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**Study Report**  
**on**  
**COFEPOSA**  
**Act, 1974**

Prepared by

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## **Introduction:**

The Act, **Conservation of Foreign Exchange and Prevention of Smuggling Activities**, was passed by the Parliament on 13<sup>th</sup> December 1974, giving wide powers to the executive to detain individuals on the apprehension of their involvement in smuggling activities. It has been effective since 19<sup>th</sup> December, 1974.

The Act is based on the concept of **Preventive Detention**, which apart from being a colonial legacy, is also given explicitly in our constitution as 'the necessary evil', and laws exist under Article 22 for the same for reasons related to security of the state and maintenance of public order.

## **Scope**

As the statute goes, the COFEPOSA Act provides for detention in certain cases for-

- Conservation and augmentation of foreign exchange (with reference to Foreign Exchange Regulation Act, FERA, 1973)
- Prevention of smuggling activities and matters connected.
- Other Preventive detention Laws are as under:-
  - National Security Act (NSA), 1980
  - Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances (PITNDPS) Act, 1988
  - Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act, 1980

## **Constitutional Backing**

## COFEPOSA ACT, 1974

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- **Entry No. 3 of List-III** (Concurrent List) in Schedule 7 of the Constitution of India- Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community
- **Article 22(4)(7)** of the Constitution- no law providing for preventive detention shall authorize the detention of a person for a period of more than three months unless in the mean time the Advisory Board has reported that in their opinion there is sufficient cause for detention
- **Article 22(5)** of the Constitution provides for communicating the grounds of detention

### **Important Provisions of the Act:**

The important sections of the COFEPOSA Act are as under:-

#### **Section 3:** power to make orders for detention

**3(1)- Empowering Section-** orders to detain (including foreigners), by central government, state government, joint secretary of central government and secretary of state government, in case of-

- Smuggling
- Abetting smuggling
- Transport, concealing, storing
- Harboring persons involved in smuggling
- Dealing in smuggled goods

**3(2)-** any order by state government- report to be forwarded to central government within 10 days.

## COFEPOSA ACT, 1974

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**3(3)-** with respect to article 22(5) of constitution, grounds for detention to be communicated within 5 days to detenu. Delay of up to 15 days allowed if the reason is given in writing.

### **Subjective Satisfaction:**

Vitiating of detention order in following cases-

- If evidence is overlooked, leads to claims of failure of application of mind by detaining authority.
- If the documents or evidence is not supplied to detenu  
**Case:** Md. Salim Khatri vs UOI 1993
- If the documents or evidence is withheld by sponsoring authority  
**Case:** Dharamdas Shamlal Agarwal vs Police Commissioner 1989  
**Case:** Madan Gopal alias Madan bhaiya vs. UOI 1993
- Failure to furnish a copy of relied upon documents (RUD) to detenu, which prevents effective representation and consequently violates fundamental rights [Article 22(5) of constitution and Section 3(3) of COFEPOSA]  
**Case:** LMS Ummu Saleema vs B.B.Gujral 1981

### **Grounds:**

- Order of detention is passed if a ground in existence and the order is prepared contemporaneously.  
**Case:** Pakkar Singh vs UOI 1993  
**Case:** Krishna Murari Aggarwal vs UOI 1975
- The Detaining Authority requires to satisfy the courts and also the detenu that he has acted in accordance with the laws with due consideration.  
**Case:** Mohiuddin Tayab Sony vs State of Maharashtra 1980

## COFEPOSA ACT, 1974

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- All communication, orders, notices to the detenu should be in his own language  
**Case:** B. Ramprannamma 1993
- It should be written in his own language.  
**Case:** Harikisan vs State of Maharashtra 1962
- It should be fully explained and translated.  
**Case:** Raziya Umar Bakshi vs UOI 1980

### **Execution:**

- High Courts can examine detention order prior to execution.  
**Case:** Pakhar Singh vs UOI 1993
- Detention order cannot be challenged at pre execution stage on the grounds of delay in execution.  
**Case:** Inderjit Singh Chani vs UOI 1994

### **Delay:**

- Detention order is liable to be quashed in case of long undue delay.  
**Case:** Daljit Singh Sandhu vs UOI 1993  
Unless delay is satisfactorily explained  
**Case:** Gurvinder Singh vs Under Secretary, Home, Govt. of Punjab, 1993

### **Section 4:** Execution of detention order

The order can be executed anywhere in India similar to arrest warrants under the Code of Criminal Procedure, 1973

### **Section 5A:** Grounds of detention severable

The detention order is deemed to have been made separately on each of the grounds under section 3(1). Therefore if one ground is invalid/vague/ irrelevant, the other grounds stand.

