

**(1990) 03 MP CK 0025**  
**In the Madhya Pradesh High Court**  
**Case No : M.P. No. 1447 of 1989**

Mukesh Kumar Jain

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

**Date of Decision :** 30-03-1990

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —  
Section 3(1)  
Constitution of India, 1950 — Article 226

**Citation :** (1990) MPLJ 738

**Hon'ble Judges :** Y.B. Suryavanshi, J;A.G. Qureshi, J

**Bench :** Division Bench

**Advocate :** S. Kulshreshtha, for the Appellant; B.G. Neema, for the Respondent

**Final Decision :** Allowed

## Judgement

A.G. Qureshi, J.

The petitioner Mukesh Kumar Jain has filed this petition under Article 226 of the Constitution for issuance of a writ of mandamus, prohibition or any appropriate writ "or direction challenging the order of respondent No. 1 passed in exercise of powers u/s 3(1) of the Conservation of Foreign Exchange and. Prevention of Smuggling Activities Act, 1974 for detention of the petitioner.

According to the petitioner he owns the business of refining silver in the name and style of Suhel Metal Industry at Sanwer Road, Indore. He has also a shop at 54/3, Bada Sarafa, Indore. He resides with his father, but their business is independent of each other. The respondent No. 1 has passed an order in exercise of the powers u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called COFEPOSA Act) whereby it was directed that the petitioner be detained and kept in the Central Prison, Indore. The order has been passed concurrently with the order of detention passed against the father of the petitioner and one Ramkumar Agrawal, who were detained in pursuance of the order passed against them and released under

the order of this Court in ML P No. 930 of 89 and 829 of 89 respectively. By the aforesaid order of this Court in the respective petitions the Court had quashed the said orders entirely, inter alia on the ground that the retraction of the confessional statements made by detenu Dhanyakumar Jain and detenu Ramkumar Agrawal were neither placed before the Detaining Authority nor considered by the said Authority which consequently vitiated the subjective satisfaction arrived at by the said Authority. The certified copies of the two orders of this Court have also been annexed as Annexure-A and Annexure-B.

The facts leading to this petition as alleged by the petitioner are that according to respondents Ramkumar Agrawal was found in possession of 52 gold biscuits bearing foreign marking for which Ramkumar Agrawal had no valid document to justify the possession of the imported gold biscuits. Ramkumar Agrawal was taken to the office of the respondent No. 1 where his car was searched and 52 foreign marked gold biscuits were recovered from the car. On interrogation Ramkumar Agrawal made a statement u/s 108 of the Customs Act that the gold biscuits had been delivered to him by the father of the petitioner, one Dhanyakumar Jain alias Dhanraj Jain. The petitioner further avers that the aforesaid statement of Ramkumar Agrawal was involuntary and obtained as a result of maltreatment and torture administered to Ramkumar Agrawal, Thereafter the residential premises of the petitioner's father with whom the petitioner also resides were searched and silver rectangular cubes weighing 31.130 kgs. along with cash amount were recovered therefrom. However, the recovery of the cash as also the silver cubes were not found to be in any way incriminating as the petitioner deals in refining of the silver. The statements of Dhanya Kumar Jain were also recorded on 3-4-1989 and 4-4-1989. These statements were furnished to the father of the petitioner Dhanya Kumar Jain along with the grounds of detention. But according to the petitioner actually this statement was also obtained after maltreatment and torture, which is evident from the medical report of the doctor who examined Dhanya Kumar Jain, the father of the petitioner. Similarly Ramkumar Agrawal was also examined by the doctor and six injuries were found on his person. The statements of Dhanyakumar Jain were also retracted by a letter addressed to Shri Jaiswal, Inspector of Central Excise and Customs, which is Annexure-H to the petition and the receipt of the letter is Annexure-I.

In the judgments delivered by this Court in the petitions of Ramkumar Agrawal and Dhanya Kumar Jain, this Court has already held that retractions of the confessional statements were neither placed by the Detaining Authority nor considered by Detaining Authority with the result that the subjective satisfaction recorded by the Detaining Authority stood vitiated and consequently the detention orders. passed against both the detenus were quashed inter alia on this ground also.

