

Dharmendra Tewary Vs. State of Bihar and ors.

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Court : Patna

Decided On : Apr-15-1999

Judge : B.P. Singh and S.K. Katriar, JJ.

Appeal No. : Cr. W.J.C. No. 105 of 1999

Appellant : Dharmendra Tewary

Respondent : State of Bihar and ors.

Judgement :

B.P. Singh and S.K. Katriar, J.

1. Heard Counsel for the parties.

2. In this writ petition, the petitioner has prayed for the issuance of writ of habeas corpus and for quashing the order of detention passed by the District Magistrate, Banka, respondent No. 2 contained in his memo No. 524 dated 2-11-1998 which has been passed in purported exercise of power under Section 12 (2) of the Bihar Control of Crimes Act, 1981. He has also challenged the order of the Government of Bihar issued under the signature of the Deputy Secretary, Home (Police) Department, dated 10-11-1998 approving the order of detention passed by the District Magistrate, Banka. He has further prayed for quashing of the order dated 29-12-1998 passed by the State Government confirming the order of detention under Section 21 (2) of the Act. Several grounds have been urged in the writ

petition for quashing of the aforesaid orders. One of the grounds urged in the writ petition is that there has been inordinate delay in consideration of the representation of the petitioner sent from jail.

3. A counter-affidavit has been filed on behalf of respondent No. 2 affirmed by the District Magistrate, Banka, the detaining authority. Apart from other averments in the counter-affidavit, it has been stated in para-graph-6 thereof that the petitioner had submitted his representation to the State Government on 9-11-1998 which was sent to the Home Department by the Jail Superintendent, Banka and was received in the Home Department on 11-11-1998. The representation received from the petitioner was referred to the Advisory Board on 17-11-1998 in view of the provisions of Section 19 of the Bihar Control of Crimes Act, 1981 along' with the detention order and the grounds of detention. On 18-12-1998, i.e. a month later, the representation along with the record was received in the Home Department from the Advisory Board. On the same day, the dealing Assistant placed the file before the Deputy Secretary who after giving his noting endorsed the same to the Home Secretary, and the Home Secretary on the same day sent the representation of the petitioner to the Government for its order. On 24-12-1998, the representation of the petitioner was rejected by the Government and the same was communicated to the petitioner widememo No. 14118 dated 29-12-1998.

4. It has, therefore, been submitted that the representation received from the petitioner has been disposed of within the earliest possible time because the representation remained before the Advisory Board from 17-11-1998 to 18-12-1998 and therefore, it was not possible for the Government to dispose of the same before 18-12-1998, the date on which the file along with the representation was received from the Advisory Board. After the same was received, it was disposed of promptly.

5. The facts of the case are not in dispute, and the plea of the detaining authority is that the representation of the petitioner which had been received in the Home Department on 11-11-1998 could not be disposed of earlier than 24-12-1998 since the same had been sent to the Advisory Board on 17-11-1998 and was received

from the Advisory Board on 18-12-1998. The question which arises for consideration is whether this explanation can be accepted.

6. It is well settled that a detenu has a constitutional right to make a representation before the Government, and that representation has to be considered and disposed of by the Government without delay, because the State is expected to display promptitude in the disposal of matters relating to the detention of a citizen, who is sought to be detained in custody even without trial. The seriousness and promptness with which such a representation has to be disposed of cannot be over-emphasised and in a catena of decisions 'of the Supreme Court and this Court, the State has been cautioned against lethargy and laches on its part in disposing of such representation. A distinction has been drawn between the procedural safeguards provided in a law which authorises preventive detention, and the constitutional guarantee enshrined in Article 22(5) of the Constitution of India. The constitutional guarantee is independent of the procedural safeguards that a law authorising such detention may provide, such as reference to an Advisory Board. The authorities on the subject are legion, but we may only notice some of the decisions of the Supreme Court which have dealt with the question as to whether the State Government may be justified in availing the report of the Advisory Board before passing an order on the representation of the detenu.

7. In *Khairul Haque v. State of West Bengal* (1969) 2 SCWR 529, the Supreme Court observed:

It is implicit in the language of Article 22 that the appropriate Government, while discharging its duty to consider the representation, cannot depend upon the view of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board, There was, therefore, no reason for the Government to wait for considering the petitioner's representation until it had received the report of the Advisory Board. As laid down in *Abdul Karim v. State of West Bengal*, the obligation of the appropriate Government under Article 22(5) is to consider the representation made by the detenu as expeditiously as possible. The consideration by the Government of such representation has to be, as aforesaid, independent of any opinion which may be

expressed by the Advisory Board.

The fact that Article 22(5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation must, when made, be considered and disposed of as expeditiously as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning.'

The observations quoted above emphasised the fact that the appropriate Government under Article 22(5) is to consider the representation made by the detenu as expeditiously as possible, and further that the consideration by the Government of such representation has to be independent of any opinion which may be expressed by the Advisory Board. If the representation is not disposed of expeditiously, the obligation to furnish the earliest opportunity to make representation loses both its purpose and meaning.

