

**(1993) 11 DEL CK 0050**

**In the Delhi High Court**

**Case No :** Criminal Writ Appeal No. 185 of 1993

Burhanuddin Tahevali Bilaspurwala

APPELLANT

Vs

Union of India and Others

RESPONDENT

**Date of Decision :** 01-11-1993

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3(1)  
Constitution of India, 1950 — Article 21  
Criminal Procedure Code, 1973 (CrPC) — Section 428  
Customs Act, 1962 — Section 132

**Citation :** (1993) 52 DLT 341 : (1994) 1 ILR Delhi 447 : (1994) 1 RCR(Criminal) 521

**Hon'ble Judges :** V.K. Jain, J;D.P Wadhwa, J

**Bench :** Division Bench

**Advocate :** Ashutosh, Sunil Mugon, N.K. Handa and Rajeev Sharma, for the Appellant;

## Judgement

D.P. Wadhwa, J.

(1) The petitioner by this petition filed under Article 226 of the Constitution sought a writ of Habeas Corpus or any other writ direction or order requiring the respondents to set him at liberty forthwith. The petitioner was a detenu under the Conservation of Foreign Activities Exchange and Prevention of Smuggling Act, 1974 (for short "the COFEPOSA Act). There are three respondents. First is the Union of India through the Secretary in the Ministry of Finance in the Department of Revenue. The second is the Administrator of the Union Territory of Delhi and the third is the Superintendent, Central Jail, Tihar, New Delhi. This petition was filed on 16/03/1993.

(2) The second respondent the Administrator of the Union Territory of Delhi, passed an order on 16/08/1991 in the exercise of powers conferred upon him by Section 3(1) read with Section 2(f) of the COFEPOSA Act on his satisfaction that it was necessary to detain the pe,titioner with a view to preventing him from

smuggling goods and also preventing him from engaging in transportation, concealing and keeping smuggled goods, in future, this order was served upon the petitioner on 19/08/1991 while he was in the judicial custody in the Central Jail, Tihar, New Delhi.

(3) It is not necessary for us to go into the grounds on which the order - of detention was passed by the second respondent except to note that the petitioner was arrested on 2/06/1991 under the provisions of the Customs Act, 1962, on his arrival from Kuala Lumpur at the Indira Gandhi International Airport, N. Delhi. Two kgs. of primary gold of 24 carat purity was recovered from the petitioner which was in the shape of two gold bars weighing one kg. each and the market value of which was Rs. 7,40,000.00. For offences under the Customs Act the petitioner was in judicial custody when the order of detention under Cofeposa Act was clamped upon him. The petitioner challenged his detention in this Court by filing a petition of Habeas Corpus under Article 226 of the Constitution. This was his first criminal writ. The order of detention was quashed by this Court by order dated 10/03/1993. In the trial for offences under the Customs Act as mentioned aforesaid the petitioner was convicted for offences under Sections 132 and 135(1)(a) of the Customs Act. By order dated 15/01/1993 of the learned Additional Chief Metropolitan Magistrate, New Delhi, the petitioner was sentenced to undergo rigorous imprisonment for six months for an offence u/s 132 and to undergo rigorous imprisonment for 1-1/2 years for offence u/s 135(1)(a) of the Customs Act. the petitioner was also sentenced to pay a fine of Rs. 1 lakh and in default to undergo simple imprisonment for a further period of three months. Both these sentences were ordered to run concurrently. Against his conviction and sentence the petitioner filed an appeal u/s 374 of the Code of Criminal Procedure in the Court of Sessions. The learned Additional Sessions Judge who heard the appeal reduced the period of sentence imposed on the petitioner in default of payment of fine from three months to 1 month. The learned Additional Sessions Judge also directed that the petitioner would get the benefit u/s 428 of the Code of Criminal Procedure. This was by judgment dated 27/02/1993.

