
(1973) 09 MP CK 0004

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 420 of 1973

Santosh Bharti

APPELLANT

Vs

State of Madhya Pradesh and another

RESPONDENT

Date of Decision : 05-09-1973

Acts Referred:

Constitution of India, 1950 — Article 22

Citation : (1974) ILR (MP) 368 : (1974) JLJ 33 : (1974) MPLJ 47

Hon'ble Judges : M.L. Malik, J;G.P. Singh, J

Bench : Division Bench

Advocate : S.C. Dutt, for the Appellant; Y.S. Dharmadhikari, Advocate General for State, for the Respondent

Final Decision : Allowed

Judgement

G.P. Singh, J.

This is an application by one Santosh Bharati u/s 491 of the Code of Criminal Procedure for issuance of a writ of habeas corpus for his release.

The facts are that on 4th June 1973 the District Magistrate, Jabalpur, issued an order u/s 3 (1)(a)(ii) of the Maintenance of Internal Security Act, 1971 for detention of the petitioner in the Central Jail, Jabalpur. That order was slightly modified on 7th June 1973 and the petitioner was ordered to be detained in the District Jail, Rewa. On 8th June 1973 the grounds of detention were served on the petitioner. In paragraph 4 of these grounds the District Magistrate pointed out that the petitioner had a right of representation to the State Government against the order and that he had also "a right to claim personal appearance before the Advisory Board". The detention order passed by the District Magistrate was confirmed by the State Government u/s 5 (b) of the Act on 12th June 1973. On 2nd July 1973 the Chairman of the Advisory Board (constituted under the Act) issued the following notice to the petitioner:

The meeting of the Advisory Board constituted under the Maintenance of Internal

Security Act, 1971, is fixed for Saturday, the 28th July 1973, at 11.00 A. M. in my Court Room at Jabalpur, for considering the propriety of your detention under the said Act. If you desire to appear personally before the Advisory Board, you may intimate the District Magistrate, Jabalpur, through the jail authorities, about your intention to do so, who would make arrangement for your presence before the Advisory Board on the abovesaid date.

It will appear from the aforesaid notice that the meeting of the Advisory Board was to be held on 28th July 1973 and it was intimated to the petitioner that in case he desired to appear personally he was to intimate the District Magistrate through the jail authorities about his intention to do so and the District Magistrate was to make arrangement for the petitioner's appearance before the Advisory Board on the said date. In pursuance of this notice, the petitioner on 24th July 1973 sent the following intimation through the jail authorities to the District Magistrate:

No arrangement was made for appearance of the petitioner before the Advisory on 28th July 1973. The Advisory Board on 31st July 1973 advised the Government that in its opinion there was sufficient cause for the detention of the petitioner. Representation was addressed by the petitioner to Hon'ble Shri R. J. Bhawe, Chairman, Advisory Board, on 28th July 1973. This was sent by the jail authorities to the District Magistrate who sent the same on 4th August 1973 to the Chairman, Advisory Board. On 25th August 1973 the Government issued an order u/s 12 (1) of the Act confirming the detention order of the District Magistrate.

Learned counsel for the petitioner has argued before us that on the facts stated above the petitioner was denied the right of personal hearing before the Advisory Board which was available to him u/s 11 of the Act and, therefore, his detention was illegal. It is further argued that the representation made by the petitioner against his detention has not at all been considered by the State Government so far which also makes his detention illegal. The learned Advocate General who appeared for the respondents submitted that the petitioner did not claim any personal hearing and, therefore, there is no violation of the right conferred on a detainee u/s 11 of the Act. As regards the representation, he has argued that the representation was addressed to the Chairman of the Advisory Board and, therefore, it was forwarded to him and the State Government did not consider it. It was also submitted that in case it is held that the said representation should have been considered by the State Government, the Government is still prepared to consider the representation. The learned Advocate General did not dispute that if it is held on either of the two points in favour of the petitioner, his detention must be held to be illegal.

The right of personal hearing before the Advisory Board arises u/s 11 (1) of the Act which reads follows:

The Advisory Board shall, after considering the materials placed before it and,

after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within ten weeks from the date of detention.

