PETITIONER:
STATE OF ANDHRA PRADESH & ANR.

Vs.

RESPONDENT:
BALAJANGAM SUBBARAJAMMA

DATE OF JUDGMENT27/10/1988

BENCH:
SHETTY, K.J. (J)
BENCH:
SHETTY, K.J. (J)
OZA, G.L. (J)

CITATION:
1989 AIR 389 1988 SCR Supl. (3) 620
1989 SCC (1) 193 JT 1988 (4) 441
1988 SCALE (2)1096

ACT:
Constitution of India, 1950: Articles 22, 226, 136 and Schedule VII Entry 9 of List 1, Entry 3 of List III--Preventive detention--Power of legislation--Safeguards provided in the Constitution--Advisory Board--Right to representation by legal practitioner--Whether permissible.
%
Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980: Section II--Advisory Board--Right to representation by a lawyer at proceedings--Whether permissible High ranking police officers appearing on behalf of Government and detaining authority before Advisory Board--Detenu not permitted to have representation through a legal practitioner--Quashing of the detention order by the High Court--Justified.

HEADNOTE:
An order was passed by the District Magistrate, Nellore, directing the detention of the respondent under the Prevention of Black Marketing and Maintenance of supplies of Essential Commodities Act, 1980. The State Government approved the detention and referred the matter to the Advisory Board under section 10 of the Act. The detenus. representation was also forwarded by the Government to the Advisory Board. The Advisory Board heard the detenu and the top ranking police officers, who represented the State, and expressed the opinion that there was sufficient cause for the detention of the respondent. The Government agreed with the opinion and confirmed the respondent's detention for a period of six months.

The detenu challenged the validity of the order of detention. The High Court allowed the writ petition. The High Court found that there was unequal treatment by the Advisory Board in considering the representation of the detenu.

Dismissing the appeal, it was,

HELD: (1) The Act by s. 11(4) expressly denies representation through a legal practitioner. The Board may hear any person it necessary. If the detenu desires to be

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heard, the Board may hear him also. But no person has a right to be represented by a lawyer, much less the detenu. This provision is in conformity with Art. 22(3)(b) of the Constitution. [626B-C]

(2) The power to detain a person without trial is a serious In-road into the liberty of individuals. It is a drastic power capable of being misused or arbitrarily exercised. The framers of our Constitution were not unaware of it. They had, therefore, specially incorporated in the Constitution enough safeguards against the abuse of such power. [630G-H]

(3) The Advisory Board is a constitutional imperative. It has an important function to perform. There is no particular procedure prescribed for the Advisory Board since there is no lis to be adjudicated. Section 11 of the Act provides only the broad guidelines for observance. The Advisory Board, however, may adopt any procedure depending upon varying circumstances. But any procedure that it adopts must satisfy the procedural fairness. [631F-G]

(4) It is important for laws and authorities not only to be just but also appear to be just. Therefore, the action that gives the appearance of unequal treatment or unreasonableness-whether or not any substance in it--should be avoided by the Advisory Board. It is the duty of the Advisory Board to see that the case of detenu is not adversely affected by the procedure it adopts. It must be ensured that the detenu is not handicapped by the unequal representation or refusal of access to a friend to represent his case [632B-C]

(5) In the instant case, since the Advisory Board has heard the high ranking officers of the Police Department and others on behalf of the Government and detaining authority it ought to have permitted the detenu to have the assistance of a friend who could have made an equally effective representation on his behalf. Since that has been denied to the detenu, the High Court was justified in quashing the detention order. 1632D-E]

A.K. Roy v. Union of India, [1982] 2 SCR 272; Kavita w/o Sunder Shankardas Devidasani etc. v. State of Maharashtra, [1982] 1 SCR 138; Nand Lal v. State of Punjab, [1982] I SCR 718; Johney DaCouto v. State of Tamil Nadu, AIR 1988 SC 109, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Petition for Special Leave to Appeal (Crl) No 1783/1988.

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From the judgment and Order dated 14.4.1988 of the Andhra Pradesh in W.P. No. 4454 of 1988.

G. Ramaswamy, Additional Solicitor General and T.V.S.N. Chari for the Petitioners.

A. Subba Rao for the Respondent.

The Judgment of the Court was delivered by

K. JAGANNATHA SHETTY, J. This appeal by special leave is directed against the judgment dated April 14, 1988 of the High Court of Andhra Pradesh in writ petition No. 4454 of 1988 whereby the order of detention passed against the respondent under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 ("The Act") was quashed.