According to the petitioner the impugned order of detention has been passed apparently on the statements of his ""father Dhanya Kumar Jain and Ramkumar

Agrawal which have already been retracted and these retracted statements were not placed before the Detaining Authority. In addition to this there is no material on record with the respondents which could be made a basis for the passing of the detention order. Therefore, the petitioner has prayed that the impugned order of detention is an instance of abuse of power and the grounds are wholly ultra vires of the powers of detention. The detention order is apparently based on the retracted confessional statements of the petitioner's father and of Ramkumar Agrawal, which were obtained by these persons under duress and by causing them physical and mental torture. As such the aforesaid statements could not be made the basis of the impugned order.

It has further been averred that the retracted statements of the aforesaid two persons were neither placed before the Detaining Authority nor were considered by the Detaining Authority before passing the impugned order. Therefore, the impugned order is vitiated by non-application of mind on account of the omission to consider material facts capable of influencing the satisfaction of the Detaining Authority. According to the petitioner, the respondent No. 2 filed Annexure-N in the Court of the Sessions Judge, wherein it was stated that there was no evidence of any nature indicating the complicity of the petitioner in connection with the offence registered in pursuance of the recovery of 52 foreign marked gold biscuits from Ramkumar Agrawal and there being no further investigation and collection of any other evidence against the petitioner the order of detention passed against the petitioner is purely colourable exercise of power u/s 3 of the COFEPOSA. Even as per the case of the Department the petitioner was required only as witness and not as an accused. It has also been averred that as the Department has shown no anxiety or made any attempts to get the order of detention served on the petitioner, the order cannot be held to be a valid order. Therefore, it has been prayed that the detention order dated 17-5-1989 passed by the respondent No. 1 be quashed by issuance of a writ of mandamus or any other appropriate writ, order or direction and prohibit the respondents from executing the said order against the petitioner.

In their return the respondents have narrated the facts which led to the recovery of 52 gold biscuits from the possession of one Ramkumar Agrawal. The statement of Ramkumar Agrawal was recorded on 3-4-1989 u/s 108 of the Customs Act, 1962. In the follow up action the residential premises of Mukesh Dhanraj was searched on 3-4-1989 and statement of Dhanraj Jain father of the present petitioner was recorded u/s 108 of the Customs Act on 3-4-1989 and 4-4-1989 wherein he had admitted that he had instructed his son Mukesh Jain to cause delivery of 52 gold biscuits to one Ramkumar Agrawal and the said biscuits were recovered and seized from Ramkumar Agrawal. On investigation it was found that Dhanyakumar Jain had purchased and received 18 silver slabs of foreign origin and out of them six slabs were delivered to Kamalchand Jain and Rajendra Kumar Jain of which only two slabs could be recovered and seized from the residence of Rajendra Kumar Jain and Kamalchand Jain. Dhanyakumar Jain had melted and converted the foreign silver slabs in their possession. Statement

of Dhanya Kumar Jain was recorded u/s 108 of the Customs Act on 3-4-1989. He has admitted in the statement that his son, the present petitioner, helps him in his business and that some 12 and 13 days before the incident he had obtained ten gold biscuits of foreign origin from one Sagarmal T. Jain of Bombay and the money was paid to Sagarmal Jain of Bombay and the gold biscuits were sold in the market. Subsequently Sagarmal had a telephonic talk on 31-3-1989 and settled a date for delivery of 54 foreign marked gold biscuits and on 3-4-1989 an associate of Sagarmal Jain had delivered 54 biscuits to him at his residence. On Saturday morning his son Mukesh Jain had a talk with one Ramkumar Agrawal for the delivery of 52 foreign marked gold biscuits and on 3-4-1989 his son made a telephonic call to Ramkumar Agrawal and asked him to take delivery of 54 gold biscuits. Thereafter his son left in a car to give delivery and since then he has not been able to meet him.