## COFEPOSA ACT, 1974

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### **Section 7:** Case of Absconding Persons

**7(1)a-** written report given to Metropolitan Magistrate of that jurisdiction to invoke sections 82, 83, 84, 85 of Cr.P.C.

**7(1)b-** order is notified in the official gazette directing the person to give an appearance whenever asked, else he can be punished by imprisonment upto 1 year or fine or both.

### **Section 8:** Advisory Board (under constitutional safeguards under Article 22(4))

**8b-** Government should within 5 weeks of date of detention, make a reference to the Advisory Board

**8c-** Advisory Board to report within 11 weeks of detention order. If satisfied, detention period can extend to one year

**8f-** If, in the opinion of the advisory board, there is insufficient cause for detention, the order is revoked and person released.

### **Section 9:** Detention for more than 3 months without the opinion of the Advisory Board (normal period of detention is 90 days from the date of detention)

**9(1)-** more than 3 months but less than 6 months from date of detention order- by additional secretary, if he is satisfied the person

- smuggles or is likely to in an area highly vulnerable to smuggling
- abets smuggling or is likely to in an area highly vulnerable to smuggling

## COFEPOSA ACT, 1974

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- engages or is likely to engage in transport, concealing, harbouring others in an area highly vulnerable to smuggling

Declaration- within 5 weeks of detention

### **Area highly vulnerable to smuggling:**

- Indian Customs Waters- 200 nautical miles
- Inland area 50 kms in width from coast
- Customs airport in Delhi

### **Section 10A: Extension of detention period**

**10(1)-** under section 8(f)- 1 year

**10(2)-** under section 8(f) read with section 9- 2 years

### **Section 11: Revocation of detention order**

**11(1)-** detention order may be revoked if required

**11(2)-** revocation shall not bar the making of another order under section 3 against the same person

- There is no prescribed period to deal with the representation. Under section 22(5) of the Indian constitution, it should be done 'as soon as may be'.

**Case:** Rama Dhondu Borado vs V.K.Sarf, Commissioner Police and others 1989

- Too much delay in consideration of representation can vitiate the detention order.
- Undue delay in disposing of the representation vitiates the detention order

## COFEPOSA ACT, 1974

---

**Case:** Hussain Erumban vs UOI 1993

**Case:** Smt. Gracy vs State of Kerala 1991- Supreme Court observed the detaining authority is obliged to consider the representation even if it is addressed to another body/ advisory board and not to him.

- It flows from the fundamental right.

**Case:** Yashvir Singh vs Administrator, Delhi 1993

### **Section 12:** Temporary release of detained persons (parole)

**12(1)-** directed by the central government to release the person for a specified period with or without conditions.

It is liable to cancellation at any time.

**12(2)-** the government may require the person to enter into a bond with sureties for due observance of conditions specified in the direction.

**12(3)-** released person to surrender at the time and place and to the authority as specified in the order of his release.

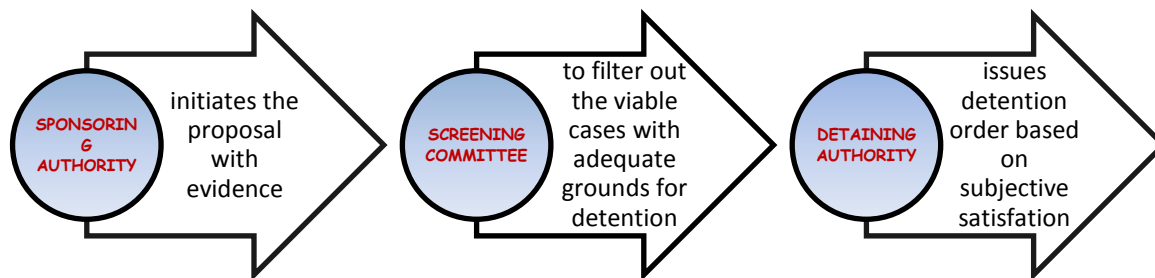
**12(4)-** in case of non surrender without sufficient reasons, the person is liable for imprisonment of upto 2 years with or without fine.

