
(1977) 02 BOM CK 0011

In the Bombay High Court

Case No : Criminal Application No. 3241 of 1976

J.M. Jain

APPELLANT

Vs

Ghamandiram K. Gowani

RESPONDENT

Date of Decision : 07-02-1977

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 12, 3
Constitution of India, 1950 — Article 227
Customs Act, 1962 — Section 135
Penal Code, 1860 (IPC) — Section 120B

Citation : (1979) 81 BOMLR 64

Hon'ble Judges : Shah, J;Jahagirdar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shah, J.—This petition under Article 227 of the Constitution raises a question as to whether a Magistrate can pass, an order directing ;the accused to be taken into custody on his bail-bond being cancelled having regard to the fact that he is already in detention pursuant to an order passed under Sub-section (1) of Section 3 by the competent authority under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for brevity"s sake called "COFEPOSA").

2. The facts which have given rises to this petition are not in dispute. The petitioner who is the Assistant Collector of Customs, Preventive Department, Bombay, filed a complaint in the Court of the Chief Metropolitan Magistrate, Bombay, charging respondent No. 1 and some others with the offence of conspiracy to smuggle 10,054 foreign wrist watches of the value of Rs. 9,51,090, which were seized on April 9, 1969 from a room in Fernandez Building,, Dr. Deshmukh Lane, off V. P. Road Bombay, an offence punishable u/s 120B, Indian Penal Code read with Section 135 of the Customs Act, 1962, and Section 5 of the Imports, and Exports Control Act, 1947, and for the overt acts, u/s 135 of the

Customs Act and Section S of the Imports and Exports (Control) Act, A bailable warrant in the sum of Rs. 30,000 with one surety in the like amount was issued against the respondent No. 1. On September 20, 1972, one Vasantlal Premji Shah stood surety for respondent No. 1 and executed the bail-bond as ordered by the Court under the provisions of Section 499 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the old Code"), corresponding to Section 441 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the new Code"). The Maintenance of Internal Security Act, 1971 (hereinafter referred to as "the MISA") was amended by an Ordinance so as to empower the competent authority to detain a person indulging in the offence of smuggling or activities relating thereto. On September 19, 1974, the respondent was detained under an order passed under the provisions of Section 3 of the MISA. The respondent challenged his aforesaid detention, by a writ petition in this Court where he succeeded and the order of detention was quashed and on November 2, 1974, he was released from detention. On December 19, 1974, the COFEPOSA came into force. On July 1, 1975, a fresh order of detention against the respondent was passed under the provisions of Sub-section (1) of Section 3 of that Act, and the respondent No. 1 was taken in custody on that very day. On June 3, 1976, the surety Vasantlal Shah made an application to the learned Magistrate that since the respondent No. 1 was put in detention under the COFEPOSA, he did not desire to continue as surety for the respondent. He, therefore, prayed that the learned Magistrate should issue an examination warrant against the respondent to enable him to apply for cancellation) of the bail-bond of the accused. Incidentally, it may be stated that the criminal case itself was fixed on board for hearing on that date. On this application, the learned Magistrate passed an order directing that an examination-warrant be issued against the respondent. It appears that the prosecution was not given any notice regarding this application filed by the surety. The matter was then adjourned to June 24, 1976, when, however, both the counsel for the respondent and the Public Prosecutor were present. On that date, the learned Magistrate passed the following order, which has given rise to this petition before us,:

The accused is produced today. His bail bond is cancelled and he is taken, into custody on the application of his surety.

Thereafter on September 27, 1976, the complainant filed an application praying that the respondent No. 1 should not be taken into judicial custody pursuant to the order dated June 24, 1976. It was further stated in the application that the respondent should be called upon to find out other sufficient sureties as per the requirement of Sub-section (5) of Section 444 of the new Code, and if he fails to do so, he should be continued on personal bond instead of taking him in judicial custody. In this application, it was contended by the complainant that the mandatory requirement of Sub-section (5) of Section 444 were not carried out and therefore the impugned order directing the respondent to be taken in to custody could not be legally passed. It was further contended by the complainant that the accused detained under COFEPOSA are found to be resorting to the

