HIGH COURT OF MADHYA PRADESH : JABALPUR

W.P. No.13987/2015

Mangal Singh alias Mangu .....Petitioner

Versus

State of M.P. and others ....Respondents

W.P.No.13989/2015

Kheri Gurjar .....Petitioner

Versus

State of M.P. and another ....Respondents

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Coram:

Hon'ble Shri Justice A. M. Khanwilkar, Chief Justice
Hon'ble Shri Justice Rajendra Menon
Hon'ble Shri Justice S.K. Seth

Whether approved for reporting : Yes.

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Shri Prashant Sharma, learned counsel for the petitioner in Writ Petition No.13987/2015.

None appears for the petitioner in Writ Petition No.13989/2015.

Shri A.A.Barnad, learned Govt. Advocate for the respondent/State.

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Reserved On : 09.09.2015

Date of Decision : 14 .09.2015

J U D G M E N T

{ 14th September, 2015}

Per: A.M. Khanwilkar, Chief Justice:

These matters have been placed before the Full Bench pursuant to the reference made by the Division Bench in the respective writ petitions.

2. The first reference was made in Writ Petition No.2689/2013 filed by Kheri Gurjar before the Bench at Gwalior (now renumbered as Writ Petition No.13989/2015 at Jabalpur) vide order dated 05.09.2013. The judges of the Division Bench differed in their views, as a result of which reference to the third Judge became necessary. The question formulated by the Bench reads thus :-

> "Whether, after considering the provision of Section 5(A) of National Security Act and judgment of this Court in **Haji Abdul Rajjak Vs. State of M.P. and Others 2012 (5) M.P.H.T. 111 (DB)**, the detention order of the competent authority passed under the N.S.A. Act can be set-aside on the basis of earlier view held in this Court's judgment reported as **Tasildar Singh Vs. State of M.P. and Others 2011 (1) M.P.H.T. 513 (DB)** wherein, the provision of Section 5 (A) of the Act was not considered."

3. In another writ petition which came up for consideration before the same Division Bench at Gwalior being Writ Petition No.4038/2013 (now renumbered as Writ Petition

No.13987/2015 at Jabalpur), the Court vide order dated 21.10.2013, formulated substantial questions of law for consideration by the Larger Bench, as follows :-

> "(1) Whether the judgment passed by the Division Bench in **Haji Abdul Rajjak** (supra) interpreting Section 5-A of NSA Act has laid down the correct law or not?
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> (2) Whether the observations of the Division Bench in **Haji Abdul Rajjak** (supra) that earlier two judgments **Dharamdas Shamlal Agrawal** (supra) and **Tahsildar Singh** (supra) have lost significance in the facts of the case and in view of Section 5-A of the NSA Act is correct or not?
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> (3) Whether the State has to plead and mention in the counter affidavit or return the fact that the order of detention has been passed on each ground and it be treated as a separated order under Section 5-A of the NSA Act in view of the decision of Hon'ble Supreme Court in **A.Sowkath Ali** (supra)?"

However, the Registry mistakenly placed this matter before the third Judge, after taking administrative order of the Chief Justice. The third Judge, vide order dated 18.12.2013, justly, opined that there was no difference of opinion on any point amongst the judges comprising the Division Bench in this case and, therefore, it was not necessary to give any opinion.

4. Both the matters were thereafter placed before the Chief Justice on the administrative side. It was ordered that the matter be placed before the Full Bench, to be heard at the Principal

Seat. Accordingly, both the writ petitions were transferred to the Principal Seat from Bench at Gwalior and have been placed for analogous hearing before the Full Bench.

