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Mahindra D. Mathani Vs. C.D. Singh, Secretary to the Government of Maharashtra (Preventive Detention) and ors.

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Court : Mumbai

Decided On : Jun-19-1996

Reported in : 1996(4)BomCR385

Judge : A.V. Savant and ;D.K. Deshmukh, JJ.

Acts : [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Sections 3(1) and 8; [Constitution of India](#) - Article 22(5)

Appeal No. : Criminal Writ Petition No. 799 of 1995

Appellant : Mahindra D. Mathani

Respondent : C.D. Singh, Secretary to the Government of Maharashtra (Preventive Detention) and ors.

Advocate for Def. : R.L. Patil, A.P.P. for the Respondent Nos. 1, 3 and 4 and ;R.M. Agrawal, Adv. for the Respondent No. 2

Advocate for Pet/Ap. : Shirish Gupte, Adv.

Disposition : Petition dismissed

Judgement :

A.V. Savant, J.

1. This is a petition by Mahendra D. Mithani, brother of the detenu Ramesh Kumar Babulal Mithani. The detenu has been detained under the provisions of section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 (for short, COFEPOSA Act,) by an order issued on the 29th November, 1994. Declaration under section 9(1) of the said Act was issued on the 17th May, 1995. The period of detention is two years under the order dated 26th June, 1995 issued by the State Government.

2. The brief facts leading to the passing of the order of detention are as under. On the 17th July 1994, the detenu arrived from Singapore by Singapore Airways Flight No. SQ-412, at Bombay, on an Indian Passport. He was carrying two suit cases & one hand-bag & two plastic shopping bags. When questioned by the officer of the Bombay Customs Department as to whether he was carrying any valuables like gold, diamonds, integrated circuits etc., the detenu replied in the negative. The officer of the Customs Department again questioned the detenu as to whether he had concealed gold on his person, to which he replied in the negative. However, when his search was taken in the presence of panchas, 8 packets wrapped in adhesive tape containing heavy metal & four other packets were recovered from his person. The eight packets were found containing 40 gold bars of 10 tolas each & the remaining four packets were found containing 80 integrated circuits. The 40 gold bars totally weighed 4664 grams valued at Rs. 17,94,640 at the International Market Value and Rs. 21,40,776/- at the Local Market Value. They were seized by the Customs Officer under a panchanama since the same were smuggled into India and hence, were liable for confiscation under the provisions of the Customs Act, 1962. The 80 intergrated circuits totally valued at Rs. 24,000/- C.I.F. and Rs. 72,000/- Local Market Value were also seized as the same were not declared & were liable for confiscation. The statement of the detenu was recorded on 17th July, 1994 itself under section 108 of the Customs Act, which disclosed that the detenu had made frequent trips to Hongkong and Singapore for shopping. From the facts and information collected, it transpired that the detenu had tried to smuggle the goods in contravention of the provisions of the Customs Act and that with a view to preventing the detenu from smuggling goods it was necessary to

detain him under the provisions of sub-section (1) of section 3 of the COFEPOSA Act. The impugned order of detention was issued on the 29th November, 1994. On 2nd December, 1994 the Government of Maharashtra forwarded its report under sub-section (2) of the section 3 of the COFEPOSA Act to the Central Government. Since the detenu was absconding, the detention order could not be served immediately but was served only on 27th April, 1995. The State Government made a reference to the Advisory Board under section 8(b) of the said Act on 16th May, 1995. The declaration under section 9(1) of the said Act was issued by the Additional Secretary to the Government of India, Ministry of Finance, Department of Revenue, on 17th May, 1995. On the 18th May, 1995, the detenu made representations to four different authorities, viz. (i) the Detaining Authority; (ii) the State Government, (iii) the Central Government, A-N-D (iv) the Advisory Board. On 19th May, 1995, the Home Department of the State Government received the representation. The Detaining Authority also received the representation on the same day, considered it and rejected it on 19th May, 1995 itself. The rejection by the detaining authority was communicated to the detenu on May 20, 1995. On May 28, 1995, declaration issued under section 9 was served on the detenu. The representation dated 18th May, 1995 sent from Nasik by post was received in the COFEPOSA Cell of the Ministry of Finance, Department of Revenue, New Delhi, on 29th May, 1995. On 30th May, 1995 the State Government rejected the representation, which it had received on 19th May, 1995. The Advisory Board met on 9th June, 1995 & made its report on the same day specifying in a separate paragraph its opinion that there was sufficient cause for detention. The State Government confirmed the order of detention on 26th June, 1995 and on 5th July, 1995, the Additional Secretary in the Ministry of Finance, at New Delhi, cleared the proposal for rejection of the representation dated 18th May, 1995 received at New Delhi on 29th May, 1995. On the 6th July, 1995 the concerned Secretary confirmed the proposal of rejection. On the 10th July, 1995 the Finance Minister rejected the representation.

4. There is no dispute before us that the detenu was absconding and though several attempts were made to trace him & serve the order of detention on him, the authorities concerned were not successful in arresting him. In the meanwhile, steps were taken for cancellation of bail obtained by the detenu in the case

pending against him under the Customs Act for smuggling the goods and steps were also taken for initiating action under section 7(1) of the COFEPOSA Act. Ultimately, it was on 27th April, 1995 that the detenu was arrested when the order of detention was served upon him. This petition was filed on 26th July, 1995 and Rule was issued on 31st July, 1995, returnable early. However on 25th September, 1995 Counsel for the petitioner sought leave to amend the petition by raising the ground of alleged delay in consideration of the representation made to the State Government. The petition has accordingly been amended by adding Ground (V) in Para 3 which is to be found at Page 14-A of the petition. What is, however, emphasised in the said amended ground is not delay on the part of the State Government in considering the representation against the order of detention, but the delay on the part of the Central Government in considering the representation against the order of detention.

