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**(1993) 09 MP CK 0032**  
**In the Madhya Pradesh High Court**  
**Case No : M.P. No. 797 of 1993**

Sudhir Kumar Jain

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 02-09-1993

**Acts Referred:**

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3  
Constitution of India, 1950 — Article 21, 22, 226

**Citation :** (1995) 51 ECC 82

**Hon'ble Judges :** M.W. Deo, J;A.G. Qureshi, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

M.W. Deo, J.—By this petition under Article 226 of the Constitution of India, the petitioner, who has been detained u/s 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA Act"), challenges his detention order dated 12.11.1992, Annexure "P-1" in English and Annexure "P-2" of even date in Hindi and prays for issuance of a writ of Habeas Corpus.

2. The material facts leading to the passing of the detention order and the filing of this petition are detailed in Annexure "P-3" of the petition and the petition itself. They are as follows:

The petitioner was an occupant of a truck bearing registration number CII-6177 which was driven by another person as a driver. The said truck was intercepted by the sales tax authorities near Indore and was found to have 199 smuggled silver slabs bearing foreign markings. The sales tax authorities informed the Customs and Central Excise Head Quarters, Indore the same day, i.e., 13.9.1992 and the Customs and Central Excise department then seized the aforesaid silver slabs and took the driver Laxman Ingle as well as the occupant, namely the present petitioner in custody. The investigation into the relevant offences was

going on. The petitioner was said to have made statement to the police during the course of investigation which the petitioner retracted and finally Shri Sikander Khan, Joint Secretary to the Government of India formulated the grounds, Annexure "P-3", on 12.11.1992 for detaining the petitioner in preventive custody u/s 3(1) ibid and passed the detention orders Annexures "P-1" and "P-2" on the same day, i.e., 12.11.1992. The petitioner was supplied with Annexure "P-3" which are grounds for detention in English together with Annexure "P-4" which is the Hindi version of the grounds along with the documents referred to in Annexure "P-5" in support of the grounds.

The impugned order of detention (Annexure "P-1") dated 12.11.1992 was served on the petitioner in Central Jail, Indore on 13.11.1992. The petitioner made a representation on 4.12.1992 under Article 22(5) of the Constitution of India for revocation of detention order. His representation was decided and rejected by the competent authority on 30.12.1992 and the order of rejection, Annexure "P-8", of even date was communicated to the petitioner on 1.1.1993 in the Jail at Indore.

3. The petitioner challenges the detention order mainly on the grounds (1) that his representation for relief under Article 22(5) of the Constitution of India was not decided expeditiously and suffered callous delay resulting in denial [of] right of liberty guaranteed under Constitution to him; (2) that the affidavit filed by Shri Mahendra Prasad on behalf of the respondents has to be totally ignored as Mr. Mahendra Prasad has nothing to do with the dealing of the case and had no knowledge of the facts. The affidavit was not sworn by Shri Sikander Khan who had dealt with the material facts. Consequently there is no explanation for the delay; (3) that the competent authority failed to apply its mind in order to arrive at subjective satisfaction for ordering detention of the petitioner u/s 3(1) ibid; and (4) that there is variance between the grounds mentioned in the English order as against its Hindi version (Annexures "P-3" and "P-4") which manifestly shows that the authority did not apply its mind at arriving at subjective satisfaction as to the apprehended illegal activity under the Act.

4. The respondents filed a counter denying the aforesaid allegations. It stated the delay has been explained; that there was good basis for arriving at subjective satisfaction; that there was no variance between English and Hindi version and consequently the detention was defended.

5. Coming to the first question of delay in deciding representation of the petitioner, the material dates are not in dispute and are found in para 10 of the return as follows:

- (i) The representation is dated 4.12.1992 signed by the detenu on 7.12.1992.
- (ii) It was received by Jail authority on 7.12.1992 and was forwarded the same day.
- (iii) The representation was received by COFEPOSA Unit on 17.12.1992.

- (iv) The representation was placed before the detaining authority the same day and comments from sponsoring authority were called on 17.12.1992.
- (v) The sponsoring authority submitted comments through fax on 23.12.1992.
- (vi) The case was submitted to Joint Secretary, on 23.12.1992 who considered it on the next date, i.e., 24.12.1992.
- (vii) The representation was submitted to the Chairman (CBDT), Director General (KIB) and then to the Finance Secretary on 24.12.1992.
- (viii) The Finance Secretary after 4 days submitted it to the Finance Minister on 28.12.1992.
- (ix) The Finance Minister considered the case on 29.12.1992 and rejected the representation.
- (x) The case was received back on 30.12.1992 from the Finance Minister.

