

## PATNA HIGH COURT

Gulam Sarwar

Vs

State of Bihar

Criminal Writ Jurn. Case No, 46 of 1972

(U.N. Sinha, C.J. and Akbar Husain, J.)

20.05.1972

### JUDGMENT

#### **U.N. Sinha, C.J.**

1. The petitioner has applied under Article 226 of the Constitution of India, read with Section 491 of the Code of Criminal Procedure, praying, that, a writ in the nature of habeas corpus be issued, quashing an order of his detention, dated the 17th March, 1972, and setting him at liberty. There are three respondents in this case and the learned Advocate General has appeared for them.

2. The relevant facts may be stated as follows. The petitioner was arrested on the 17th March 1972 at Patna at 11-55 p.m. The arrest was by virtue of an order passed by the Governor of Bihar, in exercise of the powers conferred by Section 3(1)(a)(ii) and Section 5 of the Maintenance of Internal Security Act, 1971 (Central Act No. 26 of 1971). The petitioner had been handed over an order of detention, with a Hindi translation of the same at the time of his arrest, and a copy of the order in English has been given as Annexure 1 to the writ application. The petitioner was taken to the Central Jail, Hazaribagh, and he reached there in the morning of, the 18th March. It is said, that, the petitioner was served with a copy of the grounds of detention on the 23rd March at 7.50 a.m., while he was in detention at Hazaribagh. A copy of the same has been appended as Annexure 2. The petitioner has alleged in this application, that, the grounds of detention served on him do not come within the purview of Section 3 of the Act. It is alleged, that, the petitioner's detention, in pursuance of the order, dated, the 17th March, 1972, was void, illegal and violative of the guarantees of personal liberty, as the grounds of detention had been served on him on the 23rd March, 1972, without recording reasons for the delayed service of the grounds. Many other grounds have been taken in the writ application, contending, that the petitioner's detention is illegal, but, it is not necessary to refer to any other aspect of the matter, in view of the contentions raised in this Court. A counter-affidavit was filed on the 10th May, 1972, on behalf of the respondents, alleging the following. It is mentioned, that, the grounds of detention were issued on the 22nd March and sent through a special messenger to Hazaribagh the same day for being served on the petitioner. As the messenger reached Hazaribagh late in the night of the 22nd March, the grounds were served on the petitioner on the 23rd March at 7-50 a.m. In this counter-affidavit a further statement was made as follows :

"The detenu has already been informed about the reasons for this delay in Home Special Department's Order No. 4149 dated 8.4.1972, but he refused to accept the order."

Other parts of this counter-affidavit merely controvert the various allegations made in the original writ application about the reasons and the motive for which the petitioner was said to have been detained. The case opened for argument on the 18th May 1972 and, on that day, the petitioner filed a rejoinder to the counter-affidavit annexing therewith copies of two documents, marking them as Annexures 7 and 8. Annexure 7 is a communication sent from the State Government on the 4th May 1972 to the Superintendent of Jail, Hazaribagh, on the subject of detention of the petitioner. The communication had actually been signed on the 3rd May and it mentioned, that, after due consideration of the representation sent by the detenu, no reasons appear for withdrawing the order of detention. Annexure 8 is said to be a copy of the representation, which had been sent by the detenu to the State Government under Section 8(1) of the Maintenance of Internal Security Act (hereinafter to be referred to as the Act) dated the 23rd March, 1972. In this representation, it was mentioned, that, the petitioner had been detained on the 17th March, 1972 at 11-55 p.m. and that he had been served with the grounds of detention on the 23rd March 1972 at 7-50 a.m. It was alleged in this representation, that, the grounds of detention had been communicated to the detenu in clear violation of the specific provision of Section 8(1) of the Act. The last two paragraphs of this representation may be quoted, as some argument has been advanced on it by the learned Advocate General. They run as follows :

"7. That again this time I make a request to you through this representation to place it before the Advisory Board who may be pleased to hear me personally as expressly provided under Section 11(1) of the Act when I would like to prove beyond all reasonable doubts and by virtue of documentary evidence, issues of my newspaper and tape recording of my speeches and other speeches that the above order has been passed in sheer haste, with a malice, without having been satisfied and is also bad in law, unjust illegal and baseless besides being mischievous, arbitrary, communal and highhanded.