It is further stated by the respondents that the injuries found on the person of Dhanya Kumar Jain were self inflicted. Summons were sent to Mukesh Jain, but they were returned back undelivered. It is admitted that the orders under COFEPOSA have been passed for detention of the present petitioner Mukesh Jain, but he is not traceable and all attempts to apprehend him have proved futile and, therefore, the order could not be executed. The statements of Dhanya Kumar Jain and Ramkumar Agrawal are voluntary confessions and the aforesaid two persons were never subjected to third degree methods. It has also been averred that all the relevant material has been placed by the Sponsoring Authority before the Detaining Authority and the material is sufficient to warrant the order impugned. The letter of representation of Dhanyakumar Jain was placed before the Detaining Authority and the same has been examined.

A preliminary objection has been raised by Shri Neema, Standing Counsel for the Government of India, during the course of the arguments that the petition should be dismissed in view of the fact that the detention order has not been served on the petitioner and the petitioner has not been served with the grounds of detention. Shri Neema states that in the absence of the detention of the petitioner in pursuance of the detention order passed by the respondent No. 1 this Court cannot go into the question of validity of the detention order. In support of his arguments Shri Neema has placed reliance on a Full Bench decision of the Gujarat High Court in Vedprakash Devkinandan Chiripal and etc. Vs. State of Gujarat and Another, He has also placed reliance on a Supreme Court authority in Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, According to Shri Neema once the Court issues a notice even in a petition of mandamus where the preventive detention order is not executed and the respondents state on oath that the order of detention is validly passed against the person concerned, then the petition has to be dismissed.

On the other hand Shri Kulshreshtha, learned counsel for the petitioner states that the M. P. High Court in Misc. Petition No. 1049 of 85 decided on 31-3-1986 has entertained and allowed the petition of the petitioner against whom the detention

order was passed but not actually executed. This Court has placed reliance on the case of Jayantilal Bhagwandas Shah and etc. Vs. State of Maharashtra and others, The Supreme Court in a recent decision in S. M.D. Kiran Pasha v. The Govt. of Andhra Pradesh and Ors. reported in JT 1989 (4) SC 366 has considered all the aspects of the powers of the Court under Article 226 and has held that the Court can exercise powers under Article 226 of the Constitution in a case where there is an imminent threat to the personal liberty of a person and it is competent to consider and decide the petition of a threatened invasion on the right of a citizen on merits.

In the Full Bench decision of the Gujarat High Court in Vedprakash v. State (supra) it has been held that even a writ of mandamus cannot be sought ordinarily in cases where the petitioner has not surrendered nor has been served with the order of detention and he cannot ordinarily invoke the jurisdiction of the High Court under Article 226 of the Constitution. The jurisdiction of the High Court can be invoked only in exceptional cases and in rarest of rare cases where the detention order appears to be ab initio void. A review of the grounds of detention before the actual serving of the detention order on the detenu will go against the procedure established by law. In such cases where the detention order has been passed and challenged by the petitioner by a writ of mandamus if the respondents state on oath that the order of detention is validly passed against the person concerned, then this will be the end of the matter.

In the case of Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, it has been held that once a person has been committed to jail custody by a competent Court by an order which prima facie does not appear to be without jurisdiction or wholly illegal, a writ of habeas corpus cannot be issued. It has also been held that if the order of the detention is legal on the date of the filing of the petition then any defect in the legality of the detention of the petitioner prior to the filing of the petition cannot affect the detention. We are of the opinion that the aforesaid Supreme Court case is not applicable to the facts and circumstances of this case because it is not a petition seeking the issuance of a writ of habeas corpus, but it is a writ for issuance of a writ of mandamus. According to the Full Bench of the Gujarat High Court in Vedprakash v. State of Gujarat (supra) the power of this Court under Article 226 of the Constitution is limited and it could consider a petition of mandamus challenging the order of detention only when the order impugned is ab initio void. However, in any other case if a writ is filed and the respondents state on oath about the validity of the detention order passed, then the Court cannot go any further to examine the facts and circumstances of the case leading to the passing of the detention order or the grounds on which such detention order has been passed.

Relying on the above Full Bench decision of the Gujarat High Court the learned Standing Counsel for the Government of India argues that furnishing of the grounds of detention in the Court also is not necessary and, therefore, the grounds of detention have not been furnished. Shri Neema states that the

respondents have stated on oath that the detention. order passed by the Detaining Authority is legal and, therefore, the Court should dismiss this petition in view of the return submitted by the Government of India.

