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**(1989) 11 P&H CK 0052**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : Civil Writ Petition No. 1992 of 1989**

Kasturi Lal Dhir

APPELLANT

Vs

Union of India & ors.

RESPONDENT

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**Date of Decision :** 17-11-1989

**Acts Referred:**

**Citation :** (1990) 1 RCR(Criminal) 541

**Hon'ble Judges :** A.P.Chowdhri, J

**Advocate :** Jay Shri Anand, C.L. Sharma, J.S. Wasu, Advocates for appearing Parties

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## Judgement

A. P. Chowdhri, J.

1. In this petition under Article 226 of the Constitution the petitioner has challenged the order of detention dated May 3, 1989, Annexure P1, passed under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (for short, COFEPOSA Act). The case laid in the petition is that the petitioner was allegedly apprehended from his residential house at Hoshiarpur on March 4, 1989, for an alleged offence under section 8(1) of the Foreign Exchange Regulation Act, 1973. He was produced before the Judicial Magistrate 1st Class, Jalandhar, on the following day. It is further averred that while in custody the petitioner was tortured; some recovery of foreign currency was planted on him and a confessional statement was extracted from him. The petitioner was granted bail by the Judicial Magistrate, Jalandhar, on March 7, 1999. When the petitioner came out on bail, he sent a telegram to the Enforcement Directorate on March 10, 1989, that the recovery alleged to be made from him was false and the confessional statement had been obtained under duress. The petitioner also submitted a written representation to the Director. Later the petitioner learnt that an order of detention had been passed against him on May 3, 1989. The petitioner has placed on record a copy of the said order as Annexure P1 and has challenged that order on various grounds set out in various subparagraphs of paragraph 7. A return to the above petition was

filed by way of affidavit of Shri Kuldeep Singh, Under Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi. It was stated therein that the petitioner was arrested on March 4, 1989, at Jalandhar at 6 p.m. Memo of arrest was prepared showing the place, date and time of arrest. The residential house of the petitioner was searched on March 4, 1989, and the search yielded pound 2543/ & US dollar. 583722 & certain incriminating documents, Search of the residential house of one Darshan Kumar alias Darshan Dalal was also conducted on the same day at Hoshiarpur and the same resulted in seizure of documents, disclosing involvement of the petitioner in transactions in violation of the provisions of the Foreign Exchange Regulation Act, 1973. The statement of the petitioner was recorded under section 40 of the FERA, 1973. It was denied that the statement had been obtained under duress. The statement found material corroboration from the recovery of foreign currency and documents seized from the residence of the petitioner, documents seized from the residence, of Darshan Kumar and the statements of one Ashwani Kumar alias Gopi and Darshan Kumar. It was also stated that the petitioner made no grievance of any duress or planting of the alleged recovery when he appeared before the Duty Magistrate, Jalandhar, in connection with remand. It was admitted that the petitioner sent a telegram on March 10, 1989. It was examined and duly replied by letters dated April 6, 1989, (Annexure R1) and dated April 21, 1989 (Annexure R2). With regard to the order of detention Annexure P. 1. the stand was that this was not the order of detention and in any case the order of detention was accompanied by detailed grounds of detention which had not yet been served on the petitioner. The order of detention dated May 1, 1989, could not be executed as the petitioner had been absconding ever since. The various grounds on which the order of detention was challenged were specifically controverted. An objection was taken that as the order of detention had not been executed the writ petition itself was not maintainable. It was also stated that the petition could, if at all, lie only after the petitioner's representation had been considered by the Central Government and his case had been looked into by the Advisory Board.