5. Affidavits-in-Reply have been filed, firstly, by Shri C.D. Singh, Principal Secretary to Government of Maharashtra (Preventive Detention) Mantralaya, Mumbai, on 9th November, 1995 setting out the details of the various steps taken before passing the order of detention. Shri R.Y. Nalawade, Desk Officer, Government of Maharashtra, Home Department (Special), Mantralaya, Mumbai, has filed his affidavit on 12th January, 1996 regarding the steps taken by the Home Department in the matter of forwarding a report to the Central Government under section 3(2) of the COFEPOSA Act as also the details of the steps taken in connection with reference to the Advisory Board under section 8(b) of the Act & the report & the opinion sent under section 8(c) of the said Act. A reference is also made to the State Government passing the order of confirmation on 26th June, 1995 under section 8(f) of the Act. Shri M.P. Sando, Assistant Commissioner of Customs, COFEPOSA CELL, Mumbai, who was the sponsoring authority at the relevant time, has made an affidavit setting out the details of the steps taken from 17th July, 1994 onwards till the service of the order of detention on 27th April 1995. He has averred that since the detenu was evading arrest, the order of detention issued on 29th November, 1994 could not be served earlier than 27th April, 1995. Shri L.S. Danekar, Senior Inspector of Police, attached to the Prevention of Crime Branch, C.I.D., Bombay, has made an affidavit on 17th January, 1996 setting out the various attempts made on as many as 8 different

dates to trace the whereabouts of the detenu. A further affidavit has been made by Shri C.D. Singh, the detaining authority, on 22nd February, 1996 in reply to the amended ground (V) explaining that the representation dated 18th May, 1995 made by the detenu was considered and rejected on 19th May, 1995 and the rejection was communicated to him on 20th May, 1995. Thus, it is stated that there is no violation of Article 22(5) of the Constitution. Shri S.K. Agey, Additional Senior Jailor, attached to the Nasik Road Central Prison, Nasik, has made an affidavit on 8th March, 1996 setting out the steps taken by him in forwarding the representations to the various authorities and communicating the replies of rejection received from them to the detenu.

6. Shri A.K. Sinha, Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi, has made an affidavit on 10th November, 1995 setting out the date-wise steps taken by the Central Government while considering the representation dated 18th May, 1995, which was received in the COFEPOSA Cell of the Ministry of Finance, New Delhi on 29th May, 1995. The said representation was rejected by the Finance Minister on 10th July, 1995 and the communication to that effect was sent to the detenu on 12th July, 1995, which was received by him on the 16th July, 1995 while he was in the Nasik Prison. Two more affidavits have been made when the matter was called out for final hearing. Shri A.K. Singh, Assistant Commissioner of Customs, in his affidavit dated 15-6-1996 has given the details relating to the steps taken by the Assistant Commissioner, COFEPOSA Cell, Mumbai, in response to the query from the Central Government in respect of the representation dated 18th May, 1995 made to the Central Government and explaining that there was no delay on the part of the sponsoring authority in that behalf. The other affidavit was filed by Shri S.R. Yadav, Intelligence Officer, COFEPOSA, Sahar International Airport, Mumbai, pointing out the various steps taken right from 17th July, 1994 till the service of the order on 27th April, 1995.

7. In the light of the above pleadings, we have heard the three learned Counsel at length; Shri S.M. Gupte for the petitioner, Shri R.M. Agrawal for respondent No. 2 - Secretary, Government of India, Ministry of Finance; and Shri R.L. Patil for respondents Nos. 1, 3 & 4 - the Detaining Authority, the State Government and the

Superintendent, Nasik Road Central Prison, Nasik. Three contentions have been raised before us which are as under:---

i) There is an unexplained delay on the part of the Central Government in considering the representation against the order of detention which violates the detenu's right under section 22(5) of the [Constitution of India](#):

ii) There is an unexplained delay in issuance of the order of detention inasmuch as, the incident is of 17th July, 1994 and the order of detention has been made on 29th November, 1994;

iii) There is also an unexplained delay in execution of the order of detention which was served on 27th April, 1995.

8. As far as the first contention of unexplained delay in consideration of the representation made by the detenu against the order of detention to the Central Government, it is contended that the detenu prepared the representation on 18th May, 1995. It was handed over to the Superintendent of the Nasik jail, which was forwarded by him on the same day 18th May, 1995 - to the COFEPOSA Cell in the Ministry of Finance, Department of Revenue, New Delhi. It was received in the said COFEPOSA Cell on 29th May, 1995. The Under Secretary to the Government of India in the said COFEPOSA Cell on 30th May, 1995 sent for the para-wise comments from the Collector of Customs, Sahar Airport, Mumbai. That letter was received, apparently by post, in the office of the Collector of Customs (presently known as Commissioner of Customs), Sahar International Airport, Mumbai on 7th June, 1995. It was marked to the Additional Commissioner for necessary action, who forwarded it to the concerned Assistant Commissioner, which was the sponsoring authority. The Assistant Commissioner received the letter on 12th June and it was forwarded to Shri Gupta for preparing the necessary parawise comments. Shri Gupta examined the said letter immediately on the 13th June and prepared a draft of the parawise comments for approval of the superiors. The parawise comments were finalised immediately on the 14th June, 1995 and were forwarded to the second respondent Secretary, Government of India, Ministry of Finance, New Delhi on 15th June, 1995. They were received by the COFEPOSA Cell at New Delhi on 19th June, 1995. This is the first time-lag

pointed out by Shri Gupta viz. 18th May, 1995 to 19th June, 1995, However, the grievance was made only in respect of a period of 15 days between 30th May and 15th June, 1995.