device of getting their sureties to make applications for withdrawal of their surety bonds and allowing an order to be made for their being taken into formal custody with a view to gaining an undue advantage of a set-off against the sentence of imprisonment as provided u/s 428 of the new Criminal Procedure Code. According to the complainant, the respondent should not be allowed to resort to such device which would result in his getting undue advantage of the provisions of Section 428 in case he was found guilty and sentenced to suffer imprisonment. By his order dated October 15, 1976, the learned Chief Metropolitan Magistrate rejected the application of the complainant. He took the view that the provisions of Sub-section (3) of Section 444 of the new Code were substantially complied with on the facts of this case, and he had exercised the discretion which, was, conferred on him by the said provisions and had passed an order taking the accused in custody. The learned Magistrate has stated in his order that he considered it futile to offer fresh bail to the respondent and, therefore, accused was not asked to find fresh surety in view of the fact that it would not have been possible for him to release the respondent on bail in view of the said provisions of Section 12(6). The learned Magistrate rejected the contention raised on behalf of the complainant that the law did not contemplate imposition of one custody over the other. As regards the argument based on the provisions of Section 428 of the new Code, the learned Magistrate did not express his opinion on the ground that the question of the respondent being entitled to claim set-off u/s 428 is hypothetical at this stage and would arise only in the event of his conviction and his being sentenced to imprisonment for a particular period. He further held that he had no jurisdiction to revise or review his own order passed on June 24, 1976. The complainant has challenged both the orders dated June 24, 1976 and October 15, 1976 in this petition filed by him under Article 227 of the Constitution.

3. It was contended by Mr. Gandhi, the learned counsel for the complainant, that the imposition of one custody over the other is impermissible in the case of a person who has been detained under the COFEPOSA having regard to the fact that the presence of such a person at the trial before the Magistrate is secured by reason of his being under detention. In any event, according to him, the Magistrate does not have the power to order custody of the accused person when he is in detention under the relevant detention law for an indefinite period. He further submitted that in view of the provisions of Section 12(6) of the COFEPOSA, it is not open to the Magistrate to offer bail or accept surety or in default to take him in custody. According to him, having regard to the provisions contained in Section 12(6) of the COFEPOSA, there is no question of the applicability of Section 444(5) of the Code. It was also his contention that in the present case, although there is an application by the surety for discharge of the surety-bond, the fact that the Court discharges the surety will not automatically bring to an end the personal bond executed by the accused and must continue to remain in force in the absence of a specific application in that behalf by the accused. He further submitted that while passing the order of taking the accused

in custody, as is done in the present case, the Court must take into account the ultimate consequences which such order will have on the applicability of Section 428 of the Code, which provision confers a benefit on the accused to set-off the period of detention undergone during the trial against the term of imprisonment that may be imposed on him on conviction. According to Mr. Gandhi, the application of the surety in the instant case is nothing but a device to get the benefit of Section 428 in the event of the accused being convicted and sentenced to a period of imprisonment. The learned counsel also drew our attention to the provisions of Section 267 of the Code which confer certain powers on the Court to secure the attendance of the prisoners who are confined or detained in prison during the course of trial, and on the basis of these provisions, it was urged by him that there was no warrant for passing an order of custody as the presence of the accused could be readily secured by passing an appropriate order u/s 267.

4. Before we proceed to examine the contentions, we think it necessary to refer to some of the material provisions of the Code of Criminal Procedure relating to the powers of the Magistrate to take an accused in custody or his powers to release the accused on bail. Sub-section (1) of Section 167 of the new Code, which makes departure from the provisions of the old Code in some respects, provides that, whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. Sub-section (2) thereof empowers the Magistrate to whom an accused person is forwarded under Sub-section (1) to authorise the detention of the accused in such custody as he thinks fit, for a term not exceeding fifteen days in the whole. Clause (a) of the proviso to this section gives powers to the Magistrate to authorize detention of the accused persons otherwise than in custody of the police beyond the period of fifteen days on adequate grounds. However, it is provided that the Magistrate cannot authorise the detention of the accused person for a total period exceeding sixty days, and on the expiry of the said period of sixty days, the accused person has to be released on bail if he is prepared to and does furnish bail. Section 309, which falls under chap. 24 of the new Code, provides for the power to postpone or adjourn proceedings. Under Sub-section (2) thereof, it is provided that, if the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. Under the first proviso to Sub-section (2), the Magistrate cannot pass an order remanding an accused person to custody for a term exceeding fifteen days at a time. Thus,

the provisions of Section 309 would indicate that on every date the accused must be brought before the Court, and for that purpose, the accused has got to be remanded to custody for a term not exceeding fifteen days at a time. Of course the provisions of Section 309 regarding custody will not apply to an accused person who has been granted bail by the Magistrate. Chapter 33 of the new Code contains the provisions as to bail and bail-bonds and incorporates the provisions from Section 436 to Section 450. Section 436 deals with a case where a person is accused of a non-bailable offence; whereas Section 437 deals with a case where a person is accused of or suspected of the commission of any non-bailable offence. Under Sub-section (1) of Section 436, if any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail. However, under the first proviso to Sub-section (1), a discretion is given to the police, officer or the Court as the case may be to discharge the accused person on his executing a bond without surety for his appearance instead of taking a bail from him. Then Sub-section (1) of Section 437, which applies to the case of a person who is accused of or suspected of the commission of a non-bailable offence, provides that, when any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Provisions conferring powers on the Court to grant anticipatory bail are contained in Section 438. u/s 439, special powers are given to High Court or Court of Session regarding bail. Under Sub-section (1) of Section 441, before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be. Then we may refer to the provisions of Sections 442 and 444 which are of some importance while considering the question of the legality of the order passed by the learned Magistrate. These two provisions are as under:

442. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and, such officer on receipt of the orders shall release him.