8. That while making the above prayer it is also requested that you may be pleased to cause transfer of this detenu to Patna well in advance and at least a fortnight earlier to enable him to collect necessary papers and documents instrumental in placing his case before the Board personally.

And for this I would be highly obliged."

It may be stated, at this stage, that a supplementary counter-affidavit has been, filed today, during the course of hearing, on behalf of the respondents, explaining the circumstances under which the representation of the detenu had been rejected. According to this supplementary counter-affidavit, the representation had been rejected by the Chief Minister of the State on the 29th April, 1972, and this rejection was communicated to the petitioner by Annexure 7 dated the 4th May. Referring back to the petitioner's rejoinder filed on the 18th May, it may be stated, that, the order of the Government rejecting the detenu's representation was communicated to him on the 8th May, 1972. On the facts and circumstances, mentioned above, two questions of law have been raised by the learned counsel for the petitioner, based on Section 8 of the Act and Article 22(5) of the Constitution of India. The first point raised on behalf of the petitioner is, that, the

service of the grounds of detention on the petitioner on 23rd March, 1972 was in violation of the provision of Section 8(1) of the Act. The provision relied upon, is quoted below :-

"When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government."

It is contended, that, when the petitioner had been arrested on the 17th March, 1972, in the ordinary circumstances, the grounds of detention had to be served on him on or before the 22nd March and that service on the 23rd March was beyond five days from the date of detention. According to the learned counsel for the petitioner, further, no reasons recorded in writing are available to show that it was an exceptional case for which the grounds of detention could be served one day later than five days, within the meaning of Section 8(1) of the Act. This argument clearly refers to the portion of the counter-affidavit filed on behalf of the respondents, which has been quoted above. The first point for consideration is, whether service of the grounds of detention on the detenu in the morning of 23rd March, 1972 was in compliance of Section 8(1) of the Act. that is to say, whether the grounds were served not later than five days from the date of detention. Normally, in our judgement, after excluding the 17th March, five days would expire at the midnight of the 22nd March. But, the learned Advocate-General has relied upon Section 9 of the General Clauses Act, 1897 (Central Act No. 10 of 1897) and has argued on the wordings of Section 8(1) of the Act and Section 9 of the General Clauses Act, that, the five days contemplated by Section 8(1) of the Act expired at the midnight of the 23rd March and not at the midnight of the 22nd March. To appreciate this contention, Section 9(1) of the General Clauses Act is reproduced below :-

"In any Central Act or Regulation made after the commencement of this Act, it' shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from', and, for the purpose of including the last in a series of days or any other period of time, to use the word to."

The learned Advocate-General has urged, that, Section 8(1) of the Act used the expression "not later than five days..... from the date of detention", and, therefore, the date of detention, in this case, being the 17th March, the first day in the series of five days, which must be excluded, would be the 18th March. According to him, if 18th March is excluded by virtue of Section 9(1) of the General Clauses Act, then five days from the date of detention would expire at the midnight of the 23rd March. We do not think, that, this contention raised by the learned Advocate-General, is valid. The date of detention was certainly the 17th March and, for the purpose of excluding the first in the series of five days, the first day has to be excluded, which is 17th March and not 18th March. In law, it did not make any difference, at what time of the 17th March, 1972 the detenu had been arrested, but, for the computation of five days within the meaning of Section 8 (1) of the Act, 17th March has to be excluded. Therefore, five days would expire at the midnight of the 22nd March, 1972. If the provisions of Section 8(1) of the Act are