(4) When this petition was filed the petitioner had not been released from Jail although he said, he had already undergone the sentence awarded to him and although his detention under the Cofeposa Act had been set aside by this Court. The petitioner said that he was in illegal custody of the Superintendent, Central Jail, Tihar, New Delhi, the third respondent and all by this petition he sought his release from the illegal custody. We issued notice to show cause in the matter. "The respondents put in their appearance. The facts are not much in dispute. On the request of the respondents when we adjourned this matter to 29/03/1993 the petitioner in the meanwhile was released from the jail custody. Petitioner said he should have been released fifteen days earlier. At that time the respondents accepted that position and said that there was a mistake in calculation. We observed it was a serious matter and directed the respondents to file a proper affidavit bringing on record all the relevant facts. At the same time we granted

opportunity to the parties to argue on the question if any compensation was to be awarded to the petitioner if we held that his detention and imprisonment at least after 10/03/1993, when the Court passed the order quashing the detention order under the Cofeposa Act, was not legal. We recorded in one of our orders that when the detention order was quashed on 10/03/1993 the result would be that there was no detention order at all. The respondents said that their interpretation of law earlier had been that sentence of imprisonment in lieu of payment of fine would start only after the period of detention under the Cofeposa Act had expired and in support of this reference was made to a Bench decision of this Court in Cr. Writ No. 349/92 dated 15/07/1992. There is no such decision on which reliance could be placed by the respondents. This is merely an order by the Bench while issuing rule D.B. when the Bench raised a query as to when the period of imprisonment in lieu of fine would start. The case before us is quite different. Here the effect of the order dated 10/03/1993 is that detention order did not exist at all, while in the Criminal Writ 349/92 the detention order remained in force. Again as per the interpretation given by the respondents the petitioner could have been released only on 27-4-1993 but it was stated that on the advice of the Standing Counsel, the petitioner was released one month earlier on 26/03/1993. In his affidavit the Jail Superintendent, the third respondent has stated that the simple imprisonment in default of payment of fine could commence only on 11/03/1993, the date after the quashing of the order of detention under the Cofeposa Act, and Therefore, the release of the petitioner was fixed for 26/04/1993. It was stated that benefit u/s 428 of the Code could not be given to the petitioner for sentence in default of payment of fine. Despite that, the third respondent says, the petitioner was released from jail on 26/03/1993 as per legal advice of the Government Counsel. Respondents 1 and 2 in their affidavit have taken the following position :-

"8. That the deponent is advised to state that the imprisonment in lieu of payment of fine runs after the expiry of substantive imprisonment. The deponent is further advised to submit that in case a person is sentenced to two terms of imprisonment and payment of fine in two cases, then the sentences, in that event, the Court awarding sentence as direct the substantive offences to run concurrently but the sentences in lieu of payment of fine in more than one case consecutively.

9. That the deponent is further advised to state that there is no settled law interpreting the provisions of Section 429(2) of the Criminal Procedure Code. If there be any settled case neither the office of the deponent nor the jail administration were advised accordingly.

10. That the Jail Administration, without any mala fide intentions and without the intention of curtailing the individual liberty, have been equating the detention order with that of the term of imprisonment. With respect the deponent submits, in law it may not be found to be a correct position, but the concerned department and the jail administration were never advised to the contrary.

Considering the period of imprisonment the Jail administration took the view that the period of imprisonment in lieu of payment of fine would run after the period of detention expired. The same mode of calculation is followed in the cases of similar nature."

This affidavit of respondents 1 and 2 has been filed by the Deputy Secretary(Home) of the Delhi Administration. These respondents 1 and 2 further say that in view of the interpretation as abovementioned the jail authorities thought that the period of imprisonment in the present case in lieu of payment of fine will run w.e.f. 11/03/1993 after the order of detention was quashed. They further say that the moment they were advised by their Additional Standing Counsel (Criminal) that interpretation of law as given by the department did not seem to be correct, the petitioner was released forthwith. During the course of arguments, however, the respondents have taken a contrary stand. They say the petitioner was not rightly released on 26/03/1993 as the interpretation given by the authorities earlier was correct and the petitioner was liable to be re-arrested to undergo the remaining part of his sentence in case this petition was dismissed. The respondents though say that the detention of the petitioner after 10/03/1993 was neither with any malafide intention nor deliberate nor intended to curtail his personal liberty on account of any other factor, but was on account of bonafide belief that the period of imprisonment in lieu of payment of fine would commence after 10/03/1993.