2. During the pendency of the writ petition, Crl. Misc. No. 4908M of 1989 was moved for staying the arrest of the petitioner pending decision of the petition. N.C. Jain, J. by his order dated June 23, 1989, issued notice to the respondents and stayed arrest of the petitioner in the meanwhile. In reply to the said Crl. Misc. application, the stand taken was that arrest of the petitioner in connection with the execution of order of detention could, not be stayed. It was also stated that in the past as well the petitioner had been found involved in prejudicial activities. In particular, on March 4, 1989, foreign currency detailed in para 2(i) was recovered from his residential house. On September 5, 1988, the petitioner was searched by the Punjab Police at Dasuya, district Hoshiarpur, resulting in the recovery of 25 gold biscuits valued at Rs. 8,94,905/-. Lastly, the personal search of the petitioner on November 4, 1985, resulted in recovery of 15217 US dollar. The petitioner had suffered detention under COFEPOSA Act from March 13, 1986

to November 14, 1986.

3. The aforesaid Crl. Misc. was argued for a while and the learned counsel for the petitioner ultimately appears to have found that there, was no case for bail and accordingly argued the main petition. In this connection, I deem it apt to refer to section 12 of the COFEPOSA Act. The section relates to temporary release of persons detained under the said Act. It was amended by COPEPOSA (Amendment) Act, 1975 (35 of 1075) and subsection (6) was inserted with effect from July 1, 1975. It reads as under :

"(6) 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."

This provision appears to have been made in view of the avowed object of COFEPOSA Act. In *Smt. Poonam Lata v. M.L. Wadhawan and others*, 1987(2) RCR(Crl.) 100 (SC) : AIR 1987 S.C. 1383 , it was pointed out that the Parliament had authorised the detention of a person under the COFEPOSA to serve two purposes :

(i) To prevent the person concerned from engaging himself in an activity prejudicial to the conservation of foreign exchange and also preventing him from smuggling activities; and,

(ii) in order to break the link between the person so engaged and the source of such activity and from his associates engaged in that activity or to break the continuity of such prejudicial activities so that it would become difficult, if not impossible, for him to resume the activities.

These objects would be frustrated if a person is enlarged on bail independently of the above statutory provision. It has been repeatedly held by the Supreme Court that the High Court had no jurisdiction to grant bail to a detenu detained under the COFEPOSA Act. Reference may be made to *State of Bihar v. Ram Balak Singh*, AIR 1966 S.C. 1441; *Samir Chatterjee v. State of West Bengal*, AIR 1975 S.C. 1165; *State of U.P. v. Jiamam*, AIR 1982 S.C. 942 and *Poonam Lata's case* (supra). For these reasons, Crl. Misc. aforesaid has no merit and the same is dismissed.

4. Learned counsel for the respondents took a preliminary objection that the petitioner having not been actually detained in pursuance of the order of detention, having been allowed bail by this Court, the present petition is not maintainable. This very question arose in Crl. W.P. No. 11768 of 1988, 1989(1) Recent Criminal Reports 319 (*Ajay Bhudhiraja v. Union Territory, Chandigarh and another*) decided by S.D. Bajaj, J. on November 17, 1988. It was held that writ petition in such circumstances is maintainable. As at present advised, I express no different opinion.

5. An ancillary argument has been raised. It is contended that the order of detention having not been served on the petitioner the petition can lie only on

grounds which are independent of the supposed infirmities in the detention order as the detention order had admittedly not been served on the petitioner. In order to appreciate this argument, it is necessary to bear in mind that there is a vital distinction between the order of detention and the grounds on which that order is passed. While order of detention is referred to subsection (1) of Article 22, reference to grounds of detention is made in subsection (5) thereof. It follows that the order of detention and the grounds in support thereof are two distinct things, though there is no prohibition in the grounds being included in the order of detention itself. To the same effect are the provisions of section 3 of the COFEPOSA Act. Whereas the order of detention is passed under subsection (1) of the said Act, the grounds of detention are to be furnished to the detenu within the time prescribed in subsection (3) of section 3 of the Act. This distinction has been clearly brought out by a Constitution Bench decisions of the Supreme Court in *Naresh Chandra v. State of West Bengal and others*, AIR. 1984, 1335 (sc), Their Lordships have described the formal order of detention as a preamble and the remaining as the grounds for the detention. The case setup by the petitioner herein is that Annexure P.F. is the order of detention. Even according to bird, Annexure P.1 is only copy of a preamble fact whether it is a true copy of the order of detention is also disputed by the respondents. Assuming for the sake of argument that only a copy of preamble of the order of detention it is apparent that it is only a copy of preamble of the order of detention. The petitioner has not even attempted place on record the supposed grounds of detention. All grounds mentioned in the petition, asserting the supposed grounds of detention, are therefore, based on conjectures. This clarification has to be constantly borne in mind while appreciating the contentions raised by learned counsel for the petitioner.

