

(1972) 04 CAL CK 0006

In the Calcutta High Court

Case No : Criminal Misc. Case No. 1304 of 1971

Mewalal Agarwalla

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 19-04-1972

Acts Referred:

Constitution of India, 1950 — Article 22(5)
Criminal Procedure Code, 1898 (CrPC) — Section 491
Maintenance of Internal Security Act, 1971 — Section 3(1), 3(2), 8
Preventive Detention Act, 1950 — Section 10

Citation : 76 CWN 892 : (1972) 2 ILR (Cal) 435

Hon'ble Judges : N.C. Mukherji, J;Anil K. Sen, J

Bench : Division Bench

Advocate : N.C. Banerjee and Mahitosh Majumbar, for the Appellant; Mukti Prasanna Mukherjee and Bhaskar Sen, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Sen, J.—This Rule was issued on an application u/s 491 of the Code of Criminal Procedure. The Petitioner before this Court is the brother of the detenu Omprokash Agarwala. The subject-matter of challenge is the present detention of the aforesaid detenu under an order dated December 6, 1971, passed by the District Magistrate, Burdwan, in exercise of his powers u/s 3(1) read with Section 3(2) of the Maintenance of Internal Security Act (XXVI of 1971). The object of detention is to prevent the detenu from acting in any manner prejudicial to maintenance of public order.. Such detention rests on three grounds set out in the grounds of detention which are proximately related to and appear to us to be quite relevant to the object of detention. But even then, for reasons given hereunder, the detention must fail for non-fulfillment of the obligations enjoined by Article 22(5) of the Constitution.

2. Though the order is One dated December 6, 1971, the detenu was actually arrested and put to detention under the order on December 12, 1971. But the order of detention and the grounds were served on the detenu on December 13,

1971. In paras. 9 and 10 of the present application the Petitioner has clearly made out a case that the detenu who had read upto Class II only is for all practical purposes an illiterate man, he knows a little of Hindi language but is completely ignorant of English and Bengali. The order and the grounds were served in English language only which the detenu was unable to read or appreciate. It is further stated in para. 10 that when he was being so served with such grounds the detenu requested the serving Police officer to grant him copies in Hindi language, but his request was refused by the Police officer. It should be noted that such a specific complaint was made in the application u/s 491 of the Code of Criminal Procedure moved in this Court within ten days from the date of detention. It is not in dispute that the copy of the grounds served on the detenu was in English language.

3. In contesting this Rule at first an affidavit-in-opposition was filed by the Respondent No. 2, i.e. the detaining authority who is the District Magistrate of Burdwan. Swearing the relevant paragraphs of this affidavit as true to his own knowledge the Respondent No. 2 in para. 9 denied that the detenu is an illiterate man or that he does not understand English or that he could not understand the contents of English grounds even when it had been explained to him in Hindi language. In para. 10 the Respondent No. 2 further denied that the detenu requested the serving Police officer to grant him copies of orders in Hindi or that the detenu was seriously handicapped or could not make any proper representation or that he did not understand the ground nor could he appreciate the same as alleged. Such a statement by the detaining authority was not acceptable to this Court as obviously such statement could not have been within the personal knowledge of the Respondent No. 2. At least, no circumstance was disclosed in this affidavit wherefrom this Court could satisfy itself that the Respondent No. 2 could have any personal knowledge about such matters. Such statement was not based on any information nor any source of information or knowledge disclosed in the affidavit. Such being the position the case was adjourned and a further opportunity was given to the Respondents to meet the relevant allegations. Accordingly a supplementary affidavit-in-opposition has been filed by one Gurucharan Sarkar, the officer-in-charge of Jamuria P.S. who claims to have served the copy of the grounds on the detenu on December 13, 1971. In para. 2 of this supplementary affidavit he states that on December 13, 1971, he served a copy of the memorandum containing grounds on the detenu in the presence of witnesses and the detenu accepted the same and affixed his signature on a copy as a token of his acceptance. This acknowledgment is not disclosed though it is conceded by Mr. Mukherjee, who is appearing on behalf of the State, that the copy served was in English language. The deponent then goes on to state in para. 3, I, therefore, in the presence of the aforesaid witnesses explained the said grounds of detention to the detenu in a manner intelligible to him and the detenu perfectly understood the same and did not make any complaint whatsoever. The detenu never asked for any Hindi translation of the said grounds from me. Gross divergence and reckless nature of averments made