9. The second time-lag in connection with the first contention of delay is between 22nd June and 4th July, 1995. It is contended that on receipt of parawise comments from the sponsoring authority in Mumbai, the Additional Secretary (Administration) in the Ministry at New Delhi, made certain queries on 20th June, 1995 regarding the adjudication proceedings that were pending under the Customs Act. The query in this behalf was received by the Collector of Customs, Sahar, Mumbai, on 22nd June, 1995. It was forwarded to the concerned Assistant Commissioner for necessary action. The concerned officer in the Adjudication Cell made necessary inquiry and forwarded the information that the adjudication proceedings were still pending and that hearing was fixed. It appears that a show-cause notice in the matter of adjudication was issued under section 124 of the Customs Act on 7th October, 1994 and the reply thereto was submitted on 25th October, 1994 and the proceedings were pending. This reply was sent by speed-post to second respondent at New Delhi on 26th June, 1995, which was received in the COFEPOSA Cell, Ministry of Defence, Department of Revenue, on 4th July, 1995. There is no quarrel about the time taken between 4th July, 1995, the date of receipt of information from Mumbai and 10th July, 1995, the rejection of representation by the Finance Minister, which was communicated by letter dated 12th July, 1995 served on the detenu on the 16th July, 1995. The grievance is of the alleged delay of 11 days between 22nd June and 4th July, 1995.

10. A number of authorities have been cited before us by all the learned Counsel but we do not think it necessary to refer to all of them and would refer to only such of them as have a direct bearing on the contention raised before us. However, before doing that, it must be borne in mind that in dealing with the question of delay in consideration of the representation made by the detenu against the order of detention, what the courts expect is diligence and prompt action on the part of the concerned authorities. As long as there is no callousness or negligence on the part of the concerned authorities in considering the representation, mere delay, by itself, cannot be held to be sufficient to violate the right of the detenu under Article

22(5) viz. to make a representation against the order of detention. If in the facts of the case the delay in consideration of the representation has been properly explained, it cannot be held that the right of the detenu under Article 22(5) has been in any manner violated. This would be clear from a review of the Supreme Court decisions discussed below.

11. The Constitution Bench of the Supreme Court in the case of *Jayanarayan Sukul v. State of West Bengal*, : 1970 CriLJ743 , considered the question at length and laid down four broad principles in regard to the representation of detenu which are set out in para 20, at pages 678 & 679 of the Report, which reads as under:---

'20. Broadly stated, four principles are to be followed in regard to representation of detenus. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case alongwith the detenu's representation to the Advisory Board. If the appropriate Government will release the detenu the Government will not send the matter to the Advisory Board. If however the Government will not release the detenu the Government will send the case alongwith the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu'.

12. In *Frances Coralie Mullin v. W.C. Khambra and others*, : 1980 CriLJ548 , considering the similar grievance about the delay in consideration of the

representation against the order of detention, the Supreme Court observed that while it is true that the detaining authority must provide the detenu a very early opportunity to make a representation and the representation must be considered as soon as possible, the time imperative can never be absolute or obsessive. There has been a leeway depending on the necessity of the case. In the case of *Mst. L.M.S. Ummu Saleema v. B.B.Gujaral and another*, reported at : [1981]3SCR647 , the Supreme Court considered its earlier decisions in the case of *Khudiram Das v. State of West Bengal* : [1975]2SCR832 , *Iccudevi Choraria v. Union of India* : [1981]1SCR640 and *Frances Coralie Mullin v. W.C. Khambra and others* : 1980 CriLJ548 and *Pritam Nath Hoon v. Union of India* : 1980 CriLJ1340 and observed that the occasional observations made by the Supreme Court that each day's delay in dealing with the representation must be adequately explained, are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu. It was further observed that the law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae. In the light of the said observations of the Supreme Court, it was pointed out in *Ummu Saleema's* case that the representation was made on 5th February, 1981 and it was received in the office of the Detaining Authority on 13th February, 1981. It was in postal transit from 5th to 13th February, 1981. There was some delay in considering the representation since the Detaining Authority had gone abroad. But that was held to be not an unaccountable or unreasonable delay in the disposal of the representation by the Detaining Authority.

13. Again in the case of *Raisuddin alias Babu Tamchi v. State of Uttar Pradesh and another*, reported at : 1983 CriLJ1785 , the Supreme Court observed that the question whether the representation submitted by the detenu has been dealt with all reasonable promptness and diligence is to be decided not by the application of any rigid or inflexible rule or set of formulae, nor by mere arithmetical counting of dates, but by careful scrutiny of facts and circumstances in each case. In *Raisuddin's* case, the order of detention was passed on 8th November, 1982, which was served on the detenu on the same day. On 24th November, 1982, the detenu made a representation against the order of detention to the State

Government, which rejected the representation on 9th December, 1982.

14. Then in Abdul Salam alias Thiyyan v. Union of India and others, reported at : 1990 CriLJ1502 , the Supreme Court reiterated the above legal position. That was a case where the order of detention was passed on 21st May, 1988 after a lapse of 8 months from the incident of smuggling of gold on 17th September, 1987. The detenu made a representation to the Central Government on the 27th September, 1988 and it was disposed of on 2nd November, 1988. The complaint was of delay on the part of the Central Government in rejecting the representation which amounted to violation of the right under Article 22(5) of the [Constitution of India](#). Dealing with this contention, the Supreme Court considered the earlier decisions on the point and came to the conclusion that the delay was satisfactorily explained.