(2) Nothing in this section, section 436 or section 437 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

444. (1) All or any sureties for the attendance and appearance> of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail.

5. Having regard to the said provisions and the scheme of the Code, it would appear that whenever a cognizable offence is committed by an accused person, it must fall in one of the two categories, viz. that it may be bailable or non-bailable offence. If it is bailable offence and the accused person is arrested, the provisions of Section 436 are applicable and it is obligatory on the police officer or the Court to grant him bail and further a discretion is given to them that instead of taking bail for such person to discharge him on his executing a bond without sureties for his appearance. A person committing non-bailable offence, however, has to be treated in a slightly different manner. u/s 437, he can be released on bail, but there is no provision which empowers the Court to discharge him on his executing a bond with or without surety. The primary purpose of the arrest or detention of an accused person, or his being released on bail, or executing a bond, is to get the accused under the control of the Magistrate to enable the Magistrate to secure his presence on the dates of hearing as well as to execute the order of sentence passed against such person. This is clear from the provisions of Section 309 which have been referred to by us above. The presence of the accused may be secured in three different ways, as pointed out above, by his arrest and detention in jail; or his being released on bail; or his being released on his executing a bond without surety. So far as the release on bail is concerned, the bail-bond has to be executed by the surety or sureties for a particular sum of money as directed by the Court. An accused person who has been granted bail, whether in the case of a bailable offence or non-bailable offence, has not only to execute a personal bond but also such a bond has to be executed by one or more sufficient sureties as directed by the Court, Sub-section (1) of Section 441 clearly indicates that the ultimate aim is to secure the presence of the accused before the police or the Court at the time and place mentioned in the bond as well as on subsequent occasions. Having regard to the scheme and the provisions of the Act, it would appear that the provisions are so made with a view to see that the accused person is amenable to the jurisdiction of the Court and be under his control till the disposal of the case both for the purpose of the progress of the case as well as to ensure the execution of the order of sentence passed against him. This object is secured by his being released on bail or his being discharged on his executing a bond or the Court itself taking the accused in custody. If the accused does not furnish bail or if he

has already furnished bail and the surety thereunder desires to get himself discharged, and the, accused is unable to get any other surety, the only course open to the Magistrate to have the accused person under his control is to pass an order for his custody. In fact, this is what is contemplated by Sub-section (3) of Section 444. It is not possible to visualize a position where the Magistrate can let off the accused and not take him in custody, although the accused does not furnish bail for one reason or the other. Even in a case where the same accused is involved in two or more separate criminal offences, the Magistrate is bound to follow the same procedure for each of the offences. Even if the accused happens to be already in jail custody in connection with one offence, the Magistrate is bound to deal with the second criminal case in the same manner. It may be that the Magistrate may pass an order in a given case for releasing the accused on bail, or even discharge him on his executing a personal bond, but such an order would not enable the accused person to be released in view of the fact that his jail custody in the earlier case still continues. This is the result which has been brought about by enacting the provisions of Section 442. It clearly provides that even if an order for bail is passed in respect of an accused person in jail, it would not have the result of requiring the release of the person liable to be detained for some matter other than that in respect of which the bond was executed. The concept of imposition of one custody over the other is quite well known and is recognized by the provisions of the Code itself.

6. In the present case, the respondent is already in detention pursuant to the detention order passed under the COFEPOSA. The surety for his own reasons made an application to the learned Magistrate that he did not desire to continue as surety for the respondent and prayed for cancellation of the bail-bond. In view of this application, which was apparently made by the surety under Sub-section (1) of Section 444, the learned Magistrate passed an order of an examination warrant to be issued against the respondent as contemplated by the provisions" of Sub-section (2). Accordingly, the accused was brought before the learned Magistrate, and thereafter the impugned order of taking the accused in custody was passed. In view of the provisions of Sub-section (5) of Section 444, on the appearance of the respondent pursuant to the warrant, the learned Magistrate had no other alternative but to direct that the bond be discharged. It was urged by Mr. Gandhi that provisions of Section 444(5) being mandatory on the Magistrate directing the bond to be discharged, it is incumbent on him to call upon the accused to find other sufficient sureties and it is only on his failure to do so that the Magistrate can commit him to jail. It would be apparent from the provisions of Section 444(5) that they are meant for the benefit of the accused. The intention behind making this provision is obviously to give a chance to the accused to find other sufficient sureties to avoid his being committed to jail when the existing surety is discharged. In the present case, in spite of the order of the surety being discharged, the accused did not make any grievance against the passing of the impugned order of custody nor did he make any attempt to furnish fresh surety or ask for time to enable him to find out other sufficient

sureties. Having regard to these facts, the non-observance of the procedure of "calling upon the accused to find other sufficient sureties" may amount to a mere procedural irregularity which cannot vitiate the impugned order. We fail to see how in the facts of this case the prosecution can complain about the non-observance of the procedure u/s 444(5), especially when the accused has not made any grievance about it. Passing of an order asking the accused to find out other sureties would in the circumstances have been a mere formality. We, therefore, reject the contention that the order of taking the accused in custody is bad for non-compliance of the procedure prescribed u/s 444(5) of the Code.