imperative, then it is clear, that, the provisions of that section have not been followed in this case. According to the learned Advocate-General, even if the provisions of Section 8(1) of the Act are mandatory, the requirement of compliance with that law is not so absolute as to nullify the detention, if that provision has been substantially complied with. Reference has been made to the case of *Howard v. Bodington, reported in*<sup>1</sup> In this context, certain facts, to which we have already referred, are also relied upon. It is argued, that, when the grounds of detention had been issued to a person through a special messenger on the 22nd March and when the messenger had reached the Hazaribagh late in the night of the day, service of the grounds of detention on the 23rd March on the detenu was a substantial compliance of the requirement of Section 8(1) of the Act. We do not think, that, either the question of law raised by the learned counsel is valid, or that the facts and circumstances mentioned in the counter-affidavit sending the messenger on the 22nd March is sufficient for holding, that, strict compliance of Section 8(1) of the Act was not necessary, in the sense of serving the grounds of detention on the detenu before the midnight of the 22nd March. There is no doubt, that, the provisions of Section 8(1) of the Act are imperative and that if grounds of detention have to be served not later than five days from the date of detention, no departure can be made from the legal calculation of the five days, on the ground, that, the grounds of detention had been despatched on the 22nd March. The learned Advocate-General has also argued, that, when the grounds of detention had been transmitted on the 22nd March, it must be taken to have been communicated to the detenu on the same day, as envisaged by Section 8(1) of the Act. The learned counsel has referred to the meaning of the word "communicate" in the Shorter Oxford English Dictionary, which gives one of the meanings of the word "communicate" as "to impart, confer, transmit." This argument cannot also be accepted for the interpretation of the word "communicate", occurring in Section 8(1) of the Act. This provision of law states, that, the grounds on which the order of detention is made must be communicated to the detenu not later than five days from the date of detention, in ordinary circumstances. Therefore, the fact, that the grounds of detention were issued to a messenger on the 22nd March is not a sufficient ground for holding, that, the grounds had been communicated to the detenu on the same day. With respect to the statement made in the counter-affidavit, referring to Home (Special) Department's Order No. 4149 dated the 8th April, 1972, the order is not forthcoming at all. Therefore, it is not possible to hold that. Section 8(1) of the Act was complied with, by recording reasons in writing for communicating the . Therefore, it is not possible to hold that. Section 8(1) of the Act was complied with, by recording reasons in writing for communicating the grounds of detention to the detenu beyond five days from the date of detention. This is, apart from the fact, that, fifteen days from the date of detention had expired before the 8th April, 1972. Therefore, there is no doubt, in our judgment that, Section 8(1) of the Act was not complied with in material particulars.

3. The second point of law urged on behalf of the petitioner is based on Article 22(5) of the Constitution of India. which reads as follows :-

"When any person is detained in pursuance of an order made under any law providing for preventive detention the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

The learned counsel has argued, that, admittedly, the representation of the petitioner had been

received on the 25th March in the office of the Secretary, Home (Special) Department, Bihar, Patna, and it was rejected so late, that, Article 22(5) of the Constitution of India was violated, as has been laid down by their Lordships of the Supreme Court in more than one case. Reliance is placed specifically on two decisions, one in the matter of Durga Show, reported in 1970 (3) SCC 696, and another, in the case of *Jayanarayan Sukul v. State of West Bengal*, reported in<sup>2</sup> As a matter of fact Jayanarayan Sukul's case was cited by the learned Advocate-General himself. He, on the other hand, has contended, as a preliminary answer to this point, that, Annexure 8 was not really a representation within the meaning of Section 8(1) of the Act. It is contended, that, it was not a petition addressed to the State Government, with a request to revoke the order of detention, or cancel it. In this context, paragraphs 7 and 8 have been referred to, which have been quoted above. We do not think, that, this contention of the learned Advocate-General is valid either. Annexure 8 was addressed to the Under-Secretary to Government, Home (Special) Department, Government of Bihar, Patna, and it is stated therein, that, it was a representation under Section 8(1) of the Act and it alleged, as mentioned earlier, that, the petitioner's detention was bad in law, as he had been arrested on the 17th March and the grounds of detention had been served upon him on the 23rd March, thereby violating the prov. Therefore, it is not possible to hold that. Section 8(1) of the Act was complied with, by recording reasons in writing for communicating the grounds of detention to the detenu beyond five days from the date of detention. This is, apart from the fact, that, fifteen days from the date of detention had expired before the 8th April, 1972. Therefore, there is no doubt, in our judgment that, Section 8(1) of the Act was not complied with in material particulars.

