

Durga Pada Ghosh

Vs

State of West Bengal

Writ Petition No. 174 of 1972

(J. M. Shelat, I. D. Dua, H. R. Khanna J J )

07.08.1972

JUDGMENT

DUA, J. -

1. This is a petition by Durga Pada Ghosh under Article 32 of the Constitution praying for a writ in the nature of habeas corpus on the ground that the order of detention made against him under the Maintenance of Internal Security Act 26 of 1971 (hereinafter called the Act) is void and unconstitutional.

2. The detention order in this case was made by the District Magistrate, Burdwan on December 10, 1971, under sub-sections (1) and (2) of Section 3 of the Act. The unlawful activities in which the petitioner was alleged to have been indulging are stated in the order of detention as follows :

"(1) On September 15, 1971, at about 1 p.m. you with your associates, viz. Sudhir Dey and others at the point of dagger and exploding bombs snatched away Rs. 1,900/- from Shri Krishna Bahadur and Shyamapada Chakraborty of Raj Collegiate School on the road in front of the branch office of the State Bank of India, situated at Burdwan University. By such act in broad daylight you created panic and terror and the peaceful citizens of the area felt insecure to come out on the road and their even tempo of life was adversely affected.

(2) On November 8, 1971 at about 08.45 hrs. you with your associates Sudhir Dey and others at the point of dagger snatched away Rs. 2,100/- on the road in front of Municipal office from Tapan Kundu of Borhat. This created a panic in the locality and the peaceful citizens were terrorized and felt hesitant to come on the road. This adversely affected the even tempo of life of the people of the locality."

On the same day, i.e., December 10, 1971, the District Magistrate reported this fact to the State Government as required by sub-section (3) of Section 3. Pursuant to this order of detention the petitioner was arrested on December 15, 1971 and on the same day the grounds of detention were served on him. The detention order was approved by the State Government on December 16, 1971 and on the same day this fact was reported to the Central Government as required by sub-section (4) of Section 3. On January 4, 1972, the petitioner's representation was received by the State Government. The petitioner's case was placed before the Advisory Board constituted under Section 9 of the Act on January 7, 1972. This was done in compliance with Section 10 of the Act. The petitioner's representation was considered by the State Government on February 12, 1972. The Advisory Board gave its decision on February 16, 1972 and the detention order was confirmed by

the State Government on March 17, 1972. This order was communicated to the petitioner on March 8, 1972.

3. Though the petitioner by means of his application, dated July 15, 1972, desired to raise some additional grounds challenging the constitutional validity of the Act, at the time of arguments this challenge was not pressed before us. The only ground on which emphasis was laid by Shri. Ram Panjwani, the learned advocate appearing as amicus curiae, was that the representation made by the petitioner was considered by the State Government after inordinate delay and, therefore, his detention must be considered to have become illegal entitling the petitioner to be released forthwith. The delay contended to be inordinate was between January 4, 1972, the date of receipt of the petitioner's representation, and February 12, 1972, when the representation was considered by the State Government.

4. The explanation for this delay is contained in Para 14 of the counter-affidavit which reads :

"In this connection I further state that the said representation of the detenu-petitioner could not be considered by the State Government earlier, due to slow and irregular movement of files in the office of the State Government which was the effect of go-slow movement of performance and work in September-October, 1971 on the part of the State Government employees. The delay was further caused due to sudden increase in volume of detention cases under Maintenance of Internal Security Act. Due to aforesaid reasons movement of the files were very much delayed and the records of the office were not regularly available. It appears that there was one month eight days delay in considering the said representation of the petitioner by the State Government. I further state that the delay was unintentional and was for reasons beyond control of the State Government and I submit that in these circumstances delay may be condoned by this Honourable Court."

This, according to learned counsel for the State, is a satisfactory explanation and deserves to be accepted by this Court. Reliance was placed on behalf of the respondent on a recent decision of this Court in *Nagendra Nath Mondal v. The State of West Bengal* (AIR 1972 SC 665 : (1972) 1 SCC 498.), in which delay of about 34 days on the part of the State Government in considering the detenu's representation was held not to vitiate the detention. This is what the Court said in this connection :