(5) We have not been told as to when and who formed such an opinion that the sentence in lieu of fine was to start only after the expiry of the period of detention under the Cofeposa Act. Mr. Ashutosh, learned Counsel for the petitioner, has pointed out that the respondent had been adopting this very attitude on earlier occasion as well when the matter was listed before the Metropolitan Magistrate and he has brought on record two orders, one of the Metropolitan Magistrate and the other of the Additional Chief Metropolitan Magistrate, while not accepting the stand of the jail authorities, and directing the jail authorities to release the detenus in the cases before them forthwith. It is unfortunate that in spite of that the respondent did not take any authoritative opinion and even before us adopted this very attitude of justifying their action.

(6) The object of the Cofeposa Act is not punitive but preventive. u/s 4 of the Cofeposa Act the provisions of the Code are applicable only as regards the execution of the detention orders passed under the COFEPOSA Act. In Pushpadevi M. Jatia v. M.L. Wadhavan, Additional Secretary, Government of India, and Others, : 1987CriLJ1888 the Court also considered the question whether the period of parole should be treated as part of detention period itself under the Cofeposa Act, and said that this question had already been elaborately considered in its earlier decision in Poonam Lata Vs. M.L. Wadhawan and Others, where it was said that period of parole had to be excluded in reckoning the period of detention under Sub-section (1) of Section 3 of the Cofeposa Act. Then the Court observed that though the element of detention was a common factor in

cases of preventive detention as well as punitive detention, there was a vast difference in their objective. The Court said that the punitive detention follows a sentence awarded to an offender for proven charges in a trial by way of punishment and had in it the elements of retribution, deterrence, correctional factor and institutional treatment in varying degrees. On the contrary preventive detention was an extraordinary measure resorted to by the State on account of compulsive factors pertaining to maintenance of public order, safety of public life and the welfare of the economy of the country.

(7) Reference at this stage may be made to Sections 428 and 429 of the Code which are reproduced as under :-

"428. Period of detention undergone by the accused to be set off against the sentence of imprisonment. Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the terms of imprisonment imposed on him.

429. Saving. (1) Nothing in Section 426 and Section 427 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction. (2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, effect shall not be given to the award of imprisonment in default of payment of fine until the person has undergone the further sentence or sentences."

Relying on these provisions of the Code, Mr. Tulsi, learned Additional Solicitor General, made the following submissions :-

1. The detention of the petitioner till the date of his release on 25/03/1993 was perfectly legal, valid and justified. The substantive sentence awarded to the petitioner by the Trial Court by judgment dated 15/01/1993 had already come to an end on 2/12/1992 after giving the petitioner the benefit of imprisonment as under trial u/s 428 of the Code. On the date of expiry of sentence, a valid order of preventive detention under Cofeposa Act was in force. Therefore, detention in custody from 2/12/1992 onwards was of the nature of preventive detention till the date 10/03/1993 when the order of detention was quashed by this Court. The petitioner had yet to undergo the sentence in default of fine awarded by the Trial Court and as modified in appeal. This practice was perfectly in conformity with the provisions of Section 429(2) of the Code. The expression "after substantive sentence" in this regard will embrace in its scope all lawful orders and warrants authorising detention of the prisoner in further custody. Such

sentence may be penal or preventive as au undertrial or as a convict or even in the course of extradition proceedings or remand to children's home. So long as any other warrant of custody existed against the prisoner, he must be regarded to be under obligation to exhaust such warrant by undergoing "further substantive sentence" before he was required to undergo sentence in lieu of fine. This is the scheme of the section on its plain reading.

2.Sentence in lieu of fine, under the scheme of Section 429(2) of the Code was required to be executed at the end. The reason for this schema for execution of such sentence at the end was that the prisoner was given the maximum opportunity to pay the fine. Imprisonment in lieu of default of payment of fine was merely the means to enforce the sentence of fine. Thus, the statute incorporated a principle of execution of sentence in default after all further sentences and warrants of custody had been exhausted. That being so, treating the date of quashing the detention as the date for starting the sentence in default office was in conformity with the principle of Section 429 and not opposed to the same.

3.The expression "sentence" has been used interchangeably with detention in may statutes.

4.Even if this Court were to come to conclusion that the expression "sentence" had a distinct and a different meaning from detention ,it was submitted that nevertheless this Court may adopt a liberal construction to make the object of Section 429(2) more effective and operative.