5. A bare look at the aforesaid dates, brings out the following uncontrovertible position (a) Period of 24 days (7.12.1992 to 30.12.1992) for deciding the representation. It cannot be disputed that this was inordinately long period of delay and certainly required good and convincing explanation for the delay from the respondents. The main three points of delay are, a period of 10 days from 7.12.1992 when the representation was forwarded to 17.12.1992 when it was received in COFEPOSA Unit. There is absolutely nothing in the return of the respondents to explain this delay. An ex tempore submission was made during the arguments that there were disturbances from 6.12.1992 onwards and that might have prevented the transit of the representation for ten days. This kind of cavalier explanation without any particulars in counter has to be deprecated, as has been done by the Supreme Court in a number of decisions referred to hereinafter. The second unexplained period is of 7 days at the point of sponsoring authority inasmuch as para 10 of the return states that the comments were called on 17.12.1992 and the comments were submitted by the authority on 29.12.1992. This shows that the sponsoring authority took 7 long days only to make comments. Again the case lay for 4 days with the Finance Secretary who received it on 24.12.1992 and forwarded to Ministry of State (Revenue) on 28.12.1992. Lastly the return shows that the representation moved from table to table like Chairman (CBDT) and others whose role is not clear from the return.

6. The Supreme Court in the case of Gazi Khan alias; Chotia Vs. State of Rajasthan and another, has considered all the earlier precedents on the question of delay and has quoted with approval the dictum of the case of Rama Dhondu Borade Vs. V.K. Saraf, Commissioner of Police and Others, as follows:

The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution of India. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness of the detention

order clamped upon him and requesting for his release, to consider the said representation within reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering [the continued detention constitutionally impermissible since such a] breach would defeat the very concept of liberty--the highly cherished right--which is enshrined in Article 21 of the Constitution.

7. It is true that what is reasonable dispatch will depend upon the facts and circumstances of each case and as stated above we have in our case a delay at three stages totalling 17 days which has not been explained at all in the return except giving the chronology of movement of file from table to table, during which time was spent and such loss of time was deprecated and was not accepted as good explanation of delay in the case of AIR 1981 1127 (SC)

8. The clenching contention on behalf of the petitioner is with the aid of the dictum of the Supreme Court in the case of Gazi Khan (supra) turning on the fact of lack of affidavit sworn by the authority on whose subjective satisfaction the detention order u/s 3 was passed. In our case it was Shri Sikander Khan who passed the detention order Annexure "P-1" on the basis of grounds set out by Shri Sikander Khan in Annexure "P-3"; while the affidavit in support of the return has been sworn by Shri Mahendra Prasad, Joint Secretary to the Government of India who had nothing to do with the grounds set out in Annexure "P-3" which went to make the alleged subjective satisfaction of Shri Sikander Khan. Relying upon the decision of Gazi Khan (supra) only conclusion that can be arrived at is, that the respondents have not explained the delay by affidavit of the person dealing with the matter and the order of detention is also not supported by an affidavit of the person whose subjective satisfaction has to be the foundation of the detention order. The practice of any officer swearing affidavit in support of the reply has been deprecated by the Supreme Court in the case of Gazi Khan (supra).

9. For the foregoing reasons the detention order Annexure "P-1" in English and its version Annexure "P-2" in Hindi are entirely illegal as passed in total disregard of the requirement of law in relation to the defence of a detenu under Article 22(5) of the Constitution of India and hence they have to be quashed.

10. It is also arguable that the Hindi and English versions of the grounds of detention (Annexure "P-3") relating to the apprehension about activity of the detenu are gullible and with such variance that they would be open to exposure of charge of want of application of mind by the detaining authority. This ground though manifest need not be gone into details as the order of detention has to be quashed on first contention itself as stated supra.

11. In the result the petition succeeds. The order of detention of the petitioner, Annexures "P-1" and "P-2" dated 12.11.1992 are quashed. The detenu shall be

released forthwith if not detained under any other proceedings. Respondents shall pay Rs. 3,000/- as quantified costs to petitioner.