"The time-gap between the receipt by Government of the petitioner's representation and the date of its decision was of 34 days. The question is whether that gap can be treated as inordinate delay going to the root of the validity of the detention or its continuation thereafter. The counter-affidavit filed on behalf of the Government, no doubt, did not contain any explanation. But that was because it answered only the allegations in the petition filed by the petitioner from jail, which had in it only general allegations such as the vagueness of the grounds of detention, mala fides, etc., and did not raise specifically any point on this aspect at all. The point as to delay was for the first time taken in the course of arguments when the petition first came up for hearing before another Bench of this Court. At that time, counsel for the State produced the records of the case and notings from the records were actually read out before the Court in the hearing of the petitioner's counsel. That fact is not disputed before us and so also the fact that those records showed that on June 7, 1971, Government had sent the files in connection with the petitioner's case and his

representation to the Advisory Board. As soon as the representation was returned to it, Government considered it and rejected it but that was before the Board made its report and sent it to Government. But counsel urged that this fact may explain the lapse of time from the date that the records were sent and the date when they were returned, but not the delay between May 27, 1971 and June 7, 1971, during which Government could have arrived at its decision. That argument has not much force, because in a given case Government may not be able to reach a proper conclusion within a short time, especially, in a case where another authority, in this case the District Magistrate, has passed the questioned order. It might have to make inquiries as to the situation in the locality, the nature of and the circumstances in which detention was found necessary, the previous history of the person detained, etc. Therefore, it is difficult to agree with counsel that Government should have reached its conclusion during the said period. No doubt, the delay in deciding the representation was of 34 days, but part of it was due to the fact that the representation and the record with the Board. In these circumstances, it is difficult to say that there is a just and proper analogy between this case and that of *Khairul Haque v. State of West Bengal* (W.P. No. 246 of 1969, decided on September 10, 1969.) or *Jayanarayan v. State of West Bengal* ((1972) 3 SCR 225 : (1970) 1 SCC 213 : 1970 SCC (Cri) 92.), or that upon such analogy we should reach the same conclusion which was reached in those cases. As held in *Jayanarayan's* case (*supra*), there can be no hard and fast rule with regard to the time which Government can or should take, and that each of case must be decided on its own facts. In the circumstances of the present case we are unable to hold that the delay was so inordinate as to affect the validity of the petitioner's detention."

In the reported case, after referring to the two earlier decisions of this Court, it was observed that there can be no hard and fast rule with regard to the time which Government can or should take in deciding the representation and that each case must be decided on its own facts. In the reported case the detenu's representation had been received by the State Government on May 27, 1971, but it was considered and rejected on July 1, 1971. It, however, appeared to this Court from notings on the records of the case, produced by the State, that those records had been sent by the Government to the Advisory Board on June 7, 1971. Between May 27 and June 7, 1971, during which period the Government could have considered the representation was only a duration of ten days which, according to the submission of the State, accepted by this Court, did not constitute undue delay. Before us it was urged on behalf of the State that the Government, in the reported case, may legitimately be assumed to have been aware of the fact that the Advisory Board had at its disposal ten weeks from the date of detention for discharging its statutory obligation to consider the reference and report (*vide* Section 11) and also that the appropriate Government had a period of 30 days for placing the matter before the Board (*vide* Section 10) and, therefore, bearing in mind particularly the constitutional protection of personal liberty available to all individuals and not only to Indian citizens, the representation of the detenu there should appropriately have been disposed of by the State Government before forwarding the records to the Advisory Board. The State Government, it was emphasised, had a duty to come to its own independent conclusion as expeditiously as possible uninfluenced by the decision of the Advisory Board. Though the State Government did not consider the representation before forwarding the record to the Advisory Board, the delay on its part was not considered in the reported case to be so inordinate as to vitiate the order of detention. Seeking assistance from the analogy of the approach adopted in the reported case we were pressed on behalf of the respondent that in the present case also we should not hold

the petitioner's detention to be illegal merely because of the delay in considering the petitioner's representation when it is explained that on account of the non-co-operative and obstructive attitude adopted by the Government staff in West Bengal in resorting to "go-slow movement" which had caused accumulation of large number of files in the Secretariat and also on account of sudden increase in the number of detention cases under the Act, the Government found itself unable to consider and dispose of the representation as speedily or as expeditiously as it would have done had the times been normal.