5. Briefly stated, in writ petition filed by Kheri Gurjar which was the first writ petition heard by the same Division Bench at Gwalior, there was difference of opinion between the two judges. One judge was of the opinion that as the detenu has been acquitted in nine out of twelve criminal cases referred to in the grounds accompanying the detention order, that fact was a material fact and essential to be placed before the Detaining Authority. Having failed to do so, the detention order was vitiated. For taking that view, the learned Judge placed reliance on paras 11 to 13 of the decision of the Division Bench of this Court in the case of **Tahsildar Singh Vs. State of M.P. and others**[1]**.** The said decision has mainly considered the exposition of the Supreme Court in the case of **Dharamdas Shamlal Agarwal Vs. The Police Commissioner and another**[2]**, Mohd. Subrati Vs. State of West Bengal**[3]**, Suresh Mahato Vs. The**

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[1] **2011 (1) M.P.H.T. 513 (DB)**
[2] **(1989) 2 SCC 370 = AIR 1989 SC 1282**
[3] **AIR 1973 SC 207**

District Magistrate, Burdwan[4] and **Asha Devi Vs. K. Shivraj, Addl. Chief Secretary to the Govt. of Gujarat**[5]. The learned Judge additionally relied on the decision of the Supreme Court in the case of **Baby Devassy Chully alias Bobby Vs. Union of India and others**[6] which has quoted the observations made in the case of **Rekha Vs. State of T.N.**[7] with approval. Relying on these decisions, the learned Judge was of the opinion that it was obligatory on the part of the Superintendent of Police (Sponsoring Authority) to bring correct facts before the District Magistrate (Detaining Authority) so that the District Magistrate could record his subjective satisfaction and apply his mind properly. Non placement of material facts before the Detaining Authority entails in non-application of mind and for which reason the subjective satisfaction of the Detaining Authority as recorded in the detention order is rendered invalid. On that reasoning, the first learned Judge was of the opinion that the detention order deserves to be quashed.

6. However, the second learned Judge, relying on the dictum

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[4] **AIR 1975 SC 728**
[5] **AIR 1979 SC 447**
[6] **(2013) 4 SCC 531**
[7] **(2011) 5 SCC 244**

of the Division Bench of this Court in the case of **Haji Abdul Rajjak Vs. State of M.P.**[8], in particular, paragraph 12 thereof observed that it was not possible to quash the detention order merely on that basis. Paragraph 12 of the said reported decision reads thus :-

> "In view of the decision by the Constitution Bench of Supreme Court, the two Division Bench decisions relied on by learned Senior counsel for the petitioner, namely, *Dharamdas Shamlal Agarwal* (supra) and *Tahsildar Singh Vs. State of M.P. and others* (supra), lose their significance in the facts of the case. Therefore, aforesaid contention of the learned counsel for the petitioner cannot be accepted."
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> (emphasis supplied)

In this backdrop, question of law was formulated as reproduced in paragraph 2 above. It was this matter which ought to have been referred to the third Judge for opinion but the other matter being Writ Petition No.4038/2013 was referred to the third Judge for opinion.

7. In the second matter bearing Writ Petition No.4038/2013 (Mangal Singh @ Mangu – now renumbered as Writ Petition No.13987/2015 at Jabalpur), the same Division Bench at Gwalior on this occasion vide order dated 21.10.2013, chose to

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[8] **2012 (5) M.P.H.T. 111 (DB)**

refer the matter to Larger Bench. Even in this case, the Detaining Authority has relied on eight crimes in the grounds of detention, registered against the detenu. The Detaining Authority was not made aware that the detenu was already acquitted in two crimes as also the fact that detenu was already in jail. On that basis it was argued that the subjective satisfaction of the Detaining Authority was vitiated and the detention order was invalid. The Division Bench made reference to the exposition in the case of **Dharamdas Shamlal Agarwal** (supra) as also in the case of **Rekha Vs. State of T.N.** (supra); **Baby Devassy Chully** (supra) and **Yumman Ongbi Lembi Leima Vs. State of Manipur[9].** Reference is also made to the decision of the Division Bench of this Court in the case of **Geeta Sahu Vs. District Magistrate, Shahdol and others[10]** and **Tahsildar Singh** (supra). After adverting to these decisions, in the context of the argument available to the State referable to Section 5A of the National Security Act, the Division Bench noticed the decision of the Constitution Bench of the Supreme Court in the case of **Attorney General for India Vs. Amratlal**