7. Mr. Gandhi, the learned counsel for the complainant, placed reliance on various decisions of the Supreme Court in support of his contention that superimposition of one custody over the other, or, in other words, the imposition of double custody, is not permissible in the case of a person who has been in detention for an indefinite period; in other words, for a period which has not been specified. In this connection, he submitted that the imposition of one custody over the other may be resorted to only in a case where the detention is for a short duration, say for a month or two, and the accused was likely to be released soon. Strong reliance was placed on two decisions of the Supreme Court, viz. in (1) Rameshwar Shaw Vs. District Magistrate, Burdwan and Another, and (2) Makhan Singh Tarsikka Vs. The State of Punjab, . In both the cases, Gajenidragadkar J., as he then was, spoke for the Court. In Ramzsh-war's case, the order of his detention under the provisions of the Preventive Detention Act, 1950, passed on February 9, 1963, by the district Magistrate, Burdwan, was challenged inter alia on the ground .that the order was served on him on February 15, 1963 in Burdwan jail where he had been kept as a result of a remand order passed by a Court of competent jurisdiction which had taken cognizance of a criminal complaint against him, and it was contended that such an order of detention cannot be passed in view of the fact that he was already in jail in connection with some other criminal offence. The principle on which the decision proceeds is that ordinarily an order of detention cannot be passed against a person who is already in jail as the detaining authority could not legitimately reach the satisfaction about the probability of his indulging in prejudicial activity in future. The authority has to be satisfied that the detention of the person is necessary in order to prevent him from acting in any prejudicial manner as contemplated by the relevant provisions of the detention law. In a case where, for instance, a person is undergoing sentence for ten years on his conviction in a criminal trial, it would be impossible for the detaining authority to reach the subjective satisfaction that on his release after ten years, he would indulge in the prejudicial activity, and the detaining authority would not be in a position to reach such a satisfaction. It would be a case of mala fide exercise of power or non-application of mind. It is in this context that the decision of the Supreme Court in Rameshwar's case or in Makhan Singh's case, or subsequent decisions to which a reference will be made by us, will have to be read. In each of the decisions of the Supreme Court, which has been relied on by Mr. Gandhi

including Rameshwar's case or Makhan Singh's case, it has been clearly observed that in law, the relevant provisions of the Detention Act do not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. In this connection, it would be useful to refer to the observations in para. 12 of the judgment in Rameshwar's case which run as under (p. 338):

As abstract proposition of law, there may not be any doubt that S. 3(1) (a) does not preclude the authority from passing an order of detention against a person whilst he is in, detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail.

This has been illustrated in para. 12 by taking instances of a case where a person is undergoing a sentence for a long period, say for ten years, and another person who is undergoing imprisonment for a short period, say for a month or two. In the first category of cases, one may legitimately argue that the order of detention is bad and could not have been passed, while in the latter category of cases where the imprisonment which the detenu is undergoing is for a short duration, the order of detention can be upheld as the authority passing the order of detention may bona fide be satisfied having regard to the antecedents of the person that the detention of that person will be necessary after his release from jail, and in such cases, he could make a valid order of detention during the period of sentence itself. It is for these reasons that it has been observed at the end of para. 12 that (p. 338):

Therefore, we are satisfied, that the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each" case.

Makhan Singh's case also lays down the same proposition of law and in fact reiterates the principles laid in Rameshwar's case. In para. 16 of the judgment, it has been clearly observed that, on principle, it would be difficult to state as a general proposition that an order of detention cannot be validly made against a person who is in jail custody for the reason that investigation is proceeding in regard to an offence alleged to have been committed by him. The counsel also relied on a latest decision of the Supreme Court in the case of Masood Alam etc. Vs. Union of India (UOI) and Others, Following the earlier two judgments in Rameshwar's and Makhan Singh's cases, the Supreme Court held that there is no legal bar in serving an order of detention on a person who is in, jail custody if he is likely to be released soon thereafter and there is relevant material on which the detaining authority is satisfied that if free, the person concerned is likely to indulge hi activities prejudicial to the security of the State or maintenance of public order. To the same effect is the view taken by the Supreme Court in the case of Chetu Sheikh @ Chetu @ Shabji Vs. The State of West Bengal, In para. 7

of the judgment, it is observed (p. 983):

It is now settled law that if from the circumstances of a particular, case, the detaining authority is satisfied that the detention or jail custody of the detenu is about to terminate shortly and further that in view of his prejudicial activities in the proximate past, an apprehension of his acting in the same prejudicial manner after his release exists, the authority may, if the conditions of Section 3 are satisfied, validly make an order of detention even while the detenu is still in jail. The preventive jurisdiction which the authority exercises under the Act is different from the jurisdiction to prosecute him for a substantive offence. In dealing with this question however considerations of proximity of time will be a relevant factor.