5. The learned counsel for the State also sought support from the decision of this Court, dated May 3, 1972, in Arun Kumar Roy alias Katu v. The State of West Bengal (W.P. 52 of 1972, decided on May 3, 1972 : (1972) 3 SCC 893.). Mitter, J., speaking for the Court (Reddy, Mathew and Mitter, JJ.) in that case said :

"The Act shows that if a detention order is made by an officer such as the District Magistrate it cannot remain in force for more than 12 days after the making thereof unless in the meantime it is approved of by the State Government. The State Government is also under a duty to communicate the order made and its approval of the order within seven days to the Central Government. Under Section 10 the appropriate Government must place the case within 30 days from the date of detention before the Advisory Board. As the case was placed before the Advisory Board on October 8, 1971, all the provisions of the Act from Sections 3 to 10 were undoubtedly given effect to within time. The only complaint which is now raised though not made in the petition is that the representation was considered by the Government as also by the Advisory Board only on November 17, 1971, i.e., one month and ten days after the date of the receipt of the representation. As the Advisory Board has to consider the case within ten weeks from the date of detention which in this case was September 9, 1971, there has been no violation of the provisions of (sic) section. The question is, can the order of detention be upheld on the facts of this case in the background of the constitutional provisions.

It will be noticed that the act does not make it obligatory on the State Government itself to consider the representation of the detenu but makes it obligatory on the part of the State Government to place the case before the Advisory Board along with the representation if any, made by the person affected by the order and where the order has been made by an officer also the report of such officer under sub-section (3) of Section 3. The Advisory Board must consider the materials placed before it and may call for further information as it may deem necessary from the appropriate Government or from the person concerned and submit its report to the appropriate Government after hearing the detenu in person if he desires to be heard or in any case where the Board considers it essential to give him a hearing. The Board must make its report to the appropriate Government within the weeks from the date of detention. Although Section 15 of the Act gives the appropriate Government power to release a detenu for a temporary period with or without conditions, the Act does not empower the Government to release a detenu finally except after the report of the Advisory Board. When the Advisory Board reports that there is no sufficient causes for the detention of the person concerned, the Government must give effect to it and revoke the detention order.

The main hurdle against the petitioner in this case is that he made no grievance in his

writ petition about the delay in the consideration of his representation. If any such plea had been taken, we would have had to consider whether Government had any explanation to offer for the delay. In this case, as already noted, the Government had approved of the order of detention as early as September 4, 1971 and submitted its report to the Central Government. There was nothing in the representation of the petitioner, apart from a bare denial of his commission of any offence which necessitated the immediate consideration of the representation. As the Act did not empower the Government to release the detenu on the strength of the representation without sending the matter to the Advisory Board, it appears, to us that Government's consideration of the representation after its prior approval of the detention order, would have little significance or import."

The petitioner's learned counsel, however, referred us to the decision of this Court, dated May 5, 1972, in *Kanti Lal Bose v. State of West Bengal* (W.P. No. 8 of 1972 : (1972) 2 SCC 529.), in which Arun Kumar Ray's case (*supra*), was considered. The Court there also considered the following earlier cases of this Court : *Jayanarayan v. State of West Bengal* ((1970) 3 SCR 225 : (1970) 1 SCC 219 : 1970 SCC (Cri) 92.), *Khairul Haque v. State of West Bengal* (W.P. No. 246 of 1969, decided on September 10, 1969.); *K. I. Singh v. State of Manipur* (AIR 1972 SC 438 : (1972) 2 SCC 576.); *Baidya Nath Chunkar v. State of West Bengal* (W.P. No. 377 of 1971, decided on March 14, 1972 : (1972) 2 SCC 473.) and *Nagendra Nath Mondal v. State of West Bengal* (*supra*).

6. The point of delay was dealt with thus :

"When the matter came up for hearing before us on April 26, 1972 Mr. Vohra sought permission to take up additional grounds in support of the petition. He thereafter filed a written application setting forth the additional grounds. Looking to the facts of the case we allowed Mr. Vohra to take the additional grounds.

It was argued on behalf of the petitioner that his representation was received by the State Government on August 11, 1971. The State Government considered the representation and rejected it on September 8, 1971. There thus elapsed a period of 28 days between the receipt of the petitioner's representation and the consideration and rejection of the same by the State Government. Learned counsel for the respondent, who had the Government file relating to the detention of the petitioner, could not furnish any explanation as to why the Government took a long period of 28 days to consider and reject the petitioner's representation. In the absence of any cogent ground the failure of the State Government to consider the representation of the petitioner and pass an order thereon for a period of 28 days would, in our opinion, invalidate the detention of the petitioner.