5.The present case was certainly not one where it could bo said that any provision of any Act, rule or order duly promulgated, had been violated. If on interpretation of the language Along with the object of Section 429(2) of the Code this Court came to the conclusion that the sentence in lieu of default of payment of line ought to have started running immediately after the expiry of the substantive sentence, in that event, this Court would for the first time lay down such a proposition. Thus, in any case, the action of the respondent could not be dubbed by the petitioner as contrary to any provision of law on the date on which resort to it was had nor could it be termed as negligence in any manner. In any event, in order to avoid the possibility of retaining the petitioner in custody during the pendency of these proceedings, as by abundant caution and indifference to the overriding claims of liberty of citizens, the petitioner was pre-emptorily released from custody. This only reaffirmed bonafides of the respondents. In the circumstances it was submitted that it was not a fit case where the petitioner, even if, interpretation of this Court were to go against the respondents, was entitled to any compensation.

6.In all the cases referred to by the petitioner relating to the award of compensation for illegally depriving personal liberty, the illegality of detention of petitioner was clearly unconstitutional, or was prima facie established, on the basis of which order of compensation under Article 226 or 32 of the Constitution

was passed. Such not being the case in the present petition, the petitioner could not be allowed compensation in the facts and circumstances of this case.

(8) Mr. Tulsi also referred to the meaning of the word ""sentence" from the book "Words and Phrases-legally defined" by John B. Butter worths,1970 Ed 43. The definition of sentence is with reference to some English Acts and is not relevant for our purposes. We, Therefore, need not refer to that.

(9) All the above submissions of Mr. Tulsi have been refuted by Mr. Ashutosh and he said it was a clear case where the petitioner has been deprived of his personal liberty by respondents illegally and that the petitioner was entitled to requisite compensation. In support of his submissions he referred to a decision of the Supreme Court Bhuvneshwar Singh Vs. Union of India (UOI) and Others, Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others, ; and a Bench decision of this Court in Hukam Singh v. State (Delhi Administration), 1993 3 AD 497.

(10) The whole argument of Mr. Tulsi appears to have been based on a premise that the substantive sentence under the Customs Act and detention under the Cofeposa Act would amount to cumulative sentence and that the length of the term under cumulative sentence would be the total of separate sentences and that second or subsequent sentence did not begin until the earlier sentence or sentences had been satisfied. The submission was with reference to Article 1587 of Corpus Jurisdiction, Volume 24 (Criminal Law). From this article the following portion was also referred to :-

"WHERE one of two consecutive sentences is invalid, the convict is entitled to discharge on expiration of the valid sentence; and ,ordinarily, where accused is sentenced to imprisonment for successive terms, and the first sentence is reversed or vacated, or is shortened by a pardon or parole, the second term begins to run from the time of the reversal or vacation, or from the pardon or parole of the convict. The same is true where a prisoner is released on the first sentence before the expiration of the sentence because he is given credit for good time. However, it has also been held that where a prior sentence falls because of reversal, the second sentence should be moved forward and made to run as of the date of its imposition or the date of the commencement of the invalid sentence."

(11) We are of the opinion that whole approach of the respondents is wrong. They would appear to have deliberately refused to grasp the difference between the preventive detention and punitive sentence. According to Mr. Tuisi, the sentence in lieu of fine was to start from 11/03/1993 ending on 26/04/1993. The substantive sentence of imprisonment had expired on 2/12/1992. The effect of the order of this Court quashing the detention against the petitioner was that his detention was not correct and his undergoing imprisonment for the period he remained in detention would stand wiped off. During the period of trial for offences under the Customs Act before the Criminal Court the petitioner

throughout remained in judicial custody. up to 2/12/1992 the petitioner was undergoing the substantive sentence under the Customs Act and detention under the Cofeposa Act. For the respondents the period from 2/12/1992 till 10/03/1992 during which the petitioner remained imprisoned was of no significance whatsoever.

(12) In *Raghubir Singh Vs. State of Haryana*, , the question before the Supreme Court was whether it was open to a person who was undergoing imprisonment on being convicted of an offence committed by him to claim that the period occupied by the investigation or inquiry carried on and the trial held while he was undergoing imprisonment in respect of another offence alleged to have been committed by him should be set off against the term of imprisonment imposed on him on being convicted of the latter offence u/s 428 of the Code. The Court said that the period occupied by such investigation, etc., could not be set off against sentence to be imposed in the latter case.

