

Siraj Sheikh Vs. Magistrate and ors.

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Court : Kolkata

Decided On : Mar-26-1976

Reported in : 1977CriLJ406

Judge : Anil K. Sen and; A.P. Bhattacharya, JJ.

Appellant : Siraj Sheikh

Respondent : Magistrate and ors.

Judgement :

Anil K. Sen, J.

1. This Rule for issue of a writ in the nature of Habeas Corups raises an important issue as to whether the State Government has any obligation to place a representation made by the detenu beyond 30 days from the date of detention but sufficiently before the consideration of the case by the Advisory Board, before the said Board The issue arises on the following facts.

2. The District Magistrate of Murshidabad in exercise of his powers under Section 3 of the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the said Act) made an order on December, 21, 1974, directing the detenu/petitioner to be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of Public order. The said order was duly approved by the State Government on December 31, 1974. The detenu was taken into custody in

execution of the order on January 24 1975. The detenu made a representation On February 28, 1975, i.e., just a few days after the expiry of 30 days from the date of detention. In this representation, he raised his own plea as to why the order and the detention thereunder are unjustified and he further pleaded that he be given an opportunity of being heard by the Advisory Board where he would make further representations in support of his defence. This representation was received by the Home Department on March 4, 1975, and the same was rejected by the appropriate authority on behalf of the State Government on March 11, 1975. A reference to the Advisory Board under Section 10 of the said Act was, however, made prior to the making of the representation on February 13, 1975. The Board took up the case for consideration on March 17, 1976. Unfortunately, though the representation was rejected by the State Government on March 11, 1975, and there was enough opportunity for the State Government to place the said representation before the Advisory Board on March 17, 1975, when the case was taken up for consideration by the Board, the State Government failed to do so. The State Government further failed to produce the detenu before the advisory Board and thus afford him an opportunity to be heard by the said Board as prayed for by him. As a matter of fact, the Home Department forwarded the representation to the Advisory Board on March 18, 1975, but as the case had already been disposed of by the Board no cognizance of the representation could be taken by the Board which received the representation only on March 19, 1975. The Board submitted a report without, however, considering the representation and without hearing the detenu on March 17, 1975, and expressed an opinion that there is sufficient cause for the detention. On the report as aforesaid, the State Government confirmed the detention by an order dated March 29, 1975. The order of confirmation, however, bears the following irregular recital:

And Whereas the said person has made a representation under Section 8 of the said Act against the said detention order and whereas the grounds on which the said detention order was made and the said representation and the report made under Sub-section (3) of Section 3 of the said Act by the District Magistrate, Murshidabad, were placed by the State Government before an Advisory Board constituted by it under Section 9 of the said Act and whereas the said Advisory Board after considering all the materials placed before it has reported that there is

in its opinion sufficient cause for the detention of the said person. Now, therefore, in exercise of the power conferred by Sub-section (1) of Section 12 of the Maintenance of Internal Security Act, 1971 (Act XXVI of 1971), the Governor is pleased hereby to confirm the said detention order No. 3968-C dated 21-12-1974 in respect of the said Shri Siraj Sheikh.

3. On the facts set out hereinbefore it is, however, wholly incorrect to suggest - as suggested in this order of confirmation that the detenu's representation was at all effectively placed before the Advisory Board or that the Board took the same into consideration in making its report.

4. On the facts set out hereinbefore it is well established that if the detenu had any right to have his representation considered by the Advisory Board the same had been denied to him in the present case when the representation not having been forwarded to the Advisory Board in time for its consideration it could not at all be considered by the Advisory Board. On behalf of the detenu petitioner it has been strongly contended that the detenu/petitioner had such a right and infringement of that right invalidates the detention impugned in this Rule. Mr. Banerji, the learned Counsel for the State on the other hand has contended that on the provisions of Section 10 of the said Act, the obligation of the State Government to forward the representation to the Advisory Board arises only in cases where the detenu makes his representation within 30 days from the date of his detention. As according to Mr. Banerji, the reference under Section 10 along with all materials is to be placed before the Advisory Board within 30 days from the date of detention and the time schedule so prescribed is mandatory, there can be no obligation on the part of the State Government to forward or place before the Advisory Board any representation which had not been made by the detenu within 30 days from the date of his detention as in the present case. Therefore, according to Mr. Banerji the representation having been duly considered and rejected by the State Government in the present case and there being no further obligation to forward the same to the Advisory Board, there is no infirmity in law notwithstanding the default referred to hereinbefore which can be said to have rendered the detention invalid:

5. The rival contention so put forward before us raises the issue referred to hereinbefore. Section 10 so relied on by Mr. Banerji provides:

Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within 30 days from the date of detention under the order, place before the Advisory Board constituted by it under Section 9 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report of such officer under Sub-section (3) of Section 3.