in the two affidavits filed on behalf of the Respondents have made it difficult for us to place any reliance on the statements controvert the allegations made in paras. 9 and 10 of the petition. It should be noted that the Respondent No. 2 himself in his affidavit has denied the claim that the detenu does not understand English language. But this claim is not denied by the serving Police officer in his supplementary affidavit-in-opposition. We have already found the statement of the Respondent No. 2 to be unacceptable. Such being the position we feel inclined to accept the case of the Petitioner that the detenu is completely ignorant of English language. Not only does the relevant statement made on oath by the Petitioner stand uncontroversial but also we have satisfied ourselves with reference to the original records produced by Mr. Mukherjee from the Home Department that the detenu could only somehow sign his name in the Hindi script and that too not in a masterly manner.

4. The next material discrepancy is in respect of the claim by the Respondents that the grounds though served in English were explained to the detenu by the serving Police officer. While the Respondent No. 2 in his affidavit has stated that it was so explained in Hindi language for reasons given hereinbefore, such statement has been found, by us to be unacceptable. Strangely, the Police officer, however, in his affidavit has not stated that the grounds were so explained in Hindi. It is obvious to us that the Police officer was not bold enough to support the statement of the Respondent No. 2 by claiming that he had explained it in Hindi. On the other hand, he has taken recourse of ambiguity by stating that it was explained in a manner intelligible to him. What this manner is has not been stated. In our considered opinion, such a statement by the Police officer is not acceptable to us particularly when the Petitioner had made a specific case that the detenu knew no language except Hindi and the ground that Was served was not in that language. The serving officer is unable to state on oath that the grounds were explained in Hindi. Accordingly, we find that in the present case the detenu, who is ignorant of English language altogether, was served with the grounds in English. We further find that the Respondents' claim that the grounds were explained to the detenu has not been established.

5. The Petitioner had made a further claim in paras. 9 and 10 of the petition to the effect that the detenu had asked for copies in Hindi from the serving officer, but that was denied and such refusal had prejudiced him in the matter of making his representation. This has been denied by the Respondent No. 2 but not in an acceptable manner. The Police officer has merely denied that the detenu had asked for any Hindi copy of the grounds from him. This statement is incorporated in the same para, 3 of the supplementary affidavit, a part of which for reasons given hereinbefore, had been found by us to be unacceptable. Such being the position we feel, diffident to place much reliance on this part of the statement also. In ordinary circumstances, it would be more natural to think that a person who has been served with a ground in a language not known to him would ask for an intelligible copy. But even if we accept this part of the statement of the Police officer it would not, in our opinion, alter the position as within ten days of

the serving of the grounds this claim had been reiterated on behalf of the detenu in the application to this Court.

6. On the findings as aforesaid an important question arises for consideration as to whether there has been any infringement of Article 22(5) of the Constitution., On our findings made hereinbefore the position is that the detenu in the present case has been served with a copy of the grounds in a language not known to him. Article 22(5) lays two mandatory obligations on the detaining authority. In the first place, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made. Secondly, such authority shall afford from the earliest opportunity of making a representation against the order. Section 8 of the Maintenance of Internal Security Act, 1971, lays down that ordinarily the grounds must be served not later than within five days from the date of detention. It has now been clearly held by the Supreme Court that communication in Article 22(5) means bringing home to the detenu effective knowledge of the facts and circumstances on which the order of detention is based and, therefore, communication must necessarily mean communication in a language and in a manner understandable to the detenu. Reference may be made to the decision of the Supreme Court in the cases of *Harikisan Vs. The State of Maharashtra and Others*, and *Hadibandhu Das Vs. District Magistrate and Another*, . Therefore, we must hold that in the present case there has been a failure of the communication of the grounds as enjoined by Article 22(5) of the Constitution.