In the case of *Jayanarayan Sukul v. State of West Bengal* (*supra*), the Constitution Bench of this Court emphasised the imperative necessity of the consideration of the representation made by a detenu by the Government as early as possible. It as observed :

"It is established beyond any measure of doubt that the appropriate authority is bound to consider the representation of the detenu as early as possible. The appropriate Government itself is bound to consider the representation as expeditiously as possible. The reason for immediate consideration of the representation is too obvious

to be stressed. The personal liberty of a person is at stake. Any delay would not only be an irresponsible act on the part of the appropriate authority but also unconstitutional because the Constitution enshrines the fundamental right of a detenu to have his representation considered and it is imperative that when the liberty of a person is in peril immediate action should be taken by the relevant authorities.

No definite time can be laid down within which a representation of a detenu should be dealt with save and except that it is a constitutional right of a detenu to have his representation considered as expeditiously as possible."

The detenu in that case made a representation to the State Government on June 23, 1969 and the same was rejected by the said Government on August 9, 1969. It was held that the Government was guilty of infraction of Constitutional provision because of the inordinate delay in considering the representation. The petitioner was accordingly set at liberty.

Reliance in the case of *Jayanarayan v. State of West Bengal (supra)*, was placed upon the earlier decision of this Court in the case of *Khairul Haque v. State of West Bengal (supra)*. In that case this Court held that Article 22(5) of the Constitution envisaged a dual obligation of the Government and a corresponding dual right in favour of a detenu, namely : (1) to have his representation independently considered by the Government, and (2) to have that representation, in the light of the facts and circumstances of the case, considered by an Advisory Board. It was observed that the said provision enjoined upon the detaining authority to make representation. This fact, in the opinion of the Court, necessarily implied that such a representation must, when made, be considered and disposed of as expeditiously as possible for otherwise 'the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning'. In *Prof. K. I. Singh v. State of Manipur (supra)*, this Court held that an unexplained delay of 17 days was enough to render the detention illegal. In *Baidya Nath Chunkar v. State of West Bengal (supra)*, unexplained delay of 29 days in considering the representation was held to have vitiated the detention of the detenu. In the case of *Nagendra Nath Mondal v. State of West Bengal (supra)*, on the other hand, although 34 days had elapsed between the receipt of the representation and its disposal by the Government, the delay was held by this Court to have been satisfactorily explained. The cases mentioned above were referred to by this Court in *Ranjit Dam v. State of West Bengal (W.P. No. 14 of 1972, decided on May 3, 1972 : (1972) 2 SCC 516.)*, and it was held that unexplained delay of 19 days in considering the detenu's representation would invalidate the detention. In the present case, as stated earlier, the delay of 28 days in considering and rejecting the representation of the petitioner has not been explained. The said delay would consequently vitiate the detention of the petitioner."

*Arun Kumar Roy's case (supra)*, was distinguished on the ground that there was no grievance in the writ petition there about the delay in the consideration of the representation. This is what the Court said in this connection :

"Mr. Ghosh has referred to a decision of this Court in the case of *Arun Kumar Roy alias Katu v. State of West Bengal (supra)*. The representation of the detenu in that case was received by the State Government on October 7, 1971 and after consideration was rejected by the said Government on November 17, 1971. The fact that a period of one month and ten days elapsed between the receipt of the detenu's representation and its disposal by the State Government was enough, according to the submission made in that case, to invalidate the detention. This submission was rejected on the ground that the petitioner had made no grievance in the writ petition

about the delay in the consideration of his representation. It was observed that if any such plea had been taken, the Court would have had to consider whether the Government had any explanation to offer for the delay. The above case, in our opinion, cannot be of much assistance to the respondent State. As stated earlier, the counsel arguing on behalf of the petitioner had been permitted to take additional grounds. One of those grounds specifically dealt with the point that the respondent had made an inordinate delay in considering the representation of the petitioner and as such had contravened Article 22(5) of the Constitution. The learned counsel for the respondent State thereafter looked into the official file and could furnish no explanation for the failure of the State Government to consider the representation of the petitioner till September 8, 1971."

