
(1990) 05 PAT CK 0007
In the Patna High Court
Case No : C.W.J.C. No. 334 of 1989

Awadhesh Shukla @ Bhutkun Shukla	APPELLANT
Vs	
State of Bihar and Others	RESPONDENT

Date of Decision : 17-05-1990

Acts Referred:

Constitution of India, 1950 — Article 22

Citation : (1990) 38 BLJR 1074 : (1991) 1 PLJR 289

Hon'ble Judges : S.C. Mookherji, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.C. Mookherji, J.—The District Magistrate of Muzaffarpur, Shrimati Deepika Padda, by her order dated 26-8-1989, directed the detention of the petitioner u/s 12(2) of the Bihar Control of Crimes Act (in short, the Government of Bihar, Home (Police) department (Annexure- 1). The detention order alongwith the grounds (Annexure-2) was served upon the petitioner on 29-8-1989 while he was in judicial custody in connection with some substantive cases instituted against him under various sections of the Indian Penal Code and Arms Act, details of which have been given in Annexure-2.

2. It is needless to state the material portion of the order of detention, the averments made in the petition, affidavit and the reply thereto, in view of the legal points raised by the petitioner and not controverted on behalf of the State.

3. The first point that has been taken is that the order of confirming the detention of the petitioner having been passed by the State Government without considering the representation of the petitioner, his detention was unlawful, as being in violation of Article 22(5) of the Constitution and Section 17 of the Bihar Control of Crimes Act. Before this point is taken up for consideration, It is necessary to state certain admitted date wise events.

4. On 19-8-1989, the petitioner surrendered in the court of Chief Judicial

Magistrate, Muzaffarpur in Barhmpur P.S. Case No. 84 of 1989. On 26-8-1989, the order of detention was passed and the same along with the grounds was served on him in jail on 29-8-1989. The State Government approved the order of detention on 6-9-1989. The matter was referred to the Advisory Board on 15-9-1989. The detenu (petitioner) submitted his representation on 28-9-1989 and on the following day, it was forwarded to the State Government in the Home (Police) department, where it was received on 16-10-1989. The Advisory Board considered the case and by its order dated 12-10-1989 opined that there was sufficient ground to detain the petitioner. On 17-10-1989, the representation was sent to the concerned department. On 21-10-1989, the Government in Home (Police) Department, asked for comments from the District Magistrate, Muzaffarpur and on the same date confirmed the order of detention (Annexure-B). On 26-10-1989, the comments of the District Magistrate, Muzaffarpur, were received in the Home (Police) Department. On 30-10-1989, the District Magistrate, Muzaffarpur was asked by the State Government to send the original copy of the representation and it was received on 15-11-1989. It was rejected by the State Government on 23-11-1989 and communicated to the detenu (Petitioner) on 27-11-1989 and received by him on 20-11-1989.

5. From the dates referred to above, it is manifest that on the basis of the opinion of the Advisory Board, the order of detention was confirmed on 21-10-1989 by the State Government (Annexure-B) without considering the representation of the petitioner although it was received on 16-10-1989. The order of rejection was communicated to the petitioner (Annexure-1) which runs as follows:

Whereas the Advisory Board in its opinion has held that sufficient grounds exist for detention of Sri Awadhesh Shukla alias Bhutkun Shukla son of late Ram Das Shukla, Mohalla Nayatola, P.S. Kaji Mohammadpur, district Muzaffarpur.

Now, therefore, in exercise of the powers conferred by Section 2(1) read with Section 22 of the Bihar Control of Crimes Act, 1981 (Act 7 of 1981), the State Government have been pleased to confirm the order of detention on 157 dated 26-8-1989, made by the District Magistrate, Muzaffarpur u/s 1(2) of the said Act in respect of Sri Awadhesh Shukla son of late Ram Das Shukla shall remain in detention till 28-8-1990.