6. This provision no doubt prescribes a mandatory time schedule for making a reference to the Advisory Board within 30 days from the date of detention and it further provides that if within the said 30 days there is a representation by the detenu that would be one of the materials to be placed before the Advisory Board along with the reference. Though this provision makes it mandatory for the State Government to place before the Advisory Board any representation made by the detenu and available for placement within 30 days from the date of detention, the same does not impose at the same time any limitation on the detenu's right to make a representation nor does it provide that any representation made after 30 days from the date of detention, need not be entertained or placed before the Advisory Board at all. It only safeguards an early reference to the Advisory Board of every case of detention without trial by rendering the delay to be fatal. The object of this provision is totally different and the legislature in this provision never intended to provide any limitation for making of a representation. Hence in our opinion, it would not be a correct approach to construe this provision in the manner suggested by Mr. Banerji namely, that this provision also prescribes a limitation to the exercise of right of making a representation by the detenu for having the representation considered by the Advisory Board.

7. A person who is subjected to detention without trial has been afforded a constitutional right under Article 22(5) of having an earliest opportunity of making a representation against the order. The constitutional provision prescribes no limitation for exercise of such right nor does the corresponding statutory provision

in Section 8(1) of the said Act. The right to make such a representation being the only remedy provided to a person in detention it would not be proper for us to construe either Article 22(5) or Section 8(1) of the said Act, in such a manner as to curtail the right by reading a period of limitation for exercise of such rights. No doubt an obiter observation of this Court in the case of *Ananda Sankar v. Chief Secy, to the Govt. of West Bengal* : AIR1953 Cal129 may support the contention put forward by Mr. Banerji, but in view of several subsequent decisions of the Supreme Court those observations can no longer be said to represent a correct approach to the issue. At least in three cases of *Shyam Lal v. Commr. of Police, Calcutta* : [1970]1SCR762 , *Rambali v. State of West Bengal* : 1975 CriLJ592 and *Samir Chatterji v. State of West Bengal* : AIR 1975 SC1165 , the Supreme Court in clear terms held that the State Government has an obligation to entertain a representation or even successive representations made by the detenu even after confirmation of the order of detention and the State Government is required not only to dispose of the same on merits but also to have the opinion of the Advisory Board on such representations. As a matter of fact, in the case of *Rambali v. State of West Bengal (Supra)* the Supreme Court held that the State Government's obligation to send a representation to the Advisory Board is not limited to Section 10 only but essentially flows from the State Government's right under Section 14 to revoke any unjustified order of detention and in deciding whether the order is unjustified or not any representation made by the detenu at any time may be taken into consideration and the opinion of the Advisory Board may be sought for on any such representation. These decisions run counter to the observations of this Court in the case of *Ananda Sankar v. Chief Secretary to the Government of West Bengal (Supra)* that the Government is technically correct in not accepting a representation sent by the detenu after the period prescribed by Section 9 of the Act then under consideration (which corresponds to Section 10 of the said Act).

8. The issue now under consideration by us was posed by the Supreme Court in its decision in the case of *Sheikh Sekawat v. State of West Bengal* : 1975 CriLJ33 but was left undecided as on the facts such an issue did not really arise for consideration. There the facts were just the converse; the detenu's representation was duly forwarded to the Advisory Board and the Board considering the representation expressed an opinion that there is sufficient cause for the

detention. On such opinion, the State Government confirmed the detention but had itself failed to consider the representation prior to confirmation; the representation having been considered and rejected after confirmation the Supreme Court held that there was a material irregularity affecting the detention.

