutional provisions for safeguarding the misuse of powers by authorities. We have thoughtfully considered these submissions and the observations of the Supreme Court in the said decisions. We have noted hereinabove that there is complete non-application of mind on the part of the detaining authority and the approach depicts casual and cavalier manner in which the order of detention has been issued which is compounded by the vague affidavit in reply filed by the detaining authority and the sponsoring authority. The Supreme Court in catena of decisions has made it clear that the power of preventive detention must be cautiously exercised and the fundamental freedoms guaranteed under the constitution cannot be undermined by adopting casual approach. The detaining authority in the present case has asserted that the documents were not considered in piecemeal manner. The record

indicates that the documents were forwarded to the detaining authority even on 7th December, 2017. The affidavit in reply filed by the detaining authority and sponsoring authority are contrary to each other. The stand taken by the detaining authority in the reply is chaotic and confusing and reflects total non application of mind. The detaining authority is not categorically dealing with the submissions advanced by the petitioners and the grounds of challenge and is apparently vague and misleading. In these circumstances the order of detention cannot be sustained and the same is required to be set aside. In the case of *Dropti Devi and Another Vs. Union of India*¹ the constitutional validity of COFEPOSA was under challeng. It was observed that the menace of smuggling and foreign exchange violations has to be curbed notwithstanding the many disadvantages of preventive detenus particularly in a country like ours where right to personal liberty has been placed on a very high pedestal, the constitution has adopted preventive detention to prevent the greater evil of elements compelling the security, the safety of state and the welfare of the nation. The Court therefore observed that on the touch stone of the constitutional jurisprudence as reflected by Article 22 readwith Article 14, 19 and 21 the provisions cannot be rendered unconstitutional. Although it is necessary to have a law of preventive detention, which is justifiable and in the light of the observations made by the Apex Court in the aforesaid

1 AIR 2012 SC 2550

decision, it is a settled law that liberty of citizen cannot be dealt with casually by clamping order of detention and the powers of preventive detention are to be exercised cautiously and without violating the freedom of the citizen and personal liberty guaranteed under the constitution. Thus, the issuance of the order of detention against the detenu suffers from non-application of mind, which is required to be set aside.

15. For the reasons stated above, the Petition is allowed. Rule is made absolute. The order of detention challenged in this Writ Petition is quashed and set aside. The detenu Ilyas Sajjad Pasha Peerzade is directed to be released forthwith, if not required in any other case.

In the view that we have taken on the ground that the detention order is vitiated by total non-application of mind, we did not deem it fit and proper to allow Mrs. Ansari to argue other grounds on which the order of detention has been challenged. The Writ Petition stands disposed off.

(PRAKASH D. NAIK, J.)

(S.C.DHARMADHIKARI, J.)