6. The first point urged by Shri Joginder Singh Wasu, learned counsel for the petitioner, is that there was inordinate and unexplained delay in (a) the date of the incident and passing of detention order; and (b) the date of the detention order its execution by arrest and actual detention of the petitioner. It will be recalled that the petitioner was apprehended on March 4, 1989, when some recoveries are alleged to have been made from him. The order of detention was passed on May 3, 1989. The order could not be executed of the petitioner until he filed the present writ petition and obtained an order staying his arrest on June 23, 1989. For, proposition (a), learned counsel referred to *Jagan Nath Biswas v. The State of West Bengal*, Ark 1975 S.C. 1516 in which it was held that inordinate delay in passing the order of detention after the occurrence of the incidents relied on which was not satisfactorily explained, rendered the subjective satisfaction of the detaining authority open to doubt. For proposition (b) reliance was placed. on *Suresh Mahto v. The Distt. Magistrate, Burdwan and others*, AIR 1975 S.C. 728, laying down that unless, satisfactorily explained the delay between the date of the order of detention and the date of arrest would throw considerable doubt on the genuineness of the subjective satisfaction of the District Magistrate and it would be a legitimate inference to draw that, the

detaining authority was not really and genuinely satisfied as regards the necessity for detaining the petitioner. Reference to the earlier part of this judgment would show that there were three separate incidents which appear to have been taken to show petitioner, tendency to indulge in activities prejudicial to the conservation of foreign exchange. The time taken by the detaining authority in verifying those incidents, the action taken thereon reasonably explains the period of less than, two months in passing the order of detention. The explanation given in paragraph 7(i), namely that the detaining authority examined all the records of the case in order to arrive at a satisfaction and that voluminous record required to be translated into Punjabi and that there was no undue delay on this count, clearly deserves to be accepted.

7. With regard to the delay in execution of the order of detention, the firm stand of the respondents is that the petitioner had been absconding continuously since the order of detention was passed. Learned counsel for the petitioner pointed out that the averment that the petitioner was absconding should not be, accepted as the petitioner attended the Court of the learned Chief Judicial Magistrate Jalandhar, on May 30, 1989, and the cash memos placed on record indicated that he attended his shop during the period 1.4.1989 to 2061989. It was also pointed out that the petitioner attended the Civil Hospital as an outdoor patient during the period 261989 to 2061989. Learned counsel for the respondents contended that the petitioner could easily produce a certified copy of the order of the Chief Judicial Magistrate dated May 30, 1989, to show that petitioner had attended his court. This had not been done. The other record could be easily manufactured and was in the nature of an admission in his own favour, which would not be sufficient to show that the petitioner was really not absconding. Office an order of detention is issued by the detaining authority, it is more consistent with probability that the same is not being executed because the detenu has made himself scarce rather than some reluctance or second thoughts on the part of the detaining authority itself. It has also to be remembered that order of detention is served and the detenu taken into custody by the local police. In any case, I am not impressed by the material placed on record by the petitioner showing that he had not absconded and was available at the normal place of work etc. In *Gore v. State of West Bengal*, AIR 1975 S.C. 473 it was observed that the test of proximity is not a rigid or mechanical, test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. It was further pointed out that it is a subsidiary test evolved by the Court for the purpose of determine the main question whether the past activities of the detenu are such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far, as it subserves that purpose and it cannot be allowed to dominate or drown it. To, the same effect is the law laid down in *Shiv Ratan Hakim v. Union of India and others*" 1986(1) Recent Criminal Reports 470 : AIR 1986 S.C. 610 . It was held that there can be no hard and fast rule as to what is the length of time which would be regarded, sufficient to snap the nexus, between the incident and the

order of detention.