8. We are, therefore, unable to see how the aforesaid decisions of the Supreme Court rendered by it in the context of interpretation of the provisions of the relevant law of detention have any application to the facts of this case. In all these decisions, the order of detention passed under the relevant detention law was challenged. The principal question that arises for consideration of the Court in the case of an order of detention when it is challenged is whether the grounds on which the authority has reached the subjective satisfaction of the necessity of detention are such that any reasonable person can possibly arrive at such satisfaction. The subjective satisfaction is related to the satisfaction of the detaining authority about the future behaviour of the detenu based on his past conduct. The proximity of the past acts with the possible future behaviour is one of the relevant factors. In the case of a person" who has been convicted and is undergoing a sentence of a long duration say of five or ten years, it cannot be said that the detaining authority could not predicate about his behaviour or the prejudicial activities after his release after a number of years. On the other hand, in the case of an accused person who has been sentenced for a short duration and is likely to be released soon, such a subjective satisfaction; may in a given case be reached. Thus, the basis: of the detention order in each of the cases is the subjective satisfaction that can be validly reached by the detaining authority. In our view, these decisions will have no bearing to a case where a person is already in detention under the relevant detention laws and is also being prosecuted for some offence. In the case of a person who is being prosecuted, the Magistrate must secure the presence of the accused on all the relevant dates and must also be in a position to implement the order of conviction if ultimately passed by him. The Magistrate in a criminal case has to be guided by the provisions and the requirements of the Criminal Procedure Code. Certain powers have been vested in the Magistrate under the Code itself to secure the presence of the accused for purposes mentioned in those sections. In our view, therefore, the decisions of the Supreme Court under the detention law where the orders of detention were challenged on the ground of the detenu being in jail and undergoing sentence can be of little assistance to us while deciding the powers of the Magistrate to take the accused in custody under the provisions of the Code with a view to secure his presence during the course of the trial. The purpose of

custody under the Code of Criminal Procedure is entirely different from the detention under the relevant detention laws. The powers conferred are also totally different and can be exercised under different circumstances. So far as the Criminal Procedure Code is concerned, in view of the provisions to which a reference has already been made by us above, the primary purpose of those provisions is to secure the presence of file accused whenever the Magistrate requires his presence during the course of the trial, and for this purpose, the Magistrate must have control over the accused, and this is secured by releasing the accused on bail or by taking his bond, or by taking him in custody. Whether an order of detention can be passed against the accused person who is undergoing sentence or is in jail as an under-trial prisoner is besides the point when we consider the exercise of the powers of the Magistrate under the Code. Even otherwise, the Supreme Court has consistently held that in law there is no prohibition against passing an order of detention against a person who is in jail, although the validity or legality of the exercise of the power would depend on the facts of each case. In on view, therefore, the legality of the order passed by the Magistrate in the present case will have to be determined by reference to the provisions of the Code itself. In fact, as pointed out above, even in the case of an accused person being involved in two criminal cases, the Magistrate has to follow the same procedure with regard to each of them. For example, .an accused person who is in custody and an under-trial prisoner may be arrested on some charge of some bailable offence; trip Magistrate while dealing with the latter case will still offer him bail, although the order will technically be of no practical effect till the accused is acquitted of the murder charge or released from jail in respect of that charge. Take a converse case. A person involved in a bailable offence is offered bail, but is in custody having not availed of the order for bail, and while in such custody another criminal prosecution is filed against him in respect of a non-bailable offence like an offence of murder committed by him before he was arrested. In such a case although the accused has not availed of the order of bail and is in custody, still, so far as the offence of murder is concerned, the Magistrate is bound to pass the order of custody in his case, for, in the event of the accused being ultimately for one reason or the other acquitted or released from custody on his furnishing bail, the Second order of custody in respect of the charge of murder would immediately operate. The Magistrate has not to wait till the release of the prisoner with regard to the bailable offence bat must act in accordance with the provisions of the Code and take the accused in custody. Such an order cannot be challenged on the ground that it would be impermissible for him to super-impose one custody over the other. In our view, the Magistrate has to act and apply the provisions of the Criminal Procedure Code in) respect of each criminal case against the same accused brought before him. It is quite possible that in acting under the provisions of the Criminal Procedure Code, he might pass an order regarding custody or bail or releasing him on a personal bond in respect of a person who is already in custody in connection with some other offence. The order of bail or releasing the accused on bond will naturally be subject to the order of custody which is already in force. Similarly, it may be that