**12(5)-** in case the conditions imposed on the person are not fulfilled, the bond will be declared forfeit and the person shall be liable to pay penalty.

**12(6)-** no bail release for a person detained under this Act unless released temporarily under this section.



## AGENCIES INVOLVED



### Challenges:

- It is extremely difficult to procure direct evidence against financiers and organizers of smuggling, as per the norms of the Evidence Act. Even more so since they use the latest technology to operate from any part of the world without leaving a viable trace.
- The Act was conceptualized to avoid interference by courts. But unfortunately, judicial intervention is rampant. As per statistics, 65-70% detainees have been released by courts due to procedural or technical grounds.
- Some reasons of granting bail have been:
  - Failure to supply legible copies of documents to the detainee.
  - Lack of RUDs (relied upon documents)
  - Translations of all RUDs in the language known to the detainee were not made.
  - Inordinate delay in sponsoring the cases
- Effectiveness of screening committee, since it meets only once a month and time is lost out in processing the detention order.
- Some feel the Customs Act, 1962 adequately covers the smuggling offences.

## COFEPOSA ACT, 1974

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- At times, the act of preventive detention is misused and is used to harass people.
- Most of the times, the action taken under this Act leads to apprehension of petty carriers or small operators.
- Many times, confidential documents are released under the RTI Act. This is at times used against the Ministry. It should be noted that CEIB is exempt under section 24 of RTI Act, 2005. If at all any documents require to be furnished, it should be done only after seeking permission from the authorities.

### **Has COFEPOSA outlived its utility?**

#### **Yes:**

- Active judicial participation and reduced chances of survival of detention order.
- Increased awareness and action under human rights.

#### **No:**

- In the era of liberalization and free trade, it is essential to protect our economy against misuse by such persons.
- Economic offenders break laws and set a deleterious example for the public.
- Ingenious methods of frauds and smuggling have become refined making preventive detention an effective deterrent in the hands of the executive.

### **SOLUTION:**

- Replacing COFEPOSA Act with a more comprehensive piece of legislation after taking into account all the places that it lacks in.
- Procedural and technical grounds should be ruled out by the new preventive detention Act.

### **Precautions to be taken by Field Formations**

- Supervision at senior levels at every stage in various field formations.
- This is an extraordinary law requiring extraordinary levels of promptness and accuracy. Speed with quality is the key.
- Time gap between date of detection of a case and passing of detention order should be minimum possible. Also investigation should be done enough to prevent quashing of the case. The detailed investigation may be done after the detention is granted.
- Details of properties owned and held by the detenu or relative or associate should be brought on record. This will help in initiating a case, if required, under SAFEMFOPA
- Proper photograph of the proposed detenu should be kept along with other identification, duly attested
- All the relevant documents should be arranged chronologically and indexed to avoid mistakes
- Proper framing of detention order and grounds of detention. Past conduct and antecedent history should be looked at and correlated with the proposed future behavior. This nexus should provide the reasonable level of satisfaction to move the detention order.
- It is equally important to keep a track of court proceedings and the hearing dates.
- The sponsoring and executing authority must send the case and investigation report to the detaining authority every 15 days.
- Due care must be taken to translate the documents into the language preferred by the detenu, without leaving out any point in the relevant document. This should be attested by the detenu as being true and bonafide.

## COFEPOSA ACT, 1974

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### **Monetary limit of the cases in order to invoke the COFEPOSA Act:**

- Rs. 50 lakhs for duty evasion and Rs. 2 crores for value of goods.
- The exemptions to it are:
  - Cases involving kingpins, financiers, organizers
  - Cases involving arms, ammunitions, explosives
  - Cases involving FICN, antiques, prohibited items or restricted items
- Approval of Chief Commissioner of Customs/ DGRI/ Director of Enforcement is MUST for invoking provisions of COFEPOSA.