15. In Kamlabai (Smt.) v. Commissioner of Police, Nagpur, and others, reported at : (1993)3SCC384 , the order of detention was made on 1st May, 1992. The detenu made a representation to the Central Government on 11th May, 1992 which called for some information from the State Government more than once and then rejected the representation on 13th July, 1992. The Supreme Court in para 4 of the decision at page 385 observed that the delay by itself is not a ground which proves to be fatal if there is an explanation for the same. It was further observed that short delay cannot be given undue importance having regard to the administrative actions. The Supreme Court, therefore, rejected the contention of unexplained delay in consideration of the representation by the Central Government.

16. Lastly, in the case of Smt. Panna w/o Pandharinath L. Waringe v. A.S. Samra and others, reported at : 1994 CriLJ1111 , the Supreme Court again reiterated that if there were no laches on the part of the Central Government in disposing of the detenu's representation expeditiously, no grievance could be made by the detenu. This was a case where the detention order was served on 3rd April, 1992. The detenu made a representation on 24th April, 1992. The Central Government called for some information from the State Government and after receipt of the same, rejected the representation on 28th May, 1992. Though there was some

time-lag during the above interval, the Supreme Court came to the conclusion that there were no laches on the part of the Central Government in disposing of the representation expeditiously and hence, the contention of the detenu was rejected.

17. In the light of the above legal position, what we have to consider is whether the alleged delay in consideration of the representation by the Central Government has in any manner violated the detenu's right under Article 22(5) of the Constitution. It must be borne in mind that neither in Article 22(5) nor in the statute viz. the COFEPOSA Act, there is any time-bound frame for consideration of the representation by the Central Government. There is no doubt that the Scheme of Clause (5) of Article 22 implies speedy consideration and disposal of the representation made by the detenu, who has been preventively detained. Admittedly, there are no mala fides in the present case. It is not even suggested that the delay either in transit or in getting the requisite information was avoidable. In view of this, reliance placed by Shri Gupte on the decision in the case of Harish Pahwa v. State of U.P. and others, reported at : 1981 CriLJ750 , appears to be misplaced. This was a case where the authorities concerned had taken unnecessarily long time in disposal of the representation dated 3rd June, 1980. It was disposed of on 24th June, 1980 and was communicated to the Jail Authorities two days later. The Supreme Court did not approve of the time taken in calling for comments from one Department or the other before consideration of the representation by the Chief Minister, who was the only authority to decide the representation. It was in this peculiar background that the Supreme Court accepted the detenu's contention that the delay was not satisfactorily explained and was avoidable, thus, vitiating the order of detention. We do not think that the ratio of the said decision can have any application to the facts of the case before us in the light of the pleadings summarised by us above. Needless to say that the observations in the above decisions in Harish's case will have to be read in the light of the observations of the Constitution Bench of the Supreme Court in the case of Jayanarayan Sukul v. State of West Bengal, reported at : 1970 CriLJ743 (supra).

18. The second decision on which Shri Gupte sought to place reliance is in the case of Rama Dhondu Borade v. V.K. Saraf, Commissioner of Police and others,

reported at : 1990(25)ECC50 . This was a case where the delay in disposal of the representation was of 32 days as set out in para 23 of the judgment at page 1865 of the Report. The explanation offered by the concerned respondent that there was delay of merely 14 days in receipt of the information from the State Government was not accepted by the Supreme Court, as satisfactory in the facts of that case. As set out earlier, there is no unexplained delay in the present case as far as the consideration of the representation by the Central Government is concerned. In the first place, having regard to the steps taken by the concerned authorities and movement of the file, we do not think that the delay between 30th May and 15th June which is the first time-lag complained of has not been satisfactorily explained. We may reproduce para 2 of the Affidavit of Shri A.K. Singh, Assistant Commissioner of Customs in this behalf.

'I say that the respondent No. 2 issued letter on 30th May, 1995 calling upon the Collector of Customs to forward parawise comments on the representation of the detenu dated 18-5-1995 alongwith the English translation of the representation. I say that the said letter dated 30th May, 1995 was received by the Collector of Customs (at present the Commissioner of Customs) Sahar International Airport, Mumbai on 7th June, 1995. The Collector of Customs marked the said letter for necessary action to the Additional Commissioner Shri M.C. Thakur. I say that the Additional Commissioner after going through the letter marked the same to the Assistant Commissioner (C.P.) on 7th June, 1995. On 10th of June, 1995 was a second Saturday and 11th of June, 1995 was Sunday. The concerned Assistant Commissioner received the said letter on 12th of June, 1995 and forwarded the same to Shri Gupta for taking necessary action. Shri Gupta on 13th June, 1995 examined the letter and the representation and prepared the draft of parawise comments for the approval of the superiors. I say that the parawise comments were finalised on 14th June, 1995 and were forwarded to the respondent No. 2 by letter dated 15th June, 1995. I, therefore, respectfully submit that there is no delay in forwarding the parawise comments to the respondent No. 2'.