Briefly stated the facts are these: The respondent was said to have smuggled paddy from Andhra Pradesh to Tamil Nadu. During the watch kept by the Inspector, Vigilance

Cell, Civil Supplies Department, Nellore on the night of November 4, 1987 a lorry bearing No. MDN-8505 carrying 125 bags of paddy was spotted when it was trying to go to Tamil Nadu avoiding check post. The lorry was chased by the Inspector of Police and his staff. The driver suddenly stopped the lorry, but the persons in the vehicle took the heals jumping out there-from and disappeared in the bushes. The respondent was identified by the Inspector of Police and his staff in the head lights of the jeep in which they were chasing. The driver of the vehicle was apprehended after a hot chase, but not the respondent. From the interrogation of the driver, it was established that on November 4, 1987, the respondent along with two others were in the cabin of the lorry and they were responsible for transporting paddy to Tamil Nadu. The paddy and the lorry were seized by the Inspector. A criminal case was registered against the driver under the Essential Commodities Act and the Andhra Pradesh Rice Procurement (Levy) Order, 1984. When the investigation of that case was proceeding, Additional Superintendent of Police, Nellore sent proposals to the District Magistrate for detaining the respondent under the Act. The District Magistrate passed an order dated December 24, 1987 directing the detention of the respondent. On January 4, 1988, the State Government approved the detention. On January 11, 1988 the State Government acting under sec. 10 of the Act refered the matter to the Advisory Board.

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On January 27, 1988, the detenu submitted a representation through the Superintendent, Central Prison where he was detained to the Chairman of the Advisory Board and to the Chief Secretary, Government of Andhra Pradesh and also to the detaining authority. The Government forwarded the representation to the Advisory Board. On January 29, 1988, the Advisory Board met and heard the detenu and the officers on behalf of the Government. There were high ranking police officials representing the Government. The Advisory Board after hearing those officers and the detenu made an order:

"We have heard the detenu, who has been produced before us and considered his written representation. We have also heard Sri V. Appa Rao, I.G.P. (Spl), Vigilance, Sri C.R. Naidu, Addl. S.P. (Vigilance), Hyderabad, Sri N. Chandramouli, D.S.P. (Vigilance), Nellore and Sri Nageswara Rao, Incharge Joint Collector, Nellore District. We have perused the grounds of detention and other connected papers.

OPINlON

We are of the opinion that there is sufficient cause for the detention of Balajangam Subaramaiah Subaramaiah Subbarami Reddy S/O Changaiah.

Chairman
Member
Member"

The Government agreed with the opinion and confirmed the detention for a period of six months. The detenu challenged the validity of the order of detention before the High Court. The High Court allowed the writ petition and quashed the order of detention. The High Court found that there was unequal treatment by the Advisory Board in considering the representation of the detenu. The Advisory Board having decided to hear the top ranking police officers like the Inspector General of Police, Vigilance, Additional Superintendent of Police, Vigilance, Deputy Superintendent of Police, Vigilance and Joint Collector of Nellore District ought to have given an equal chance of representation to the detenu by permitting him to be represented by a lawyer or at

least by an official (friend) of an equal rank. The High Court tersely observed:

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"In such circumstances, the Advisory Board ought to have provided the prisoner an opportunity for representation though not by a lawyer at least by some one equally competent like those who appeared for the State. The Government cannot deny the fact that the might of the official representation before the Advisory Board out-weighed by several times the value of the detenu's representation .

The High Court also found that the detenu did write to the Government on January 27, 1988 asking for representation by a lawyer and that request ought to have been acceded to by the Advisory Board when the matter came up before it. The High Court then said:

"We are of the opinion that the dormant right of the detenu for equal representation had become active upon the mode of conducting the proceedings by the Advisory Board. The prisoner in this case could not have envisaged that the High State officials would appear against his case and for the detaining authority. For these reasons. we cannot agree with the contention that the prisoner himself was to blame for not asking the Advisory Board for a lawyer's representation or for equal level of representation before the Advisory Board. As we are of the opinion that Article 22 (5) requires the Advisory Board to afford the prisoner an equal opportunity for representing his case compared with the quality and quantity of official representation allowed for the detaining authority and as we are also of the opinion that the official representation in this case far outweighed in importance the detenu's representation we hold that Art. 22(5) is violated in this case.

These are the findings of the High Court. The question is whether the view taken by the High Court in the premises is justified. In view of the fact that top ranking officials representing the Government were personally heard by the Advisory Board whether the detenu was prejudiced? Whether there was any breach of equality in denying him representation by a lawyer or friend?

The Act by sec. 10 provides for constitution of an Advisory Board. Sub-sec. 2 thereof provides that every such Board shall consist of three persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the appropriate

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Government. Sub-sec. 3 provides that the Government shall appoint one of the members of the Advisory Board who is, or has been, a Judge of a High Court to be its Chairman, etc. Section I0 provides for reference to Advisory Board. In every case where a detention order has been made under the Act, the Government shall, within three weeks from the date of detention of a person, place before the Advisory Board constituted by it, the grounds on which the order has been made the representation, if any, made by the person affected by the order. Section 1I provides procedure to be followed by Advisory Board. It reads:

"(1) 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 seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board, and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential. '

Section 12 provides that where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person

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concerned for such period as it thinks fit. But in case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith.