[9] **2012 (2) SCC 176**
[10] **2000 (4) M.P.H.T. 482 (DB) = 2000 (2) MPLJ 618**

Prajivandas[11] and in the case of **A. Sowkath Ali Vs. Union of India and others**[12] as well as **P.Sarvanan Vs. State of Tamil Nadu**[13] and **State of U.P. Vs. Sanjai Pratap Gupta**[14]. After referring to these Supreme Court decisions, the Division Bench then noted that the observations made in paragraph 11 and 12 in the case of **Haji Abdul Rajjak** (supra) deserve reconsideration; and further observed that the Division Bench in this case did not consider the judgment of the Supreme Court in **A.Sowkath Ali** (supra). Further, because of the observation made in paragraph 12 of the said judgment in **Haji Abdul Rajjak** (supra) - that the decision in the case of **Dharamdas Shamlal Agarwal** (supra), **Tahsildar Singh** (supra) have lost their significance, the Division Bench opined that the matter should be considered by a Larger Bench and formulated three questions for consideration, referred to in paragraph 3 above.

8. The question formulated in the first case (Kheri Gurjar) though differently worded has the same meaning as formulated in the subsequent reference order passed in the second case

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[11] **(1994) 5 SCC 54**
[12] **AIR 2000 SC 2662**
[13] **2001 SCW 2413**
[14] **AIR 2004 SC 4703**

(Mangal Singh @ Mangu). As regards, the correctness of the view taken by the Division Bench in the case of **Haji Abdul Rajjak** (supra), the same need not detain us because that decision was taken up in appeal before the Supreme Court being Criminal Appeal No.215/2013 and has been set aside by the Supreme Court on January 31, 2013, in the facts of that case.

9. In this judgment, therefore, we may deal only with the other shade of the question of law as to whether the detention order passed under the National Security Act can be set aside by merely relying on the decision in **Tahsildar Singh** (supra) which decision, however, has not considered the effect of Section 5A of the National Security Act.

10. At the outset, we may mention that the decision in the case of **Dharamdas Shamlal Agarwal** (supra) is of the Supreme Court and not of Division Bench of this Court, as is incorrectly mentioned in the question articulated by the Division Bench for consideration. As a result, the exposition of the Supreme Court in **Dharamdas Shamlal Agarwal** (supra) must govern all cases of the same type so long as it is in force. There, the Court was pleased to set aside the detention order on the finding that

relevant material was not placed before the Detaining Authority for consideration. Indeed, in this case the argument of the State on the basis of provision such as Section 5A, has been noticed in paragraph 9 of the judgment. But, the Court having found that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order was vitiated because of non-consideration of material and vital facts which would have bearing on the issue and weighed the satisfaction of the Detaining Authority one way or the other and influenced his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the Detaining Authority before issuing the detention order. It is on that basis the Court proceeded to answer the controversy before it.

11. While answering the question posed in the first case (Kheri Gurjar), we may observe that, if, the provisions of Section 5A of the Act are attracted in the fact situation of any case, the same must be given effect to; and the challenge to the detention order in such a case must be tested on that basis. In that, if it is possible to take the view that the detention order is founded on more than one ground and if the Detaining Authority is able to

demonstrate that even one ground was valid for issuing the order of detention against the concerned detenu, the fact that the other grounds are vague, non-existent, not relevant, not connected or not proximately connected with such person, or invalid for any other reason whatsoever would make no difference - as the order of detention will be deemed to have been made with reference to the valid ground or grounds. The fact that the decision of the Division Bench of this Court in the case of **Tahsildar Singh** (supra) does not refer to Section 5A of the Act, will not come in the way of the Court to consider the applicability of Section 5A of the National Security Act, if arises in the fact situation of a given case. That is a matter to be considered on case to case basis.