On the other hand learned counsel for the petitioner Shri Kulshreshta argues that this matter has been considered in details by the Supreme Court in *S. M. D. Kiran Pasha v. Government of Andhra Pradesh* (supra) wherein it has been held that the Court has all the powers to invoke jurisdiction under Article 226 of the Constitution even in a writ of mandamus because the Court cannot be a silent spectator when the petitioner comes with a grievance pertaining to threat to the right of his liberty.

After carefully considering the respective arguments of the learned counsel and the judgments cited by them, we are of the opinion, that in view of the judgment of the Supreme Court in *S. M. D. Kiran Pasha v. Government of Andhra Pradesh* (supra) this Court has a power to consider the prayer of the detenu challenging the detention order itself even if the order has not been served on him and he has not been placed under detention. The Supreme Court has held that under Article 226(1) of the Constitution of India the High Court throughout the territories have power to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose, and it also envisages making of interim order whether by way of injunction or stay or in any other manner in such, a proceeding. Article 21 giving protection of life and personal liberty provides that no person shall be deprived of his right of personal liberty except according to procedure established by law. The right of life and personal liberty has been guaranteed as a fundamental right and for its enforcement one could resort to Article 226 of the Constitution for issuance of appropriate writ, order or direction. When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State to observe that right, that is to say not to act or do anything which would amount to infringement of that right except in accordance with the procedure prescribed by law.

The Supreme Court has posed various questions as to at what stage the right can be enforced? Does a citizen has to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened with violation can the citizen move the court for protection of the right? Answering these questions the Apex Court has held that

the protection of the right is to be distinguished from its restoration or remedy after violation. Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under the law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The Court further observed that when there is a threat of the violation of right of a citizen, instead of telling the petitioner that the Court cannot take any action towards preventive justice until the right is actually violated, the Court should consider the prayer on merits and decide whether the threat to violation of the right of the petitioner is justified or not. If a threatened invasion of a right is removed by restraining the potential violator from, taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of that right.

In the aforementioned case, the Supreme Court was considering the judgment of the Andhra Pradesh High Court which has analysed the question of maintainability of the writ petition from two view points, namely the High Court's power and the High Court's Rule and Practice. The Supreme Court agreed with the analysis of the powers of the High Court that it can interfere in a case where the violation of the fundamental right is threatened under Article 226 of the Constitution, but after tracing the High Court's evolving rule or practice the High Court Bench took the view that it would not ordinarily entertain a challenge to a preventive detention unless the person concerned submitted himself to the order of detention and not to encourage persons against whom orders of preventive detention were made by the Competent Authority under a valid enactment to avoid the process of law and at the same time seek the protection of law from the Court and, therefore, the writ of habeas corpus was disallowed in view of the fact that the petitioner. was not in detention in compliance of the order of the Detaining Authority.

The. Supreme Court while considering the aforesaid case also considered the judgment of the Gujarat High Court reported in Vedprakash Devkinandan Chiripal and etc. Vs. State of Gujarat and Another, and also the case of Jayantilal Bhagwandas Shah v. The State of Maharashtra (supra). The Supreme Court agreed with the view taken by the Bombay High Court that the Court would intervene to strike down an illegal order of detention. If the Court could in matters of personal liberty intervene on the strength of a mere post-card, they surely could intervene on the strength of a petition, though they may seek the wrong relief or be phrased in the wrong form. The position of a person who is actually under illegal detention and of a person who is in imminent jeopardy of illegal detention are not far dissimilar. With the Gujarat High Court judgment in

Vedprakash Chiripal v. State of Gujarat (supra) the Supreme Court agreed only to this extent that the Court could interfere in a case where there is a challenge to the existing order of detention which is posing an imminent threat to a fundamental right of a person guaranteed under Article 21. Then the Supreme Court proceeded to pose questions aforementioned and came to the conclusion that the appellant's fundamental right to liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of the legal action would, therefore, amount to denial of his right of enforcement of his right to liberty. A petition for a writ of habeas corpus would not be a substitute for this enforcement, and thereafter considered the case on merits. The petition of the petitioner Kiran Pasha was allowed.