19. Similarly, the second time-lag complained of is 11 days between 22nd June & 4th July, 1995. In connection with this time-lag, para 3 of the affidavit of Shri A.K. Singh reads as under :

'I say that on 22nd June, 1995 the respondent No. 2 sent Fax message to the Collector of Customs of Sahar International Airport, Mumbai referring to our letter & parawise remarks dated 15th June, 1995 and enquiring and asking the Collector of Customs to intimate whether the case has since been adjudicated and if so the copy of Order be made available. It was also stated that 'please send a copy of reply to the Show-Cause Notice dated 25-10-1994 also'. The said fax was received by the Collector of Customs on 22nd June, 1995. The office of the Collector of Customs forwarded the said Fax to the concerned officer i.e. Assistant Commissioner for necessary action. After making enquiries in COFEPOSA Cell the Fax was further forwarded to Adjudication Cell for necessary enquiries on 24th June, 1995. On 24th of June, 1995 the concerned officer in Adjudication Cell made enquiries in respect of the said Fax & noted that reply may be sent to COFEPOSA Cell to enable them to give details of adjudication. The Adjudication Cell after enquiry and examination of the proceedings forwarded the Fax and show-cause notice on 27th June, 1995 to COFEPOSA Cell informing that the adjudication is still pending and the hearing is fixed. However, they also sent a copy of show cause notice with remark that the final reply is not yet received. I say that by letter dated 28-6-1995 the Assistant Commissioner COFEPOSA Cell informed the respondent No. 2 about pendency of adjudication proceedings & also forwarded copy of show cause notice for their perusal. I say that the said letter was sent by speed-post.'

In our view, the above averments satisfactorily explain the delay during both the relevant periods, namely 30-5-1995 to 15-6-1995 & 22-6-1995 to 4-7-1995. Thus, the ratio of the Supreme Court decision in the case of Rama Dhondu Borade, (supra) can have no application to the facts of the case before us.

20. The third and last decision on which Shri Gupte placed reliance is of Mahesh Kumar Chauhan alias Banti v. Union of India and others, reported at : 1990 CriLJ1507 . Reliance is sought to be placed on the observations in para 20 of the Judgment at page 1458 of the report wherein it is observed that merely mentioning that the representation was forwarded to the concerned sponsoring authority on 25-8-1989 and the comments from the sponsoring authority were received by the Department on 11-9-1989, there is absolutely no explanation as to why such a

delay had occurred. It would be clear that the steps taken between the said two dates viz. 25th August, 1989 and 11th September, 1989 as many as 16 days were not mentioned in the affidavit before the Supreme Court. That is why the learned Judges observed in para 20 that merely mentioning that the representation was forwarded to the sponsoring authority on 25-8-1989 and comments were received from the sponsoring authority on 11-9-1989 was not a satisfactory explanation of the delay. In the case before us both the Central Government as also the sponsoring authority have in their respective affidavits given datewise movement of the file from the concerned officers. Calling for the report, preparation of the draft parawise comments, finalisation thereof and sending them back to Delhi by post has been explained datewise and we have already reproduced the relevant portion of paras 2 and 3 of the affidavit of Shri A.K. Singh, the concerned Assistant Commissioner of Customs in that behalf.

21. We may also refer to the relevant portion in para 3 of the affidavit of Shri A.K. Sinha, under Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi, which reads as under :

'As regards Ground (V) of the amended petition, it is submitted that the detenu's representation dated 18th May, 1995, addressed to the Secretary to the Government of India and forwarded by Supdt., Nasik Road Central Prison vide his letter dated 18-5-1995 was received in the COFEPOSA Unit of the Ministry on 29-5-1995. On receipt of the representation, the same was placed before the considering authority who directed to call for the comments of the sponsoring authority. The comments were called on 30-5-1995 which the sponsoring authority furnished vide their letter dated 15-6-1995 and the same were received in the COFEPOSA Unit on 19-6-1995. The case was processed and submitted to Joint Secretary on 20-6-1995 who considered the representation and the comments of the sponsoring authority thereon and submitted the file to Additional Secretary (Admn.) on 20-6-1995. Addl. Secretary (Admn.) made certain queries regarding the detention of the detenu. Some information were sought for from the sponsoring authority which were received on 4-7-1995. The case was further processed and submitted to Joint Secretary (COFEPOSA) on the same day who after his recommendations submitted the file to Additional Secretary (Admn.) on 4-7-1995.

Addl. Secretary (Admn.) cleared the file on 5-7-1995 and submitted to Secretary (R) who cleared the file on 6-7-1995 and further submitted to Minister of State (Revenue and Expenditure) who cleared the file on 10-7-1995 (8th & 9th July, 1995 were holidays being Saturday & Sunday). The file was put up to Finance Minister who finally rejected the representation on 10-7-1995. The file was received back on 12-7-1995. A memo intimating the detenu about rejection of his representation by the Central Government was also issued on 12-7-1995. There was no violation or infringement of Article 22(5) of the Constitution. Thus, the representation was dealt with expeditiously and promptly and there was no undue or unexplained delay in considering the representation by the Central Government.'

A combined reading of the affidavits of Shri A.K. Singh, Assistant Commissioner of Customs at Sahar International Airport, Mumbai (Sponsoring Authority) and Shri A.K. Sinha, Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, New Delhi would clearly show that during the two relevant time-lags namely 30-5-1995 to 15-6-1995 and 22-6-1995 to 4-7-1995 steps were being taken to deal with the representation of the detenu that was made to the Central Government as expeditiously as possible. In our view, therefore, there is no unexplained delay in the facts of this case on the part of the Central Government in considering the representation of the detenu against the order of detention. Consequently, there is no violation of the right under Article 22(5) of the [Constitution of India](#).

22. It must be borne in mind, as stated earlier, that there are no allegations of mala fides. It is not pointed out that the delay was in any manner avoidable. The subjective satisfaction regarding calling for the additional information by the Central Government from the sponsoring authority has not been questioned and rightly so. The query made on the second occasion regarding pendency of the adjudication proceedings was not a matter which was irrelevant or extraneous to the consideration of the representation made by the Central Government and as repeatedly observed by the Supreme Court there is no fixed time frame either in the provisions of the Constitution or under the COFEPOSA Act in the matter of consideration of the representation under the order of detention that it cannot be

disputed that this must be done as expeditiously as possible. There is no mechanical test of a number of days or a few month in so far as the time in satisfactory explanation and there is no lack of diligence or remissness on the part of the authorities concerned either at New Delhi or the sponsoring authority at Bombay. In this view of the matter, we do not find any merit in the first contention raised by Shri Gupte.