12. The decision of the Division Bench in the case of **Tahsildar Singh** (supra) is only an authority on the proposition that the subjective satisfaction of the Detaining Authority will be vitiated due to non-mentioning of material fact such as acquittal or detention of the detenu in the criminal case referred to in the grounds of detention. It is not an authority on the proposition arising from Section 5A of the Act that the order of detention is

deemed to be valid, as having been made with reference to remaining ground or grounds. In other words, the detention order cannot be set aside if it is saved by virtue of the deeming provision in Section 5A of the Act, if applicable to the fact situation of that case, merely by following the dictum of the Division Bench in **Tahsildar Singh's** case (supra).

13. Reverting to Section 5A of the Act, the same reads thus :-

> "[**5A. Grounds of detention severable. –** Where a person has been detained in pursuance of an order of detention [whether made before or after the commencement of the National Security (Second Amendment) Act,1984] under section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly –
> (a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are -
> (i) vague,
> (ii) non-existent,
> (iii) not relevant,
> (iv) not connected or not proximately connected with such person, or
> (v) invalid for any other reason whatsoever,
> and it is not, therefore, possible to hold that the Government or officer making such order would have been satisfied as provided in section 3 with reference to the remaining ground or grounds and made the order of detention;
> (b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said section after being satisfied as provided in that section with reference to the remaining ground or grounds.]"

This provision has been interpreted by the Constitution

Bench of the Supreme Court in the case of **Attorney General for India** (supra). It may be useful to refer to para 47 to 49, which read thus :-

> “47. The section is in two parts. The first part says that where an order of detention is made on two or more grounds, "such order of detention shall be deemed to have been made separately on each of such grounds", while the second part says that such order shall not be deemed to be invalid or inoperative merely for the reason that one or some of the grounds are either vague, non-existent, irrelevant or unconnected. That the second part is merely a continuation of and consequential to the first part is evident from the connecting words "and accordingly". The second part goes further and says that the order of detention must be deemed to have been made on being satisfied with the remaining good ground or grounds, as the case may be. Both the parts are joined by the word "and".
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> 48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. In Debu Mahato v. State of W.B. it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in Anil Dey v. State of W. B. It was a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in Israil SK v. District Magistrate of West Dinajpur and Dharua Kanu v. State of W.B. single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In Saraswathi Seshagiri v. State of Kerala, a case arising under COFEPOSA, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle

appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish-plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.

49. Now, take a case, where three orders of detention are made against the same person under COFEPOSA. Each of the orders is based upon only one ground which is supplied to the detenu. It is found that the ground of detention in support of two of such orders is either vague or irrelevant. But the ground in support of the third order is relevant, definite and proximate. In such a case, while the first two orders would be quashed, the third order would stand. This is precisely what the first part (the main part) of Section 5-A seeks to do. Where the order of detention is based on more than one ground, the section creates a legal fiction, viz.,

> it must be deemed that there are as many orders of detention as there are grounds which means that each of such orders is an independent order. The result is the same as the one in the illustration given by us hereinabove. The second part of it is merely clarificatory and explanatory, which is evident from the fact that it begins with the word "accordingly" - apart from the fact that it is joined to the first part by the word "and". In such a situation, we are unable to see how can the section be characterised as inconsistent with Article 22(5). Had there been no first part, and had the section consisted only of the second part, one can understand the contention that the section is in the teeth of Article 22(5) as interpreted by this Court this was indeed the situation in K. Yadigiri Reddy v. Commissioner of Police as we shall presently indicate. It is difficult to conceive any inconsistency or conflict between Article 22(5) and the first the main part of Section 5-A. Parliament is competent to create a legal fiction and it did so in this case. Article 22(5) does not in terms or otherwise prohibit making of more than one order simultaneously against the same person, on different grounds. No decision saying so has been brought to our notice. Be that as it may, we do not see why Parliament is not competent to say, by creating a legal fiction, that where an order of detention is made on more than one ground, it must be deemed that there are as many orders of detention as there are grounds. If this creation of a legal fiction is competent, then no question of any inconsistency between the section and Article 22(5) can arise."
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> (emphasis supplied)