8. In the facts and circumstances and for the reasons discussed above, I find no inordinate or unexplained delay between the incident and the order of detention or between the order of detention and its execution.

9. The next contention of the learned counsel is that there was non application of mind by the detaining authority. It was submitted that the fact that the petitioner had been granted bail by the Chief Judicial Magistrate, Jalandhar, on March 7, 1989 had not been taken into consideration. The further fact that the petitioner retracted his confessional statement on March 10, 1989, through a telegram Annexure P5, does not appear to have been taken into consideration and lastly the facts mentioned in the telegram Annexure P. 5 do not appear to have been looked into. No reply thereto was given to the petitioner. As pointed out earlier, this contention has to be considered in we context that the grounds of detention have yet, been served on the petitioner. Whether all the three points made by the learned counsel or any one them were actually considered by the detaining authority can be known only on a persual of the grounds of detention. It has also been clarified in the earlier part of this judgment that what has been produced by the petitioner as order of detention is only a preamble to the order of detention and it will be idle to expect the material as to the relevant considerations which prevailed with the detaining authority in passing the order by looking to the socalled order of detention Annexure P. 1. It is, therefore, not possible to conclude that the detaining authority had failed to take into consideration the fact of arrest and bail of the petitioner or that the petitioner had retracted his confession or the contents of the telegram Annexure P. 5 sent by him. The confessional statement appears to have been made on March, 4, 1989. The petitioner was granted bail on March 7, 1989, by the Chief Judicial Magistrate, Jalandhar. The confessional statement is stated to have been retracted on March 10, 1989, i.e., after three days after the order of bail. Mere retraction of the confession does not wipe out the earlier confessional statement. Retraction made at a later date affects the probative value of the confessional statement depending on the relevant facts and circumstances of each case. In this regard one has to see whether the confessional statement was retracted at the earliest possible opportunity, whether the confessional statement was corroborated by independent facts and circumstances, whether duress was used for obtaining the confessional statement or whether it was only under an expert advice and as an afterthought that the confessional statement was retracted.

There is no such thing that once a confessional statement is retracted, the confessional statement goes out of existence. In the absence of the grounds of detention, it will be only conjectural to hold that the detaining authority had failed to take due notice of the relevant circumstances in which the confession was retracted. The telegram Annexure P. 5 which has been placed on record by the petitioner after permission of this court was duly considered and the allegations made therein were rejected as baseless. The replysent by the

Directorate if this behalf is dated April 6, 1989 (Annexure R. 1) and dated April 24, 1989 (Annexure R. 2). It cannot be said, therefore, that the telegram sent by the petitioner was ignored and was not present to the mind of the detaining authority.

10. Lastly, it was argued that the return in this case had not been filed by the detaining authority but by an Under Secretary of the Government of India sitting in New Delhi. Learned counsel contended that unless the averments were denied by the detaining authority it should be held that the averments made by the petitioner had not been controverted. I am unable to accept this contention. In the facts and circumstances of the present case, there was nothing particularly within the personal knowledge of the detaining authority. It was on the basis of the record and the material placed before the detaining authority that the order of detention was passed. This is a matter of record. Any person who carefully goes through the record can be acquainted with the facts and is complaint to swear an affidavit with regard to the material facts and circumstances alleged in the petition of which a return is filed. I do not, therefore think that the order of detention suffers from any infirmity for non filling of affidavit by the detaining authority.

11. Before concluding it must be observed that it would lead to an utterly anomalous situation if before the service of the grounds of detention the petitioner were to challenge the order of detention and the detaining authority was required to justify its order. In other words, in every case of detention where the detenu come to know that an order of detention was under contemplation against him, he would rush to the High Court and the matter has to be first appraised by the High Court before the authorities can go ahead with the detention. This will set at naught the scheme and the purpose of the various laws dealing with preventive detention. This would amount to putting the cart before the horse.

12. For the foregoing reasons, I find no merit in this petition and accordingly dismiss the same.