In view of the aforesaid Supreme Court judgment we are of the view that this Court is empowered to consider the petition of the petitioner seeking the writ of mandamus for quashing the impugned order on merits even though the order of detention has not been served on the petitioner and he has not actually been placed under detention. As back as in the year 1986 this Court has already taken a similar view in Fazal Hussain v. State of M. P., M. P. No. 1049 of 85 decided on 31-3-1986 wherein reliance was placed on the case of Jayantilal Bhagwandas Shah v. State of Maharashtra (supra) which has been approved by the Supreme Court in Kiran Pasha's case (supra).

Considering the case on merits we find that the grounds of detention have not been placed by the respondents before us in view of the Full Bench decision of the Gujarat High Court in the case of Vedprakash Chiripal v. State of Gujarat (supra). However, the return itself also does not successfully meet the challenge made by the petitioner to the detention order. In M. P. No. 829 of 1989 decided by this Court on 14-9-1989 in the case of Ramkumar v. Union of India, after placing reliance on the Supreme Court authorities this Court has held in para 20 of the judgment as under: -

"Since it is a question of subjective satisfaction of and application of mind by the detaining authority, it is necessary that he should, as a general rule, come forward with an affidavit. It is only in exceptional circumstances that the filing of affidavit by the detaining authority may be dispensed with, but for such a course some justification or explanation must be placed before the Court. Unfortunately, there is none, in this case. It may also be noted that the affidavit filed by the Officer-in-charge is of no help to the respondents. He has not, at any stage, handled or processed the case. The affidavit is solely based on record. How can he say, and what can he say about the colourable exercise of power by the detaining authority? It is for him, the detaining authority and him alone to explain and rebut the allegation. It is not the respondents' case that the detaining authority is not available in the real sense, that no affidavit could be sworn and filed by him. A host of authorities were cited by Shri Gupta on this

point, and they are mentioned below, but to my mind, it is not necessary to deal with them as the propositions laid down therein have not been disputed or distinguished. The authorities cited are Shaik Hanif and Others Vs. State of W.B., , Suru Mallick Vs. State of West Bengal, , Ranjit Dam Vs. State of West Bengal, Devi Lal Mahto Vs. State of Bihar and Another, and Mohinuddin alias Moin Master Vs. District Magistrate, Beed and Others,

In the aforesaid judgment this Court was of the view that the detaining authority as a general rule should come forward with an affidavit swearing therein that the detention order was passed on the subjective satisfaction about the detention of the person concerned. It is only in exceptional circumstances that the filing of the affidavit by the Detaining Authority may be dispensed with. The affidavit of the Officer-in-charge was held to be of no help to respondents, because the officer-in-charge has not at any stage handled or processed the case. The affidavit was solely based on record. Therefore, the Detaining Authority alone could explain and rebut the allegation of non-application of mind which was not done in that case. Therefore, on that ground alone the order of detention was held to be vitiated.

In the instant case also the Detaining Authority has not filed any affidavit in support of the return. The affidavit has been filed by Shri Mahendra Prasad, Joint Secretary, Government of India, Ministry of Finance, who is also the detaining authority under the COFEPOSA Act. He has sworn the affidavit only in view of the fact that the Detaining Authority who has passed the detention order is out of station on official tour, therefore, he is filing the affidavit on the basis of record of the case. Nowhere this affidavit says that at any point of time the deponent has dealt with the case or at any stage he was associated with the proceedings of the case. He has no personal knowledge about the facts of the case and his affidavit is based only on the record of the case. Therefore, on this ground alone that the Detaining Authority has not filed the affidavit to deny the allegations made in the petition about the non-application of mind, the order impugned deserves to be quashed.

However, in the instant case even the allegations of not placing the retraction of the confessional statements before the Detaining Authority have not been denied and this indicates that these important documents were not placed before the Detaining Authority before the passing of the detention order. Therefore, without going further into the matter, about the consequence of the grounds of detention on which the detention order has been passed, being not placed before the Court, we are of the opinion, that the aforesaid two infirmities on behalf of the respondents are sufficient to hold that the detention order has been passed without application of mind and without considering all the material facts on the record.

Consequently this petition is allowed. The impugned detention order dated 17-5-1989 passed by the respondent No. 1 against the petitioner is quashed.