in practice, the super-imposition of one custody over the other may not make any difference so far as the actual physical custody of the accused is concerned. However, that is no ground for holding that the Magistrate is incompetent to pass an order of custody in respect of a person who is already in custody in connection with some other offence or is in detention by virtue of an order of detention passed under the relevant detention law. The counsel placed reliance on a decision in, the case of *Dhaman Hiranand v. Emperor* [1937] AIR Sind 251. The facts of that case were peculiar and the principal question that fell for determination was whether a confession made by the accused while in police custody, although, in law, he ought to have been in Magisterial custody, was legal and valid. In that case, the accused was convicted by the Magistrate of Karachi of the offence of theft of Rs. three, two cakes of soap and a bunch of keys from the house of one Tirathadas. The evidence relied on by the prosecution was the confession and the pointing out of a house by the accused. The confession was recorded on October 28, 1936 in Karachi; the accused was arrested in Bombay by the Bombay police on October 8, and he was produced before the Magistrate who transferred him to the Karachi Magistrate. The argument advanced by the prosecution was that while on journey from Bombay to Karachi, that is, from October 17, the day the Bombay Magistrate passed his order, to October 24, the day the Karachi Magistrate remanded the accused to police custody at the request of the Karachi police, i.e., the period in Magisterial custody, should be excluded, and if that is excluded, the period during which the accused was in police custody upto October 28, when the confession was recorded did not exceed fifteen days, and, therefore, the police custody from October 24 onwards till the recording of the confession was legal. However, it was conceded before the Judicial Commissioner that the remand granted by the Karachi Magistrate must in the facts of the case be deemed to be a remand granted not u/s 167(2), Criminal Procedure Code but must be deemed to be a remand u/s 344, Criminal Procedure Code, and consequently such a remand order must be referable to the remand for Magisterial custody and not for police custody. In fact, it was conceded by the learned Advocate-General who appeared for the Crown that the remand to police custody u/s 167(2) was a mistake made in good faith and that Section 344, Criminal Procedure Code applied. It is also stated in the judgement that the Karachi Magistrate admitted that he did not read the case papers before passing the order u/s 167(2). It was in this state of circumstances that it was observed that the accused ought not to have been given police custody after October 24, as was done in that case. It, however, appears from the judgment that on October 21, the accused was challaned with other accused in three other cases. While referring to this aspect of the matter, it was observed by the Judicial Commissioner (p. 253):

.... It makes no difference that one of these cases was not the case on which the accused has in this case been convicted and which was made as a result of a subsequent complaint, because an accused cannot be in magisterial and police custody at one and the same time, that is to say, he cannot be before a

Magistrate in magisterial custody in one case under S. 344, Criminal P. C., and before a Magistrate in police custody in another case under S. 167, Criminal P. C.

These observations which are relied on by Mr. Gandhi, in our view, seem to have been made in the context of considering the question as to whether the confession of the accused recorded while he was in police custody is valid. _ It appears that the Court held that a person once committed to judicial custody could not be again given to police custody merely because in the intervening period he was challaned in some other cases. As a matter of principle of law, it is not possible to agree with the view taken by the Judicial Commissioner in that case that the imposition of one custody over the other is illegal. It clearly appears to us that the observations were made in the facts of the peculiar case, and in any case, on the analysis of the relevant provisions of the Code, and having regard to the settled position of law as laid down by the Supreme Court in its various decisions, we are unable to agree with the view that there cannot be super-imposition; of one custody over the other.

9. The next question is about the impact of the provisions of Section 12(6) of the COFEPOSA so far as the order passed by the learned Magistrate is concerned. The shoulder note of Section 12 shows that the provisions are intended to provide for the temporary release of a person detained. Clause (1) or (1A) deals with the release of such person with or without conditions for any specified period. The two sub-sections confer powers on the Central Government or the State Government in that behalf. Sub-section (3) enjoins the person released under Sub-section (1) or Sub-section (1A) to surrender himself at the time and place and to the authority specified in the order directing his release or cancelling his release, as the case may be. Sub-section (4) deals with the consequences of failure of the detenu to surrender himself without sufficient cause and prescribes a punishment with imprisonment for a term which may extend to two years or fine or with both. Sub-section (5) deals with a case where the detenu who has been released to fulfil the conditions imposed upon him. The material provision in the Sub-section (6) reads:

Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise.