14. The Supreme Court has pithily dealt with the interpretation of Section 5A. This decision is holding the field and has been followed in subsequent decisions by the Supreme Court. We do not wish to multiply the same. In the light of the settled legal exposition, the issue regarding applicability of Section 5A or

otherwise, will have to be considered on case to case basis. If Section 5A is applicable, in such cases, merely because one or some of the grounds of order of detention disclosed to the detenu under Section 8 is or are found to be invalid or inoperative due to application of specified reason(s), still the detention order shall be deemed to be valid and operative with reference to the remaining ground or grounds disclosed therein. For, both clause (a) and clause (b) in Section 5A independently provide for a legal fiction - that the order of detention has been validly passed with reference to the remaining ground or grounds. That is the principle of severability of the grounds of detention. Indeed, Section 5A will be applicable only when the order of detention is made on two or more grounds disclosed to the detenu. The Supreme Court in the case of **State of Gujarat vs. Chaman Lal Manjibhai Soni**[15], which decision has been quoted with approval by the Constitution Bench of the Supreme Court in Attorney General for India (supra), in para 2 has observed thus:-

> "2. …….. In our opinion, this is neither the object of the Act nor can such an object be spelt out

[15] AIR 1981 SC 1480

> from the language in which Section 5A is couched. What the Act provides is that where there are a number of grounds of detention covering various activities of the detenu spreading over a period or periods, each activity is a separate ground by itself and if one of the grounds is irrelevant, vague or unspecific, then that will not vitiate the order of detention. The reason for enacting Section 5(A) was the fact that several High Courts took the view that where several grounds are mentioned in an order of detention and one of them is found to be either vague or irrelevant then the entire order is vitiated because it cannot be predicted to what extent the subjective satisfaction of the authority could have been influenced by the Vague or irrelevant ground. It was to displace the basis of these decisions that the Parliament enacted Section 5(A) in order to make it clear that even if one of the grounds is irrelevant but the other grounds are clear and specific that by itself would not vitiate the order of detention. Mr. G.A. Shah appearing for the detenu frankly conceded that he is not in a position to support the view taken by the Gujarat High Court on the interpretation of Section 5(A). He also stated that he does not want to challenge the vires of Section 5(A) of the Act. Mr. Phadke has frankly stated that he only wants the law to be settled in the peculiar circumstances of this case and the order of the High Court quashing the detention need not be disturbed. We, therefore, hold that the view taken by the High Court on interpretation of Section 5(A) is legally erroneous and is hereby overruled. With these observations the appeal is disposed of without disturbing the order of the High Court quashing the order of detention."
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> *(emphasis supplied)*

15. That takes us to the last question presented to us for consideration namely; whether the State must plead and assert in the reply-affidavit or return about the fact that the order of detention has been passed on each ground and it be treated as a separate order under Section 5A of the National Security Act, in

view of the decision of the Supreme Court in **A. Sowkath Ali** (supra). For considering this question, we may straightway refer to the Supreme Court decision in the case of **A. Sowkath Ali** (supra). In that case, the detention order was passed under Section 3(1) (i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. That detention order was challenged on diverse grounds. The main ground pressed by the petitioner as noted in paragraph 3 of the reported judgment, was that the detention order was liable to be set aside as there was suppression of vital and important document by the Sponsoring Authority from it being placed before the Detaining Authority. The Court dealt with that contention and answered the same in favour of the detenu. The last contention considered at the instance of the Detaining Authority was with reference to Section 5A of the Act. In paragraph 27, after adverting to its earlier decisions in the case of **Vashisht Narain Karwaria Vs. State of Uttar Pradesh**[16]**,** observed as follows :-