It is clear from a perusal of the language of the section that if the detainee desires to be heard, a hearing must be afforded to him by the Advisory Board before its report is submitted to the Government. If the detainee does not desire to be personally heard, it would be in the discretion of the Board to hear or not to hear him. It is further clear that the right of hearing in case the detainee so desires is not dependent upon any representation made by him. The right to make a representation and to have it considered by the States Government and the Advisory Board arises under sections 8 and 10 of the Act and Article 22 of the Constitution. But, even when no representation is made by the detainee he may yet claim personal hearing before the Advisory Board and make oral representation to the Board against his detention. Further, even if a representation is made the detainee may not desire to appear before the Advisory Board in person. In our opinion, the right of making a written representation is different and distinct from the right of personal hearing conferred by the Act. Indeed it was so conceded by the learned Advocate-General.

The question, therefore, is whether the petitioner desired to be heard before the Advisory Board. We have already set out the notice issued by the Advisory Board to the petitioner. In that notice it was clearly stated that in case the petitioner wanted to appear personally before the Advisory Board he was to intimate the District Magistrate through the jail authorities. The words "desire to appear personally" in this notice refer to the right of personal hearing conferred u/s 11 of the Act. In pursuance of this notice the petitioner gave an intimation to the District Magistrate, which is in Hindi and which we have earlier quoted and which was admittedly received by the District Magistrate on 26th July 1973. It is clear from the said document that the petitioner stated that he was not bound to make any representation to the District Magistrate, that whatever representation he has to make he will make before the Advisory Board, and that arrangement should be made for his personal appearance on the date fixed by the Advisory Board. A reading of the document will show that there are some words missing in the copy produced before us but the meaning is quite clear that the petitioner was requesting the District Magistrate to make arrangement for his appearance before the Advisory Board on 28th July 1973 so that whatever he may have to say against his detention he may say it before the Board. We are clearly of opinion that by sending the said intimation to the District Magistrate the petitioner "desired to be heard" within the meaning of section 11 of the Act and it was obligatory on the District Magistrate to produce him before the Advisory Board on 28th July 1973 which was the date fixed by the Board for the

appearance of the petitioner. The District Magistrate in his affidavit has admitted that after receipt of the intimation from the petitioner on 26th July 1973 he did not send any information to the Advisory Board nor was the petitioner produced before the Board. The explanation of the District Magistrate is that he had a talk with the Chairman of the Advisory Board on 23rd July 1973 and he was told that the petitioner need not be produced and that in case the Board thought it necessary to hear the petitioner an intimation to that effect will be given to the District Magistrate. The District Magistrate says that as the Advisory Board on 23rd July 1973 had already decided that the petitioner was not to be produced, he did not think it necessary to produce the petitioner before the Advisory Board. The explanation furnished by the District Magistrate proceeds upon a misconception. On 23rd July 1973 the petitioner's intimation claiming personal hearing had not been received and, therefore, the Advisory Board may have opined that the petitioner need not be produced and that if personal hearing was considered necessary the Board will intimate the District Magistrate later. When personal hearing is not claimed by a detainee, the question of hearing him rests entirely within the discretion of the Advisory Board. Therefore, the opinion expressed by the Advisory Board on 23rd July 1973 was correct as till then the petitioner's intimation claiming personal hearing had not been received. But, when on 26th July 1973 the petitioner's intimation was received by the District Magistrate claiming personal hearing and requesting him to produce the petitioner before the Advisory Board, it was obligatory on the District Magistrate to produce the petitioner before the Board. Even if there was some doubt, the District Magistrate should have informed the Board that the petitioner has claimed personal hearing and direction should have been sought whether the petitioner should be produced before the Board. If, as stated in the affidavit, the situation in Jabalpur was such that it was not advisable to bring the petitioner here, the Advisory Board could have met at Rewa or postponed the hearing. Be that as it may, the fact remains that though the petitioner intimated his desire to be heard in the manner required by the notice of the Advisory Board, he was not heard and report of the Board was submitted to the Government without hearing him. The procedural requirement in section 11 of the Act that a detainee, if he so desires, must be heard is a provision enacted for protection of the interest of the detainee. Provisions of this nature made in an Act which affects the liberty of the subject must be construed to be mandatory. A report of the Board which is submitted without affording an opportunity of hearing to the detainee when he desires to be heard must be held to be invalid and detention continued on the basis of such an invalid report must also be held to be invalid. Denial of opportunity of hearing to the petitioner has thus resulted in making his detention illegal.

Since we have accepted the first point raised on behalf of the petitioner, it is not necessary to examine the correctness of the second point.

The petition is allowed and we order that the petitioner be set at liberty forthwith.