7. Mr. Mukherjee appearing on behalf of the State has, however, contended that the two parts of Article 22(5) must be read together. According to him, the obligation to communicate the grounds arises only because the detenu must be given an opportunity to make a representation. Mr. Mukherjee has drawn our attention to a written representation submitted to the State Government by the detenu which is on the Home file. Referring to this document Mr. Mukherjee has contended that this document would clearly establish that the detenu had made an effective representation on each of the grounds so that even if there had been a defect in the matter of communication of the grounds when the detenu had not been prevented from making a representation, the defect does not invalidate "the detention. This fact, however, had not been clearly brought out in either of the two affidavits filed and it is difficult to conclude merely with reference to this document that there could not have at all been any prejudice in the matter of making a representation. That apart, in our opinion, the two rights conferred by Article 22(5) are quite independent and infringement of either would invalidate the detention. No doubt, there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given under- the second part to the detenu to have an earliest opportunity to make a representation, yet the first part is not entirely a corollary to the second. In the case of *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, in construing Article 22(5) the Supreme Court observed? the right to receive the grounds is independent but is thus intentionally bound up and connected with the right to

make the representation.

That Supreme Court further observed? in our opinion, it is, therefore, clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds is quite different.

In our opinion, therefore, the two parts of Article 22(5) lay down two mandatory obligations conferring correspondingly two rights to the detained person so that if there is a failure on the part of the detaining authority to discharge the first obligation of communicating the grounds, such failure is never cured by the fact that the detenu by some other process procures the grounds and makes a representation. We must not lose sight of the fact that these obligations have been laid down by the Constitution to provide the minimum safeguard to a person detained without trial. Furthermore, to accept the contention of Mr. Mukherjee that the failure of the first part of the obligation under Article 22(5) is curable in cases where effective representations have ultimately been made would be inconsistent with the mandatory character of the obligation provided for and would further nullify the time limit prescribed for communication of the grounds by Section 8 of the Maintenance of Internal Security Act, 1971. It would be useful to refer to the decision of the Supreme Court, in the case of *The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another*, where the Supreme Court overruled a similar contention there raised by the Attorney-General. In that case an objection was raised that the grounds or some of them were vague. The learned Attorney-General in meeting the said objection put forward an alternative contention that even if the grounds were vague when u/s 10 of the Preventive Detention Act (the detention there being under the said Act) the detenu was entitled to be heard in person before the Advisory Board he would have the opportunity of getting the necessary particulars through the Board. This contention was, however, not accepted by the Supreme Court and it was observed?

the question, however, is not whether the Petitioner will in fact be prejudicially affected in the matter of securing his release by his representation, but whether his constitutional safeguard has been infringed.. Therefore, in order to detain a person validly the detaining authority must discharge both the mandatory obligations cast on him; if he fails to discharge the first obligation the detention must fail and he cannot be allowed to plead that as the detenu had otherwise made the representation his failure is of no consequence. To accept such a plea on the part" of the detaining authority would really mean wiping out the first part, of Article 22(5) in certain cases. Such a construction should, in our opinion, always be avoided. This being the position, when on our findings there has been a failure of the communication of the grounds the detention must be held to be not in accordance with law and this would be so even if we accept the submission of Mr. Mukherjee that in the present case notwithstanding such failure the detenu

had otherwise made a representation to the State Government.

8. On the conclusions as above this application succeeds and the Rule is made absolute.

9. We direct that the detenu be set at liberty forthwith.

10. We further direct that a copy of this order be forwarded to the District Magistrate for information and for taking, appropriate steps in future to see that that the grounds are communicated in a language known to the detenu.

N.C. Mukherji, J.

11. I agree.