23. The second and third contentions have been argued together by Shri Gupte. They are relating to the alleged unexplained delay relating to the issuance of the order of detention on 29th November, 1994 and the alleged delay in execution of the order on 27th April, 1995. As stated above, neither under the Constitution nor under the COFEPOSA Act, there is any time frame prescribed for passing the order of detention with reference to the date of the offending incident or for serving the order of detention. The offending incident in this case is of 17th July, 1994. It must also be borne in mind that in matters of detention under section 3(1) of the COFEPOSA Act, generally people who deal in smuggling are part of a well organised net and it takes time to get the relevant information from different sources, sometimes from the foreign countries. As long as the live link has not been snapped and the alleged incident is not too remote to say that the propensity of the detenu to indulge in similar activities in future has ceased to exist, in our view, no objection can be taken merely on a mechanical basis of calculation of number of days or even months from the date of the offending incident till the issuance of the order of detention or the service thereof. In this behalf, another thing which needs to be mentioned, in the facts of this case, is that the detenu was absconding and the affidavits, to which we will make a brief reference, show that several attempts were made to trace the whereabouts which were un-successful & it was only on 27th April, 1995 that the order of detention issued on 29th November, 1994 could be served on him.

24. In this behalf, we may usefully refer to the observations of the Supreme Court in the case of Bhawarlal Ganeshmalji v. The State of Tamil Nadu and another, reported at : 1979 CriLJ462 which was also a case of detention under COFEPOSA Act. In that case, the order of detention was issued on 19th December, 1974 in respect of the two incidents mentioned in the grounds of detention which were of

23rd February, 1972 and 20th April, 1974. The detenu was absconding and hence the order of detention passed on 19th December, 1974 could be served on him only on 1st February, 1978. Dealing with the similar contention of delay in the issuance of the order and its execution, the Supreme Court observed thus in para 6 at page 544 of the report:---

'It is true that the purpose of detention under the COFEPOSA is not punitive but preventive. The purpose is to prevent organised smuggling activities and to conserve and augment foreign exchange. It is true that the maximum period for which a person may be detained under the COFEPOSA is one year. It is further true that there must be a 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention namely the prevention of smuggling activities. We may in appropriate cases assume that the link is 'snapped' if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. In such a case we may strike down an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation & the change circumstances. But where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the 'link' not snapped but strengthened. That, precisely, is the state of affairs before us. The order of detention was made on 19th December, 1974. The detenu was found to be absconding.'

The concluding portion in the above observations, underlined by us, shows that a detenu who has been absconding and in respect of whom satisfactory explanation has been given regarding the steps taken to trace him, cannot be heard to complain that the link had been snapped. Indeed the observations quoted above suggest that the conduct of the detenu in evading the arrest strengthens the link rather than snapping it.

25. In Shiv Ratan Makim s/o Nandlal Makim v. Union of India and others, reported at : 1986 CriLJ813 , there was a solitary incident of gold smuggling which had occurred on 20th November, 1984. The order of detention had been issued on 11th April, 1985. The Supreme Court observed in para 5 of the judgment at page

408 of the report that there can be no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident & the order of detention. In the case before the Supreme Court the time lag was nearly five months and the Supreme Court observed that the said time lag had been satisfactorily explained by the detaining authorities.

26. In *Rajendrakumar Natvarlal Shah v. State of Gujrat and others*, reported at : 1988 CriLJ1775 , which was a case of detention under the Gujrat prevention of Anti-social Activities Act, 1985, the Supreme Court considered a number of its earlier decisions and not only disapproved the approach of the Delhi High Court in certain cases but sounded a note of caution to High Courts in the following words in para 10 at page 1260 of the report.

'Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Court that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 25(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy & thereby to the security of the Nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the Court finds that the grounds are 'stale' or illusory or that there is no real nexus between the grounds and the impugned order of detention.'

27. In the above case of Rajendrakumar Shah, the incident was of the night between 29th and 30th December, 1986. The accused was arrested on 2nd February, 1987 since he was absconding and order of detention was made on 28th May, 1987 after the lapse of about five months. Though the delay of nearly 4 months between 2nd February, 1987 and 28th May, 1987 was not explained, the Supreme Court observed thus in para 12 of its judgment at page 1261 of the report : 1988 CriLJ1775 :

'Even though there was no explanation for the delay between 2nd February and 28th May, 1987 it could not give rise to a legitimate inference that the subjective satisfaction arrived at by the District Magistrate was not genuine or that the grounds were stale or illusory or that there was no rational connection between the grounds and the impugned order of detention.'

After consideration of some of its earlier decisions, the Supreme Court further observed at page 1261 as under:---

'But no 'mechanical test by counting the months of the interval' was sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like, information of participation being available only in the course of an investigation. The Court has to investigate whether the casual connection has been broken in the circumstances of each case.'