### **Suggested Approach in COFEPOSA Matters**

- Soon after a case is detected which the prima facie appears to be potential enough to generate a proposal for detention under the COFEPOSA Act, 1974, the statement of the subject is required to be recorded with personal details and financial profile of the subject. This will help to a very large extent at subsequent stage for the issue of LOC/Red Alert/Red corner Notice, initiating concerns under SAFEM(FOP) Act, 1976, initiate action under Section 7(1)(b) and 7(1)(a) of the COFEPOSA Act, 1974 against the person, in case he/she absconds at a later stage.
- The investigation should be completed expeditiously and once the investigation generate sufficient case-materials for the purpose of sustaining a proposal for detention, the proposal for detention should be sent to the COFEPOSA unit immediately along with complete set of documents generated during the course of booking the case and investigations including court matters.
- Look out Circular (LOC)/Red alert be issued immediately in case the person is not available in his known address during investigation

## COFEPOSA ACT, 1974

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and in case he/she absconds after issue of detention order. This will also help to intercept the person in areas other than port/exist point/entry point and handover to Police for execution of detention order. The passport details of the proposed detenu should be promptly sent to the Ministry of External Affairs with the request to get the passport cancelled.

- Once the clearance of the proposal by the Screening Committee is communicated, the up-dated additional documents with the brief should be sent to the COFEPOSA unit immediately positively within seven days of the date of communication.
- In case the documents are to be translated in the language known to the proposed detenu, the original documents should be translated and kept ready for placing before the Detaining Authority and supply to the detenu. As far as practicable, it must be ensured that such translations are done by officially approved translators only.
- Information/material/clarification sought by the detaining authority must be attended most expeditiously.
- Information/material/clarification required from other agencies must be obtained expeditiously. This can be achieved only by monitoring and pursuing by senior level officer personally with the concerned authority.
- Subsequent development including the court matter along with documents must be brought to the notice of the Detaining authority forthwith till a decision is taken on the proposal and the order is actually passed.
- Once the person is detained the grounds of detention and the relied upon documents must be served to the detenu together. The grounds of detention in the language known to the detenu must be served within the stipulated period of 5 days.

## COFEPOSA ACT, 1974

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- In case the person is not in judicial custody, the detention order is sent to the state police. However the sponsoring authority should make all out efforts to track down the person and make close liaison with the executing authority to detain the person. Keeping a track of the court proceedings, if any going on, in which the person is required or likely to appear before the courts on a given dates is a must which will help in tracking down the person for execution of the Detention order. Failure in such cases is viewed seriously by the courts. However, all possible methods need to be exhausted to track down the absconder.
- In case LOC/Red Alert has not been issued, the same must be issued at this stage.
- Intelligence about the possible whereabouts of the person must be developed and surveillance must also be maintained
- The executing authority must also be provided with a photo of the person and other details immediately which may help them to identify the person.
- Action under Section 7(1)(b) of the COFEPOSA Act 1974 should be taken immediately on expiry of one month from the date of detention order in case it remained un-executed during the period. After waiting for one more month and if the person continues to remain absconding, action under Section 7 (1)(a) of the COFEPOSA act should be initiated henceforth. Thereafter the applications which are filed before the competent court for the purpose of action under section 82, 83, 84 of the Cr.P.C should be pursued vigorously.
- If the absconding person surrenders for whatever reason and is remanded to judicial custody, this fact must be reported forthwith by the sponsoring authority to the Detaining Authority for consideration of the Detaining Authority and the detention order shall be served

## COFEPOSA ACT, 1974

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after further direction of the Detaining Authority. Similarly any vital development in the case including development in the court regarding bail matter or any other during the pendency of the execution of the order must be reported forthwith to the detaining authority.

- In case of interim stay order from the High court on execution of order of detention, an application must be moved immediately for vacation of stay order quoting the relevant constitutional provisions upheld by the apex court.
- In cases where the proposed detenu was released on bail, considering the merits of the bail application, the competent court must be approached at first available opportunity for seeking cancellation of such bail.
- Writ petition in High Court and representation of the proposed detenu must be attended properly.
- The updated status of Adjudication/prosecution proceedings must be reflected in the proposal for Review committee meeting in unexecuted detention order. The proposal for the Review meeting must be complete and updated with authentic information supported with documents e.g. In case of death of the detenu, the death certificate must be enclosed.
- In deserving cases immediate action may be initiated for issue of “Red Corner Notice” through CBI.
- A senior officer must supervise the entire process and guide the dealing officer for compliance of all the instructions /guidelines issues from time to time.

### **Important Terms Used**

- Detaining Authority

## COFEPOSA ACT, 1974

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- Sponsoring Authority
- Screening Committee
- Advisory Board
- Detention Order
- Red Corner alert
- Look Out Circular

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