9. Reviewing earlier decisions on the subject of representations, the Supreme Court in *Joynarayan v. State of West Bengal* : 1970 CriLJ743 laid down four principles which go to establish twin obligations on the part of the State Government in respect of a representation made by the detenu. The first obligation is that the representation made by the detenu must be considered by the State Government on its merits as early as possible and second obligation is that the representation should also be placed before the Advisory Board for being considered by the said Board. The respective consideration by the State Government and the Board is independent of each other and is the only safeguard provided to a person detained without trial. This principle has been consistently reaffirmed by the Supreme Court in several subsequent decisions including the decision in the case of *Rambali v. State of West Bengal* referred to hereinbefore.

10. In our opinion, the detenu's right to have his representation considered independently both by the State Government and by the Advisory Board flows from the constitutional and statutory provision giving him the right to make such a representation-We have pointed out hereinbefore both the constitutional provision and the statutory provision which confer such a right do not prescribe any limitation. Only limitation, however, so far as consideration by the Advisory Board is concerned, would be that the representation should be made in such a manner as to leave an appropriate opportunity to the State Government to place it before the Advisory Board before the Board considers the case within the time prescribed by Section 11. That again is not really a bar of limitation; in such cases where the detenu makes his representation leaving no opportunity to the State Government to place it before the Advisory Board at the time of its consideration of the case, his right is frustrated not by the default on the part of the State Government entailing any infirmity in the procedure but due to the detenu's own laches. But where, as in the present case, the detenu made a representation and the State Government had enough opportunity of placing the representation before the

Advisory Board at the time of its consideration of the case, failure on the part of the State Government to place the representation before the Advisory Board is a positive default on the part of the State Government which leads to denial of an important right to the detenu of having his representation considered by the Board. Mere fact that the detenu had made the representation beyond 80 days from the date of detention does not absolve the State Government of its obligation to place the representation before the Advisory Board, inasmuch as, the obligation flows from the detenu's constitutional and statutory right of being afforded an opportunity of making a representation, Section 10 may have imposed a mandatory time limit for making a reference and also of forwarding the representation when made before the expiry of 30 days within the time prescribed by the said section but the said provision neither expressly nor by necessary implication rules out the obligation to place the representation before the Advisory Board where that is other wise possible only because the representation is not made within 30 days from the date of detention. To import such a limitation by necessary implication from the provision of Section 10 would be curtailing an important right of a person in detention without trial and would not be consistent with the only substantial safeguard prescribed by the Constitution and the statute to such a person of having his representation considered first by the State Government and then by the Advisory Board. If the law has provided such consideration of the representation as the only substantial relief and safeguard to the person detained we find no logic in the contention that a representation made by a detenu which could otherwise be considered by the Advisory Board need not be placed for its consideration only because he had made it 2, 3 or 4 days beyond 30 days of the date of detention. In this view, we must hold that notwithstanding the fact that the representation was made by the detenu beyond 30 days from the date of his detention as there was ample opportunity in the present case still left to the State Government to place it before the Advisory Board at the time the Board took up for consideration the case of the detenu, failure on the part of the State Government to place the representation for consideration by the Advisory Board infringes the detenu's right of being afforded an opportunity of making a representation which invalidates the detention.

11. That apart, we have pointed out the infirmity in the order of confirmation. That infirmity only betrays non-application of mind to relevant facts by the appropriate authority in making the confirmation. Making of an order of confirmation is not a mechanical process. Though an opinion of the Advisory Board to the effect that there is no cause for the detention is binding on the State Government, a recommendation to the contrary is not so. It still remains open for the State Government to review the entire case on the basis of the recommendation of the Advisory Board and then confirm the order of detention if it considers such confirmation to be necessary. It is, therefore, necessary that the appropriate authority on behalf of the State Government must cause an independent mind to bear upon the consideration of the case at that stage. On the facts of the present case, however, it is quite evident that the said authority never applied its mind in that manner but the confirmation was made in a mechanical process, Such confirmation is no confirmation in law far less any confirmation in accordance with law hence the continued detention is rendered invalid.

12. On the conclusion as aforesaid, this application succeeds, the Rule is made absolute and we direct that the detenu be set at liberty forthwith. As this application succeeds, the other application (Cr. Misc. Case No. 2634 of 1975) by the detenu impugning the same detention presented from Jail is disposed of by this order without any further orders being made thereon.

A.P. Bhattacharya, J.

13. I agree.