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him on the 23rd March, thereby violating the provisions of Section 8(1) of the Act. It is difficult to hold that, because the petitioner had requested that his representation be placed before the Advisory Board, where the petitioner may also be able to place his case personally, this representation must be ignored as a representation under Section 8(1) of the Act. Now, on the assumption, that, the Chief Minister of the State had rejected the representation of the detenu on the 29th April, 1972, the question is, whether the petitioner's representation had been considered as soon as it could have been considered as required by the law. As early as in Jayanarayan Sukul's case, their Lordships of the Supreme Court laid down the law unambiguously, stating thus :-

"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 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 favor 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 may be seen, that, in Durga Show's case, reported in 1970 (3) SCC 696, their Lordships had stated, that, in that case a delay of sixteen days, which was the minimum out of the three, cases, was a long delay where a person was being detained without trial under a special law relating to preventive detention. In Jayanarayan Sukul's case, their Lordships of the Supreme Court stated, that, it was 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 the governance of the citizens. Therefore, in the instant case, a delay of thirty-four days in the consideration of the detenu's representation by the Government can hardly be said to have been an expeditious consideration of the representation of a person detained under the present Act. In all fairness to the learned Advocate-General, we must state, that, he has drawn our attention to two more cases of their Lordships of the Supreme Court, one in the case of *Prof. Khaidem Ibocha Singh v. State of Manipur*, reported in<sup>5</sup> and another, in the case of *Baidya Nath v. State of West Bengal*, reported in<sup>6</sup> The placitum of first of these two cases states, that, unexplained delay of seventeen days in passing orders on representations made by detenus, who

are detained under Section 3(1)(2) of Orissa Preventive Detention Act, 1970, is, by itself, a sufficient ground for holding that the orders of detention were illegal. Their Lordships had an occasion to consider, in this judgement, Jayanarayan Sukul's case and Durga Show's case. In the second of these cases, the placitum states that, when the representation of the detenu-petitioner had been received on or about the 10th May, 1971, and it was considered by the Government on the 8th June, in the absence of any material which would excuse the delay, the petitioner was entitled to be released. Therefore, the law on the subject is now clear and the question is, whether the supplementary affidavit filed today can lead us to conclude, that, there were sufficient materials which could excuse the delay of about thirty-four days, in the consideration of the detenu's representation. We are of the view that, the several dates given in this supplementary affidavit cannot be held to be sufficient excuse for the delay in considering the detenu's representation. There is, no doubt, as stated before, that, the representation had been received on 25th March, 1972 and all that had happened according to this supplementary affidavit is, that, it went from office to office until it had reached the secretariat of the Chief Minister of the State on the 17th April. There is no clear indication as to when the file had been put up before the Chief Minister of the State thereafter, so that he could pass his order only on the 29th April. In our considered opinion, I, there has been such an inordinate delay in the consideration of the detenu's representation that the detention must be held to be improper. In our opinion, the decisions of their Lordships of the Supreme Court, in the case of *Shyamal Chakravarty v. Commissioner of Police, Calcutta, reported in*<sup>7</sup> and in the case of *Khagen Sarkar v. State of West Bengal, reported in*<sup>8</sup> relied upon by the learned Advocate-General, cannot assist him in his contention, that delay in the consideration of a detenu's representation cannot, by itself, be held to be sufficient for holding, that, the detention is either illegal or improper. It may be noticed, that, Shyamal Chakravarty's case had been referred to by their Lordships of the Supreme Court in Jayanarayan Sukul's case. Therefore, on the views expressed by their Lordships of the Supreme Court on the second point, namely, the point based on Article 22(5) of the Constitution of India, it must also be held, that, the petitioner's detention is illegal.

4. For the reasons given above, we hold that, the detention of the petitioner is illegal. The rule is, therefore, made absolute, and the petitioner is directed to be released forthwith, unless he is required to be detained in any other connection.

Petition allowed.

Cases Referred.

<sup>1</sup>(1877) 2 PD 203

<sup>2</sup> AIR 1970 SC 675

<sup>3</sup> AIR 1970 SC 675

<sup>5</sup> AIR 1972 SC 438

<sup>6</sup> AIR 1972 SC 1198

<sup>7</sup> AIR 1970 SC 269

<sup>8</sup> AIR 1971 SC 2051