Same is the case with the provisions of Section 309 contained in chap. 33 of the Code. The Court's power to remand the accused is not taken away by the provisions of Section 12(6) of the COFEPOSA. Moreover, the intention behind the provisions of Section 12(6) is to see that the detenu is not free and is confined to jail on conditions laid down under the provisions of the relevant detention law. It is difficult to see how the order of the learned Magistrate in the present case is in any way conflicting with the mandatory provisions of Section 12(6). Section 12(6) prevents the detenu from being released on bail or bond or otherwise. In the present case, the Magistrate has not released the accused on, bail or bond; on the contrary, he has passed an order of custody against the accused. We fail

to see how such an order is in conflict with the provisions of Section 12(6). It was tried to be contended by the learned counsel that a detenu is governed by a different set of conditions of detention as may be framed by the Government, while an under-trial prisoner has to be treated under the prison-rules during the period of detention. We do not see any substance in this contention. Although the accused would be in formal Magisterial custody pursuant to the order of the Magistrate, still his detention would be governed by the rules and orders passed by the Government u/s 3 of the COFEPOSA. It would, therefore, be open to Government to frame additional rules, if necessary, for the purposes of preventing the detenu from taking advantage of the treatment "under the normal prison-rules, if such rules are found, to come in the way of object of detention under the relevant detention law. We, therefore, reject the contention of the counsel that the impugned order cannot be passed in view of the mandatory provisions of Section 12(6).

10. Although Mr. Gandhi conceded that super-imposition of one custody over the other can be directed where the detention is for a very short duration of say a month or two, he contended that the Magistrate should not pass an order of custody particularly when the accused is in detention for an indefinite period. The argument seems to be that in the case of an accused who is in detention for indefinite period, there is no likelihood of his, release from detention during the course of the trial, and it would be easy for the Magistrate to secure his presence by passing appropriate orders under the provisions of Section 267 of the Code. We are unable to accept this submission. Once we hold that the Magistrate has power to act under the provisions of the Code independently of the provisions of the Section 12(6), the mere fact that the period of detention is indefinite, or there is a possibility of the accused person being made available to the Court during the course of the trial, it can be no ground for denying the Magistrate the power to pass a formal order of custody, as is done in the present case. In the case of a person who is undergoing sentence for a definite period, the Magistrate would atleast know for certain that till the expiry of the period of his sentence, the presence of the accused can be secured for the purposes of the proceedings before him. On the other hand, in the case of a detention for unspecified period or for indefinite period, the Magistrate would never know as to when the accused person would be released from detention, and in the case of the release of such a person, it may be in a given case difficult for the Magistrate to secure the presence of the accused person for the purpose of proceedings before him. The uncertainty of the period of detention really is an additional ground why the Magistrate should exercise the powers conferred on him by the Court to secure the presence of the accused before him for the purposes of the case. It is true that Section 267 does confer certain powers on the Court to pass an order requiring the officer-in-charge of the prison to produce a person confined or detained in prison. However, it appears from the provisions of Section 269 that under certain circumstances, such orders of the Court need not be carried out by the officer-in-charge of the prison. Sub-section (1) of Section 267 provides:

Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court, -

(a) that a person confined or detained in a prison should, be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or

(b) that it is necessary for the ends of justice to examine such person as a witness, the Court may make an order requiring the officer in. charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceeding or, as the case may be, for giving evidence.

It is not necessary for us to refer to the provisions of Sub-sections (2) and (3) of Section 267. Section 269 carves out certain exceptions and enjoins the officer in charge of the prison to abstain from carrying out Court's order in certain cases. There are four categories of cases where the order of the Court need not be carried out; but the most important is the third, category contained in Clause (c) of Section 269, and the result of the said provision is that, where the person in respect of whom an order is made u/s 267, is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained, the officer in charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining. In view of the indefinite duration of the period of detention, it is quite possible that the detenu may be released in advance on the date on which he is supposed to be taken before the Court under its order. As soon as the order of detention is revoked or he is directed to be released, the officer in charge of the prison will have no jurisdiction to detain the detenu for any longer time. Such detention of the detenu after the order of his release would be wholly illegal. In view of the exceptions contained in Section 269, it would not be necessary for the officer in charge of the prison to carry out the Court's order, particularly when the order of detention lapses and there is no other order under which he could hold the detenu in custody. We, therefore, reject the argument of the counsel that the accused being under an order of detention for indefinite period, the learned Magistrate should not have passed the order of custody and should have resorted to the provisions of Section 267 of the Code. Even from practical point of view, it would be desirable to pass an order of custody so that on coming to an end of the order of detention, he would still continue to be in Court's custody so that his presence before the Court is secured. The argument of the counsel that the Magistrate should not pass an order of custody because in the event of the conviction of the accused, he would be getting the benefit of set-off as contained in Section 428 must be rejected as without any substance. The provisions of Section 428 have been incorporated in the new Code to confer certain benefits on under-trial prisoners. In our view, it would be improper on the part of the Magistrate to take into consideration the possibility of the accused getting the benefits u/s 428 of the Code while passing the order of custody which he is