7. Now it is not disputed before us that on the question of delay in considering the representation by the State Government no hard and fast rule can be laid down and it is a matter which falls for decision on the facts and circumstances of each case. It may in this connection be pointed out that in Jayanarayan's case (supra), the writ petition was referred to a Bench of five Judges to consider as to what would be the question of period within which the State Government could dispose of the representation of the detenu because it was felt that there was an apparent conflict between Shyamal Chakraborty v. Commissioner of Police, Calcutta ((1970) 1 SCR 762 : (1969) 2 SCC 426.) and Khairul Haque v. State of West Bengal (supra). After considering the various decisions on the point this Court expressly concluded thus :

"No definite time can be laid down within which a representation of a detenu should be dealt with save and except that it is constitutional right of a detenu to have his representation considered as expeditiously as possible. It will depend upon the facts and circumstances of each case whether the appropriate Government has disposed of the case as expeditiously as possible for otherwise in words of Shelat, J., who spoke for this Court in the case of Khairul Haque (supra) : "it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning'."

8. The scheme underlying Article 22 of the Constitution highlights the importance attached in our constitutional set-up to the personal freedom Of an individual. Sub-articles (1) and (2) refer to the protection against arrest and detention of a person under the ordinary law. Persons arrested or detained under a law providing for preventive detention are dealt with in sub-articles (4) to (7). Sub-article (5) says that when a person is detained in pursuance of an order under a law providing for preventive detention the grounds on which the order is made have to be communicated to the person concerned as soon as may be and he has to be afforded earliest opportunity to represent against the order. The object of communicating the grounds is to enable the detenu to make his representation against the order. The words "as soon as may be" in the context must imply anxious care on the part of the authority concerned to perform its duty in this respect as early as practicable without avoidable delay. Similarly when the representation is made it is in the fitness of things that the said representation should be considered with the same sense of urgency with which the grounds are intended to be communicated to the detenu. That is the only way in which the purpose, for which the earliest communication of the grounds to the person concerned is provided, can be achieved. The representation must, therefore, be considered with due promptitude or expedition and without avoidable delay, in other words with reasonable dispatch. As held by this Court in Jayanarayan's case (supra), the representation should be considered as expeditiously as possible. As the question of delay in considering the representation falls for determination on the facts and circumstances of

each case the binding force of a past precedent for a later case would largely depend on the degree of close similarity of the circumstances dealt with therein. Our attention has been drawn to a recent decision of this Court (Mathew, J.) in *Amulya Chandra Dev v. The State of West Bengal* (W.P. No. 118 of 1972, decided on July 10, 1972.), which was heated and disposed of during the summer vacation this year. In that case the representation of the detenu was received by the State Government on December 3, 1971 and disposed of on December 22, 1971. This delay was, according to the explanation of the State Government, due to the fact that there was no regular work or movement of files in the office because of demonstration of the State Government employees, including those of the Home Department (Special Section) from September 12 to the end of November, 1971. This Court did not consider that to be a satisfactory explanation for the delay because the dislocation of work was only up to the end of November, 1971, whereas the representation was received by the Government on December 3, 1971. It was observed that in the circumstances of the case the State Government had not disposed of the representation as early as practicable. Reference in support of this view was made to *Jayanarayan* case (*supra*).

10. We are not unmindful of the fact that the Act was brought on the statue book in July, 1971, because, as the objects and reasons show, in the prevailing situation in the country and the development across the border need for effective preventive action in the interest of national security was considered to be urgent. Because of such a situation it may well be that there were a large number of detention cases in the State of West Bengal. This circumstance of course is not wholly irrelevant. But in our opinion the State could not and should have made ample arrangements for coping with this situation keeping in view the limitations contained in the provisions of the Constitution dealing with the subject preventive detention. No doubt, the interest of national security with which is closely connected the maintenance of public order, is rightly accorded a certain degree of priority over the right of personal freedom of the individual but the constitutional limitations cannot for that reason alone be completely ignored in administering the law relating to preventive detention.

11. We are unable, as at present advised, to hold that the view taken by this Court in *Amulya Chandra Dev* (*supra*), is erroneous requiring reconsideration by us. The circumstances relied upon in the explanation in that case are very close and similar to those in the present one. We have, therefore, no option but to hold that the State Government failed to consider the petitioner's representation received on January 4, 1972, with reasonable dispatch or as expeditiously as possible. This representation was only considered on February 12, 1972, though the go-slow movement was admittedly over by the end of October, 1971. Nothing has been said about the situation in January and February, 1972. The result, therefore, is that the petitioner's detention must be held to have become invalid. The writ petition is accordingly allowed and the petitioner directed to be set at liberty forthwith.

</html