8. In *Jayanarayan v. State of West Bengal* : 1970 CriLJ743 , the Supreme Court laid down four cardinal principles which are to be followed in regard to representation of a detenu. The Court observed thus

Broadly stated, four principles are to be followed in regard to representation of 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 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 o the detenu the Government may still exercise the power to release the detenu.

9. In *Sk. Sekawat v. State of West Bengal* : 1975 CriLJ33 , a Constitution Bench of the Supreme Court reiterated the view in *Jaynarayan Sukul* (supra) and observed that the peremptory language of Article 22(5) of the Constitution 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 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 the representation of the detenu and come to its own conclusion whether it is necessary to detain the detenu. 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 against the order of detention. The opinion of the Advisory Board on a consideration of the representation, is no substitute for the consideration of the representation by the State Government.

10. In *Narendra Purshattam Umrao v. B.B. Gujral and Ors.* : 1979 CriLJ469 , the Court observed that the two obligations of the State Government to refer the case of the detenu to the Advisory Board and to obtain its report on the one hand, and to give an earliest opportunity to him to make a representation and consider the representation on the other, are two distinct obligations independent of each other. It is well settled that in case of preventive detention of a citizen, the Constitution by Article 22(5) as interpreted by the Supreme Court enjoins that the obligation of the

appropriate Government to afford the detenu the opportunity to make a representation, and to consider that representation, is distinct from the Government's obligation to constitute a Board and to communicate the representation, amongst other materials, to the Board to enable it to form its opinion and to obtain such opinion.

11. The same principle has been reiterated in *Mohinuddin @ Mom Master v. District Magistrate, Beed and Ors.* : [1987]3SCR668 . Noticing the decision in *Narendra Purshottam Umrao (supra)*, it was laid down that the constitution of an Advisory Board under the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. It goes without saying that the constitutional right to make a representation guaranteed by Article 22(5) must be taken to include by necessary implication a proper consideration of the representation by the authority to whom it is made. The right of representation under Article 22(5) is a valuable constitutional right and is not a mere formality. The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the portals of the Secretariat while the Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the archives of the Secretariat till the Advisory Board submitted its report.

Counsel for the petitioner has also drawn our attention to the recent judgment of the Supreme Court reported in 1999(1) PLJR 48 *Rajammal v. State of Tamil Nadu*, wherein the Supreme Court, reiterating the settled legal position, has emphasised the degree of promptitude and urgency which is expected of the Government in matters relating to preventive detention.

12. Having regard to the authorities on the subject, it is not possible for us to accept the explanation furnished by the State Government for the delayed disposal of the representation made by the detenu. Counsel for the respondents submitted that under Section 19 of the Bihar Control of Crimes Act, 1981, the Government is obliged to place before the Advisory Board the grounds on which the order of detention has been made and representation, if any, made by the person affected by the order. According to him, the Statute casts an obligation

upon the State Government to place the representation before the Advisory Board, and therefore, till the advisory Board submits its opinion, it is not possible for the State Government to dispose of the representation. The first part of the submission is unexceptionable, but the second part of the submission must be rejected, while it is true that the statute casts an obligation upon the State Government to place before the Advisory Board constituted by it the grounds of detention and the representation, if any, filed by the detenu, that is only with a view to enable the Advisory Board to give its fair opinion on the subject having regard to what the detenu has : to say in regard to his detention. As observed by the Supreme Court in several decisions, the State Government has to, independent of the opinion of the Advisory Board, take a decision on the representation of the detenu. The opinion of the Advisory Board is not a substitute for the opinion independently formed by the State Government. Even if the Advisory Board is of the opinion that there are sufficient grounds to detain the detenu, it is still open to the State Government, on a consideration of the representation made by the detenu, to direct his release. The requirement of placing the matter before an Advisory Board is a procedural safeguard provided under the preventive detention law, but the right to make a representation against the order of detention to the State Government, and its immediate disposal by the State Government, is a constitutional right guaranteed by Article 22 of the Constitution of India. It is not obligatory on the State Government to wait for the opinion of the Advisory Board because de hors the opinion of the Board, even if available, the State Government can still take a decision to release the detenu if it is satisfied on the representation made by the detenu that the detention ought not to be continued. That is why it has been consistently held that though the State Government may send a copy of the representation to the Advisory Board for its consideration, it is not obligatory upon it to wait for the opinion of the Advisory Board, if that has the effect of delaying the disposal of the representation made by the detenu.

13. In the instant case for almost a month, the matter remained pending because the opinion of the Advisory board had not been received. This, to our mind, is wholly unjustified and constitutionally impossible and renders further detention of the detenu illegal.

14. We, therefore, quash the order of detention as also the orders of the State Government approving the same and affirming the same under the Act, and direct that the petitioner shall be released forthwith unless required to be detained in connection with any other matter pursuant to any order passed by any Court or authority.

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