empowered to pass u/s 444(5) of the Code. If the accused is entitled to get the benefits u/s 428 which right has been conferred on every convict, we do not see why the Magistrate should refrain from passing an order of custody merely because there is possibility of the accused claiming a "benefit u/s 428. There is nothing in Section 428 or Section 444(3) or in other provisions of the Code which requires a Magistrate to refrain from passing an order of custody on such considerations. In our view, the question as to whether the accused would be entitled to get benefit u/s 428 in the event of his conviction from the date of the order for custody passed by the Magistrate would be wholly irrelevant. We may, however, observe that it is unnecessary for us to express an opinion at this stage on the question as to whether the accused would be entitled to get benefit of Section 428 in the event of his being convicted in the criminal case by reason of the impugned order of custody passed by the Magistrate. The question would arise for consideration if and when the accused is found guilty of the offence and sentenced to imprisonment.

11. At this stage, we Would, however, like to record that Mr. Kotwal, the learned counsel appearing for the State, fairly conceded that Section 12(6) of the COFEPOSA has relevance only where a detenu makes an application for bail as a detenu, and his rights and obligations under the Code whatever they may be under the Code, are not taken away. He submitted that Section 12 is intended only for a temporary release of a detenu by the Government, and the power of such temporary release would be only exercised by the Government and not by the Court. According to him, it is only with a view to prevent any bail being granted to the detenu during the period of his detention in his capacity as a detenu that the provisions of Section 12(6) have been enacted. He also submitted that the question whether the accused would be entitled to get the benefit u/s 428, Criminal Procedure Code is not at all relevant on the question in issue, viz. whether the Magistrate could pass an order for custody against a person who is in detention. However, in view of the arguments of Mr. Gandhi, we have dealt with the aspects relating to Section 12(6) of the COFEPOSA and Section 428 of the Criminal Procedure Code.

12. It was the contention of Mr. Gandhi that the learned Magistrate has not followed the procedure prescribed in Section 444 before passing the order for custody of the accused. Under Sub-section (3) of Section 444, on the appearance of the accused person pursuant to the examination warrant, the Magistrate must direct the bond to be discharged and has to call upon the accused to find, out other sufficient surety, and if he fails to do so, the accused may be committed to jail. What is contended by the counsel is that the Magistrate has not followed the second step after discharging the bond, viz., to call upon the accused to find other sufficient surety. We fail to see how the complainant can make grievance of the omission to follow this procedure. It is obvious that this provision for giving an opportunity to the accused to find other sufficient surety is intended for the benefit of the accused so that he should get proper opportunity to furnish other sureties. In the present case, no grievance has been made on behalf of the

prisoner. The mere fact that this procedural formality of telling the accused to find out other sufficient sureties has not been followed by the Magistrate cannot invalidate the order. It is further to be noticed that in the present case, the surety made his application on June 3, 1976, and, on this application examination warrant was issued to the accused. Pursuant to that warrant, the accused was brought before the Court. In his presence, the bail bond was cancelled and the surety was discharged. No grievance obviously was made by the accused although these orders were passed in his presence. Even from this point of view, it would have been an idle formality to ask the accused to find out other sufficient surety. The order of custody passed in the presence of the accused therefore cannot "be challenged on the ground that the learned Magistrate did not formally call upon to find out other sureties. We, therefore, reject the argument of the counsel that the impugned order passed by the Magistrate is in, contravention of the Section 444.

13. It was tried to be contended by the counsel that the provisions of Section 444 were suspended in view of Section 12(6). As indicated above, the provisions of Section 12(6) have no connection whatsoever with the powers which can be exercised by the Court under the Code. Section 12(6) does not in terms refer to suspension of any provisions of Section 444. There is no contradiction between the operation of the provisions of Section 12(6) and the operation of Section 444. Even by implication, it cannot be suggested that the provisions of Section 444(5) become suspended or are overridden by virtue of Section 12(6). In our view, nothing in the provisions of the COFEPOSA or MISA affects normal functioning of the powers conferred on the Court by the Code. The exercise of normal powers under the Code by the Court do not in any way affect the operation of the provisions of Section 12(6).

14. The last contention of Mr. Gandhi which needs to be considered is that in the facts and circumstances of the case, the learned Magistrate should not have exercised discretion in passing an order for custody. The provisions of Sub-section (3) of Section 444 confer a discretion on the Magistrate to pass an order of custody. As pointed out above by us in view of the indefinite period of detention, it is all the more necessary that an order of custody should be passed by the learned Magistrate to secure the presence of the accused for the purposes of the proceedings before him. It is rather strange that the department is insisting that such an order should not be passed against the accused. The possibility of an accused person absconding after release from detention and not being available for trial cannot be overlooked and as such it cannot be said that the discretion exercised by the Magistrate is in any manner arbitrary and illegal. Under the circumstances, we see no reason to interfere with- the discretion exercised by the trial Magistrate.

15. The petition, therefore, fails. Rule discharged.