(13) In *Government of Andhra Pradesh and Another Vs. Anne Venkateswara and Others*, , the Court decided a group of four appeals. In one of the appeals the claim was that period of detention undergone by the appellant (A.V. Rao) under the preventive detention law should be set off u/s 421 of the Code against the term of imprisonment imposed on him on his conviction in the criminal case. The argument was that the expression "period of detention" Section 428 included detention under the Preventive Detention Act or the Maintenance of Internal Security Act. The Court said : "It is true that the Section speaks of the "period of detention" undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the "same case" in which he has been convicted. We, Therefore, agree with the High Court that the period during which the writ petitioners were in preventive detention cannot be set off u/s 428 against the term of imprisonment imposed on them." The Court also rejected the argument of the State that a person under detention cannot have two types of detention-One preventive and the other punitive. The Court said : "As regards the alleged anomaly of a man having to suffer two kinds of detention at the same time, one preventive and the other punitive, we do not find this to be a valid objection. The position is not different from the case where a man is sentenced on different counts to a term of rigorous imprisonment and another term of simple imprisonment, and the sentences are directed to run concurrently."

(14) It is, thus. obvious that the provision of Section 428 or Subsection (2) of Section 429 of the Code were inapplicable. The petitioner was not undergoing any sentence of imprisonment when he was detained under the Cofeposa Act. It could not, Therefore, be said that the sentence of imprisonment in default of

payment of fine would be given effect to after the period of preventive detention was over. There is no ambiguity. The sentence of imprisonment in default of payment of fine in the present case, Therefore, started taking effect immediately after the completion of the substantive sentence of 1-1/2 years on 2/12/1992. Since the sentence of imprisonment in default of payment of fine was only 1-1/2 months the period of imprisonment, Therefore, ended on 1-1/2 months after 2/12/1992. When this period ended the petitioner was under detention under the Cofeposa Act he could not have been released. But the moment his detention under the Cofeposa Act was quashed he was entitled to be released forthwith. Thereafter he was in illegal custody. His fundamental right under the Constitution stood violated. There cannot be two opinions on that.

(15) The question then arises, if the petitioner is entitled to any compensation for infraction or invasion of his rights granted under Article 21 of the Constitution, and if so, to what amount. The law is now well settled that relief of monetary compensation as exemplary damages in proceedings under Article 226 of the Constitution for "established infringement of the indefeasible right granted under Article 21 is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and defeasible rights of the citizen." In Nilabati Behera's case the Supreme Court awarded compensation of Rs. 1,50,000.00 to the petitioner, the mother of the deceased who was aged about 22 years. It was a case of custodial death. The Court noticed that the deceased was having monthly income between Rs. 1200 to Rs. 1500.00 per month and was of the view that Rs. 1,50,000.00 would be the appropriate sum as compensation. In the case of Bhim Singh v. State of J. and K. and Others the Supreme Court granted the petitioner a compensation of Rs. 50,000.00 for his illegal detention by the police authorities for a period of 5 days from 10 to 14/09/1985 when he was not produced before the Magistrate and the provisions of Articles 21 and 22(2) of the Constitution stood violated. In the present case the petitioner was in illegal custody for 15 days. Law is not settled as to what amount of compensation is to be awarded in such cases. We do not think any difference can be made if a citizen is poor or rich for the purpose of award of compensation in a case like the present one. Whether a person is rich or poor personal liberty has the same meaning. It may perhaps be more in the case of poor and a down trodden who has to earn for his livelihood each day.

(16) We are certainly dismayed at the stand taken by the respondents. They have tried to justify their action on grounds which are wholly untenable. Rather it would appear that their approach has been very casual and they have not shown even little sense of responsibility where a person has been deprived his personal liberty in violation of his fundamental right under Article 21 of the Constitution. Personal liberty is too precious a thing to be taken rightly by any one much less the State and its functionaries. Nothing could be more precious and sacrosanct than the liberty of an individual.

(17) We are of the view that interest of justice would be served if we award

compensation at the rate of Rs. 1,000.00 for each day the petitioner was deprived of his personal liberty. The total compensation, Therefore, comes to Rs. 15,000.00. The petitioner will also be entitled to costs. Counsel fee Rs. 3,000.00. The amount of compensation and the costs shall be paid to the petitioner within two months from today. Petition allowed.