28. We may also refer to the decision in Abdul Salam alias Thiyyan v. Union of India and others, reported at : 1990 CriLJ1502 where the incident was of 17th September, 1987 and order of detention was passed on 21st May, 1988. Dealing with the question of snapping of the live link, the Supreme Court observed that the mere delay in passing the detention order was not conclusive but the type of grounds given have to be seen and then consider whether such grounds could really weigh with an officer after such delay in coming to the conclusion that it was necessary to detain the detenu. A reference was also made to the decisions in the case of (i) Lakshman Khatik v. State of West Bengal : 1974 CriLJ936 and (ii) Rajendrakumar Natvarlal Shah v. State of Gujarat : 1988 CriLJ1775 (supra). On the explanation that was tendered, the Supreme Court concluded that the delay

has been satisfactorily explained & reiterated that 'the courts have not laid down that on mere such delay the detention has to be struck down'. It was also observed that the potentiality to indulge in prejudicial activities has to be judged on a consideration of the relevant facts and if the detaining authority is so satisfied on the material available, then on mere delay, as long as it is not highly unreasonable and undue, the Court should not normally strike down the detention on that ground. A reference was also made in this behalf to the case of Hemlata Kantilal Shah v. State of Maharashtra : 1982 CriLJ150 . While dealing with the case of delay in execution of the order of detention in Abdul Salam's case (supra) the Supreme Court also referred to the fact that there was deliberate attempt on the part of the detenu to make himself scarce and observed that there is no decision where a Court had gone to the extent of holding that mere delay in arresting the detenu renders the detention invalid. The explanation offered in Abdul Salams case was held to be reasonable & it was observed that each case must depend upon its peculiar facts and circumstances and thus the contention was rejected.

29. Our attention was also invited to the recent decision of the Supreme Court in the case of Kishore Sukan Raj Jain and others v. State of Rajasthan and others, reported at 1995 S C C (Cri) 847. In that case the offending incident was of 3rd May, 1991 when the detenu was found in possession of silver slabs worth Rs. 59 lakhs and odd. He was arrested immediately and was released on bail on 21st May 1991. The proposal for detention was initiated on 31st January 1992 and order of detention was passed on 28th May, 1992. Dealing with the contention of delay in making the order of detention, snapping the link, the Supreme Court observed that on the facts of the case it was difficult to come to the conclusion that the delay was on account of the laxity on the part of the customs authorities. It was further observed that it was difficult to say that the link had snapped. Though there was delay, it was not on account of the fact that the customs authorities had given up the chase and it was observed that the High Court was right in rejecting the contention. It was further observed in para 5 of the judgment at page 850 of the report as under:-

'The activities of persons engaging in such nefarious economic offences are generally carried on the sly and having regard to their network in the country it is

difficult to locate their movements and keep a close watch on their activities.'In the result the contention based on the ground of delay in passing the order on 28th May, 1992. And its execution on 13th October, 1992 was rejected. As stated earlier, the incident had occurred on 3rd May, 1991 in Kishore Sukan Raj Jain's case (supra).

30. In the light of the principles laid down in the above decisions of the Supreme Court, let us turn to the pleading before us. As far as the issuance of the order of detention on 29th November, 1994 is concerned, Shri C.D. Singh, Principal Secretary to the Government of Maharashtra. Home Department (Preventive Detention) Mantralaya, Mumbai, in his affidavit dated 9th November, 1995 has explained in para 6, the steps taken by the detaining authority after the incident of 17th July, 1994. The necessary documents were collected by the sponsoring authority which submitted the proposal to the Home Department on 8th September, 1994, the Government called for additional information on 14th September, 1994 which was received on 24th October, 1994, the same was considered and the order of detention was issued on 29th November, 1994. We do not think that in the facts of the case, the delay is unreasonable or unavoidable. What is more important is that the live link cannot be said to have been snapped and there is no challenge to the subjective satisfaction recorded by the detaining authority in that behalf for making an order of detention. Similarly, as far as the service of the order of detention on 27th April, 1995 is concerned, the affidavit of Senior Inspector of Police Shri L.S. Danekar shows that several attempts, on as many as 8 different dates, were made to trace the accused who was absconding and it was on account of this, that the order of detention could not be served till 27th April, 1995. In the additional affidavit made by Shri S.R. Yadav, Intelligence Officer, COFEPOSA, the details of the dates on which the efforts were made by the Prevention of Crime Branch, C.I.D, Bombay to locate the detenu and execute the order of detention have been mentioned. Apart from the said attempts between 29th November, 1994 and 8th February, 1995 steps were also taken for cancellation of bail in the months of March & April, 1995. It is, in this background, that the time-lag between 29th November, 1994 & 27th April, 1995 in respect of the detenu who was admittedly absconding has to be considered. In our view, the explanation offered by the authorities mentioned above in their affidavits, is wholly

satisfactory. We do not find any fault with the same. We cannot say that they have been acting with lack of diligence or competence. Admittedly, there are not allegation of any mala fides & there is no challenge to the subjective satisfaction recorded in the order of detention. In this background , we are of the view that the reliance placed by Shri Gupte on the decision of this Court in Writ Petition No. 65 of 1990, Kakubhai Joshi v. The Secretary, Government of Maharashtra and others, decided on 21st March, 1990 is misplaced. That was a case where there were no reasons set out why the power of detention was not exercised till after 9 months from the time of knowledge of the activity of the detenu.

31. Shri Gupte then placed reliance on the Supreme Court decision in the case of Issac Babu v. Union of India & others, reported at : (1990)4SCC135 . In that case the seizure was effected on 30th November, 1986 & investigation had ended in April, 1987 i.e. to say 8 months after seizure. The proposal for detention was not moved till 26th August, 1987. The explanation tendered by the detaining authority was found to be unsatisfactory and hence the order of detention was struck down. In the light of the pleadings summarised by us above in this case we do not think that the ratio of that decision can assist Shri Gupte in advancing his case.