6. Now, in support of the first contention, the learned Counsel for the petitioner has relied upon two decisions of the Supreme Court wherein a similar point arose for consideration. Following the principles laid down in an earlier decision *Jayanarayan Sukul Vs. State of West Bengal*, *Sk. Sekawat Vs. The State of West Bengal*, observed that:

It is now well settled by a decision of five Judges of this Court in *Jayanarayan Sukul Vs. State of West Bengal*, 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 making a representation against the order of detention would become illusory if there was 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. 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 against the order of detention. The opinion of Advisory Board, on a consideration of the representation, is no substitute for the consideration of the representation by the State Government. This Court, speaking through Ray., J., as he then was in *Jayanarayan Sukul Vs. State of West Bengal*, enunciated the following four principles to be followed in regard to the 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 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 Government of the citizens. A citizens' 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 alongwith 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 alongwith 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. 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 has been further observed that;

Where the detenu made a representation against the order of his detention and the State Government without considering the representation confirmed the

order of detention, it must be held that the State Government failed in its obligatory duty and that the confirmation of detention was in violation of Section 7 of the Act and Article 22(5) of the Constitution and, therefore, invalid. The subsequent consideration and rejection of the representation could not cure such invalidity of the confirmation of the order of detention and consequently, the detention was illegal and void.

7. In the instant case, the language of Section 17 of the Act and of Article 22(5) of the Constitution makes it obligatory on the State Government to consider the representation made by the detenu as soon as it is received by it. The opinion of the Advisory Board is no substitute for the consideration of the representation by Government. It is not in controversy that the representation was received by the Government before it confirmed the order of detention but it did not consider it. The subsequent consideration and rejection of the representation of the petitioner would not cure the invalidity of the order of confirmation and therefore, must be held to be illegal and void as has been held in the decision referred to above.

8. The second point that has been raised is that there was a total non-application of mind on the part of the detaining authority while passing the order impugned which is apparent from the fact that the said authority was not even aware of the position that the detenu was already in custody in connection with some substantive case. But the order of detention shows that it was passed under an impression that he (petitioner) was as large and therefore, his detention was necessary in view of his involvement in a number of cases. This position has not been controverted by the learned Counsel appearing on behalf of the State. From a perusal of the order of detention, it will appear that nowhere there is any indication that while passing the order the detaining authority was aware of the fact that the petitioner was already in jail and was of the view that there was likelihood of his coming out of jail in near future and therefore, an order of detention was necessary. In this connection, decisions of the Supreme Court in 1985 SCC 144 ; Anant Sakharam Raut Vs. State of Maharashtra and Another, ; N. Meera Rani Vs. Government of Tamil Nadu and Another, ; N. Meera Rani v. State of Tamil Nadu and Ors. may be seen. It is now well-settled, in view of a number of decisions of the Supreme Court including ones referred to, that in the event of non-application of mind of the detaining authority, while dealing with the detention order cannot be sustained.

9. The third ground that has been placed is that the representation of the petitioner was not considered within a reasonable time and this delay in consideration of representation vitiated the order of detention.

10. It is not in controversy that the representation of the petitioner filed on 28-9-1989, was finally disposed of on 21-11-1989 by the State Government, i.e. much after the order of confirmation of the detention was passed. The delay in disposing of the representation has been sought to be explained in the counter affidavit that due to the strike of the non-gazetted employees of the State

Government, it could not be disposed of earlier. This can hardly be a ground for explaining the delay as officials and authorities, who were to deal with the representation, etc. were not on strike. There was, therefore, no special reason/compelling circumstances to dispose of the representation within a reasonable time. Thus, so this ground also the order of detention cannot be sustained (See Satya Deo Prasad Gupta Vs. The State of Bihar and Others, Devi Lal Mahto Vs. State of Bihar and Another, and Aslam Ahmed Zaire Ahmed Shaik Vs. Union of India and Others, .

11. For the reason stated above, the order of detention cannot be sustained and accordingly, the same as contained in Annexures 1 and 2 are quashed. The application is allowed. No costs. Let the petitioner be released forthwith, if not wanted in any other case.