

Sk. Sekawat

Vs

The State of West Bengal

Writ Petition No. 164 of 1974

(P. Gagnomohan Reddy, P. N. Bhagwati, P. K. Goswami, R. S. Sarkaria JJ)

24.09.1974

JUDGMENT

BHAGWATI, J. -

1. This petition is directed against the validity of an order of detention dated July 26, 1972 made by the District Magistrate, Midnapur under Section 3 of the Maintenance of Internal Security Act, 1971. The petitioner has urged several ground before us, but it is not necessary to refer to them since there is one ground which is, in our opinion, sufficient to dispose of the petition in favour of the petitioner. To appreciate this ground it is necessary to notice a few facts.

2. The order of detention was made by the District Magistrate on July 26, 1972 and on the same day he made report to the State Government. The State Government approved the order of detention on August 5, 1972 and a report was made by it to the Central Government on the same day. It appears that the petitioner was absconding and he could not, therefore, be arrested pursuant to the order of detention until October 24, 1972. When the petitioner was arrested on October 24, 1972, the order of detention was served on him along with the grounds of detention. The State Government thereafter placed the case of the petitioner before the Advisory Board for its opinion and the Advisory Board submitted a report dated November 23, 1972 stating that in its opinion there was sufficient cause for the detention of the petitioner. Now, right up to this time no representation against the order of detention was received from the petitioner. It was only on November 27, 1972 that the State Government received the representation of the petitioner against the order of detention. The State Government had not yet confirmed the order of detention when the representation was received but even so that State Government proceeded to confirm the order of detention without considering the representation. The order of confirmation was passed by the State Government on November 29, 1972. The State Government thereafter considered the representation of the petitioner and rejected the same on December 2, 1972.

3. The petitioner, on these facts, contended that the order confirming the detention of the petitioner having been passed by the State Government without considering the representation of the petitioner, the detention of the petitioner was unlawful as being in violation of Article 22(5) of the Constitution and Section 7 of the Maintenance of Internal Security Act, 1971. This contention has great force and it must result in the detention of the petitioner being set aside. It is now well settled by a decision of five Judges of this Court in *Jayanarayan Sukul v. State of W. B.* ((1970) 3 SCR 225 : (1970) 1 SCC 219) that the peremptory language of Article 22(5) of the Constitution and Section 7 of the Act makes it obligatory that the State Government should consider the representation of the detenu "as soon as it is received by it". The requirement of Article 22(5) of the Constitution that the authority making the order of detention should afford the detenu the earliest opportunity of making

a representation against the order of detention would become illusory if there were no corresponding obligation on the State Government to consider the representation of the detenu as early as possible. It is not enough for the State Government to forward the representation to the Advisory Board while seeking its opinion as to whether there is sufficient cause for the detention of the detenu. The State Government must itself consider it is necessary to detain the detenu. If the State Government takes the view, on considering the representation of the detenu, that it is not necessary to detain him, it would be wholly unnecessary for it to place the case of the detenu before the Advisory Board. The requirement of obtaining the opinion of the Advisory Board is an additional safeguard for the detenu over and above the safeguard afforded to him of making a representation of the representation by the State Government. This Court, speaking through Ray, J. as he then was, in *Jayanarayan Sukul v. State of W. B.* (supra) enunciated the following four principles to be followed in regard to the representation of a detenu :

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 the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the 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 along with 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 along with 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.

It is possible that sometimes the representation of the detenu may be received by the State Government after the case of the detenu has been referred to the Advisory Board. In such a case, so long as the representation is received within thirty days from the date of the detention, the State Government would be bound to forward it to the Advisory Board. But a question may arise as to what would be the duty of the State Government where the representation is received after the expiration of thirty days from the date of detention. It was contended on behalf of the State that in such a case there would be no obligation of the State Government to send the representation to the Advisory Board, because the State Government being bound to place the case of the detenu before the Advisory Board within thirty days from the date of detention, if the representation is not received within the period of thirty days, there can be no obligation of the State Government to forward it to the Advisory Board. We do not wish to express any opinion on this contention as it does not arise for consideration on the facts of the present. Here the representation of the petitioner was received by the State Government after the Advisory Board had made its report and there could then be no question of sending the representation to the Advisory Board. But the State Government had not yet confirmed the order of detention and it was, therefore, bound to consider the representation of the petitioner. It is obvious that even where the Advisory Board reports that there is in its opinion sufficient cause for the detention of the detenu, the State Government is not bound to confirm the order of detention. The State Government has to apply its mind, keeping in view all the facts and circumstances relating to the case of the detenu including the opinion of the Advisory

Board and came to its own decision whether or not to confirm the order of detention. If, therefore, the State Government has before it at that time the representation of the detenu, the State Government must consider it and take it into account for the purpose of deciding whether to confirm and continue the detention. This view finds support from the following observations of Palekar, J. speaking on behalf of the Court in *B. Sundar Rao v. State of Orissa* ((1972) 3 SCC 11 1972 SCC (Cri) 138) :

Secondly having regard to the second principle referred to above the Government cannot absolve itself from considering the representation even at a later stage. We have seen that after the Advisory Board's opinion is received the State Government is bound under Section 11 to consider whether it should confirm the detention order and continue the detention of the person concerned. Since the Government had not considered the representation as soon as it was received nor even at the time of the confirmation and continuation of the detention, the Government had failed in one of its obligatory duties with regard to the detention of the prisoners and, therefore, for that reason also the detention becomes illegal.

Here in the present case the representation of the petitioner was received by the State Government before it confirmed the order of detention, but it did not consider the representation and thus "failed in one of its obligatory duties with regard to the detention" of the petitioner. The subsequent consideration and rejection of the representation of the petitioner could not cure the invalidity of the order of confirmation. The detention of the petitioner must, therefore, be held to be illegal and void.

4. We accordingly set aside the order of detention and declare the detention of the petitioner to be illegal and void and direct that the petitioner be set at liberty forthwith.

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