> "Firstly, we find the question of severability under Section 5-A has not been raised by the State in any of the counter affidavit, but even otherwise it is not applicable on the facts of the present case. Section 5A applies where the detention is based on more than one

[16] **AIR 1990 SC 1272**

> ground, not where it is based on single ground. Same is also decision of this Court in unreported decision of Criminal Appeal No.1790 of 1996, Prem Prakash Vs. Union of India and others decided on 7th October, 1996 relying on K.Satyanarayan Subudhi Vs. Union of India, 1991 (suppl) (2) SCC 153 : (1991 AIR SCW 1087: AIR 1991 SC 1375 : 1991 Cri LJ 1536). Coming back to the present case we find really it is a case of one composite ground. The different numbers of the ground of detention are only paragraphs narrating the facts with the details of the document which is being relied but factually, the detention order is based on one ground, which is revealed by Ground 1 (xvi) of the ground of detention which we have already quoted hereinbefore. Thus on the facts of this case Section 5A has no application in the present case."
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> (emphasis supplied)

We find that this is not an authority on the proposition that the Detaining Authority "must" take a specific plea in the return to be filed to oppose the writ petition of the detenu about the applicability of Section 5A of the Act as such. The opening sentence, no doubt, gives that impression - that the question of severability under Section 5A was not raised by the State in the counter-affidavit filed in that case. But, the essence of the conclusion, is, that Section 5A was inapplicable to the facts of that case – as the detention order was passed only on one (single) ground.

16. In our view, considering the legal presumption predicated in Section 5A of the Act, there is no reason why the Detaining

Authority should restate that fact in the reply/counter-affidavit. Non mentioning of that fact in the counter-affidavit, cannot preclude the Detaining Authority from invoking the said provision on the basis of admitted, indisputable or proved facts available from the record, which may be sufficient to answer the controversy. That would be a pure question of law to be answered on the basis of such admitted, indisputable or proved facts.

17. Indisputably, provision such as Section 5A is an exception to the ordinary rule. To wit, the ordinary rule is that the whole of the subjective satisfaction is vitiated even on one count. The statement of objects and reasons for introducing Section 5A makes it amply clear that the said provision was necessitated because of the whole of the detention order was being set aside by the Courts even due to one invalid or non-operative ground. To remove that difficulty and to make the special provisions in respect of persons whose detention is necessary for dealing effectively with the exigency, Section 5A was enacted.

18. We have no hesitation in taking the view that, as it is a

matter of legal presumption under Section 5A of the Act, the need to restate that fact in the counter affidavit or return to be filed by the Detaining Authority to oppose the writ petition challenging the order of detention may arise, in cases where the petitioner in the writ petition was to rebut the legal presumption by stating material facts in support of that plea. If the writ petitioner failed to rebut the said legal presumption in the writ petition, there would be "no occasion or necessity" for the Detaining Authority to plead about the applicability of Section 5A of the Act, in matters where the order of detention is based on two or more grounds, in view of the legal presumption in Section 5A. The third question articulated in the second case (Mangal Singh @ Mangu) is answered accordingly.

19. Having dealt with the questions referred to for consideration by the Larger Bench, we direct the Registry to place the matter before the appropriate Bench for deciding the same on merits, in accordance with law. Since the two writ petitions have been transferred from Gwalior Bench, the Registry may forthwith re-transfer the said petitions to proceed

before the appropriate Bench at Gwalior.

20. While parting we place our appreciation on record for the able assistance given by the counsel appearing for the respective parties and in particular in completing the arguments in the given time frame.

(**A.M. Khanwilkar**)
Chief Justice

(Rajendra Menon)
Judge

(S.K. Seth)
Judge

AM.