32. Similarly the ratio of the decision in the case of Pradeep Nilkanth Paturkar v. Shri S. Ramamurthi & others, reported at Judgments Today 1992(3) S.C. 261 is, in our view, wholly inapplicable to the case before us. That was a case where the order of detention was passed 5 months and 8 days from the date of registration of the last case and more than 4 months from the submission of the proposal and the Supreme Court came to the conclusion that the delay was unexplained vitiating the order of detention. Nevertheless the Supreme Court reiterated in para 12 at page 264 as under :--

'A perusal of the various decisions of this Court on this legal aspect shows that each case is to be decided on the facts and circumstances appearing in that particular case.'

Hence, in our view, the ratio of the said decision can have no application on the facts before us.

33. Shri Gupte also sought to place reliance on the observations of the Supreme Court in the case of K.P.M. Basheer v. Union of India and others, reported at : 1992 CriLJ1927 . That was a case where the order of detention was made on 7th January, 1991 under section 3(1) of the COFEPOSA Act in respect of the incident which had occurred on 12th November, 1990. The said order of detention dated 7th January, 1991 was served on the detenu on 28th June, 1991. It was apparent from the pleadings before the High Court that the detenu had appeared before the Assistant Collector of Customs on 6th February, 1991 and 20 th February, 1991 but surprisingly no attempt was made to arrest and detain him despite the order of detention having been passed on 7th January, 1991. It was, in this background, that the Supreme Court came to the conclusion that the officer did not make any real or genuine effort to secure and detain the detenu. The mere ipsi-dixit that the detenu was fugitive, evading the preventive detention order was not accepted by the Supreme Court obviously because the detenu had twice appeared before the Assistant Collector of Customs during the month of February, 1991 and despite this, no efforts were made to arrest him. We think that this was an extreme case where the order of detention having been passed on 7th January, 1991, the detenu having appeared before the Assistant Collector of Customs on two occasions in the month of February, 1991, no attempt was made to arrest him and the order of detention was served as late as on 28th June, 1991. We do not think that the facts in the case before us can, in any manner, be compared with the facts of the case before the Supreme Court in K.P.M. Basheer's case. Thus, in our view, the ratio of the said decision can have no application to the facts of the case before us.

34. The last case on which Shri Gupte has placed reliance is P.M.Hari Kumar v.Union of India and others, reported at : 1995 CriLJ4188 . In that case, the detention order was made on 11th July, 1994. In respect of the incident of smuggling silver ingots on 2nd March, 1990 and was executed on 3rd July, 1994. Dealing with the question of delay in execution of the order, the Supreme Court came to the conclusion that the authorities had not made any serious and earnest efforts to take urgent and effective steps which were available to them to serve the order of detention on the detenu. There was unusual delay in serving the order of detention which was not properly and satisfactorily explained. The plea that the

detenu was staying abroad and evading arrest was not supported by producing the passport or an affidavit on the basis of the entries in the passport There was thus an unusual delay in serving the order of detention, which was not satisfactorily explained. The order of detention was, therefore, held to be vitiated. We do not think that the ratio of the said decision can have any application to the facts of the case before us.

35. Shri Agarwal and Shri Patil also invited our attention to the Division Bench decision of this Court in the case of Ana Maria Pereira v. Union of India and another, reported at 1993 Criminal Law Journal 317 to which one of us A.V.Savant, J., is a party. Relying upon some of the Supreme Court decisions, the Division Bench in Ana Maria Pereira's case held that the delay in issuing the order of detention was not long enough to snap the link between the incident and the order of detention and hence the contention that the order of detention was vitiated was rejected by this Court.

36. In the light of the above, we may summarise our conclusions as under.

On the question of delay on the part of the Central Government in considering the representation against the order of detention, there can be no doubt that having regard to the scheme of the provisions of Article 22(5) of the [Constitution of India](#) there should not be any unexplained delay in considering the representation. Though no hard and fast rule can be laid down as regards the measure of time taken by the appropriate authority for consideration of the representation, it has to be remembered that the Government has to be vigilant in the matter of the citizen's right under Article 22(5) of the [Constitution of India](#). There may be some leeway depending upon the necessities of administrative action in the facts of a given case. There is no magical formula of any number of days within which the representation has to be disposed of. Nevertheless, the courts frown upon unexplained delay in this behalf. In substance, though there is no fixed time-frame either under Article 22(5) of the [Constitution of India](#) or under the COFEPOSA Act, it cannot be disputed that the representation must be considered as expeditiously as possible. Similarly, though there is no mechanical test of any number of days, there should be no lack of diligence or remissness on the part of the concerned

authorities. On the question of the alleged delay in issuance of the order of detention and its execution, the rule appears to be that as long as the live-link between the offending act and the passing of the order of detention has not been snapped as long as the alleged incident is not too remote to say that the propensity of the detenu to indulge in similar prejudicial activities in future has ceased to exist, no objection can be taken on a merely mechanical basis of calculation of number of days or even months either from the date of the offending act till the issuance of the order of detention or from the date of its issuance till the date of service thereof. In either case, even in the absence of any time-frame prescribed either under Article 22(5) of the Constitution or the COFEPOSA Act, the authorities concerned have to satisfactorily explain the delay. In a given case, the delay may be explained on account of the recalcitrant or refractory conduct of the detenu himself. The rule as to unexplained delay is not an inflexible rule and must necessarily depend upon the facts of each case. Ultimately, as repeatedly observed by the Supreme Court, each case is to be decided on the facts and circumstances appearing on record.

37. Thus, there is no merit in any of the three contentions raised before us by Shri Gupte.

38. In the circumstances, the petition fails and hence, the Rule is discharged.

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