The Act thus by sec. 11(4) expressly denies representation through a legal practitioner. The Board may hear any person if necessary. If the detenu desires to be heard, the Board may hear him also. But no person has a right to be represented by a lawyer much less the detenu. This provision is in conformity with Art. 22(3)(b) of the Constitution, the scope of which has been explained by a Constitution Bench of this Court. In A. K. Roy v. Union of India, [1982] 2 SCR 272, this Court speaking through Chandrachud, CJ., had this to say (at 339):

"On a combined reading of clauses (1) and (3)(b) of Article 22, it is clear that the right to consult and to be defended by a legal practitioner of one's choice, which is conferred by clause (1), is denied by clause 3(b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of abstract, general principle or on a priori considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said less to be satisfied. It is therefore, necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable."

Learned Chief Justice continued:

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"But then, the Constitution itself has provided a yardstick for the application of that standard, through the medium of the provisions contained in Article 22(3)(b). However, much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is

denied the right of legal representation is unfair, unjust and unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Article 22(3)(b) read with Article 22(1)."

And also said:

"We must, therefore, hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(4)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be a breach of Article 14, if a similar facility is denied to the detenu. We must, therefore, make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view of justifying the detention orders. If that be so, we must clarify that the

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Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not "legal practitioners" or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assist or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them."

Learned Chief Justice also examined the right of a detenu to be represented by a friend if not by a lawyer and in that context observed:

"Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who. in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board s room, may lack the ease and composure to present his point of view. He may be "tongue-tied, nervous, confused or wanting in intelligence", and if justice to he done. he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts disnevelled. Just as a person

who is dumb is entitled, as he must, to he represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial o1 natural justice per se, and therefore, if a statute excludes that facility expressly, it would not be open to the tribunal to allow it. Fairness, as said by Lord Denning M.R., in Maynard v. Osmond, [1977] I Q.B. 240, 253 can he obtained without legal representation. But, it is not fair, and the statute does not exclude that right, that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility."

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There are two decisions of this Court earlier to A.K. Roy, (supra). In Kavita w/o Sunder Shankardas Devidasani etc. v. State of Maharashtra, 11982] I SCR 138, Chinnappa Reddy, J. speaking for a three Judge Bench, observed (at 147):

"Where a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the Government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the Government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have; if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer. He preferred not to do so. In the special circumstances of the present case, we are not prepared to hold that the detenu was wrongfully denied the assistance of counsel so as to lead to the conclusion that procedural fairness, a part of the Fundamental Right guaranteed by Article 21 of the Constitution was denied to him .

In that case, this Court found that there was no denial of procedural fairness which is a part of the Fundamental Rights guaranteed under Article 21 of the Constitution. It was also found that the detenu made no request for representation by a legal practitioner before the Advisory Board.

In Nand Lal v. State of Punjab, [1982] SCR 718, A.P. Sen, J. said (at 723):

It is the arbitrariness of the procedure adopted by the Advisory Board that vitiates the impugned order of detention. There is no denying the fact that while the Advisory Board disallowed the detenu's request for legal assistance, it allowed the detaining authority, to be represented by counsel. It appears that the Advisory Board blindly applied the provisions of sub-s (4) of s. 11 of the Act to the case of the detenu failing to appreciate that it could not allow legal assistance to the detaining authority

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and deny the same to the detenu. The Advisory Board is expected to act in a manner which is just and fair to both the parties."

More recently in Johney D'Couto v. State of Tamil Nadu, AIR 1988 SC 109, Ranganath Misra, J. speaking for a Bench of this Court, said (at 112):

"The rule in A.K Roy's case (supra) made it clear that the detenu was entitled to the assistance of a 'friend'. The word friend' used there was obviously not intended to carry the meaning of the term in common parlance. One of the meanings of the word 'friend', according to the Collins

English Dictionary is "an ally in a fight or cause; supporter". The term 'friend' used in the judgments of this Court was more in this sense than meaning 'a person known well to another and regarded with liking, affection and loyality?. A person not being a friend in the normal sense could be picked up for rendering assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in this view of the matter. was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the appellant was not justified. "

The history of civilised man is the history of incessant conflict between liberty and authority. The concentration of power in one hand and liberty in the other cannot go side by side. Temptation to use the power to curtail or destroy the liberty will be always there. It is found in the history of every country. The power to detain a person without trial is a serious inroad into the liberty of individuals. It is a drastic power capable of being misused or arbitrarily exercised. The Framers of our Constitution were not unaware of it. Some of them perhaps were the worst sufferers being the victims in the exercise of that arbitrary power. They had, therefore, specifically incorporated in the Constitution enough safeguards against the abuse of such power. The power to legislate in regard to preventive detention is located in Entry 9 of List I as well as in Entry 3 of List III in the VII Schedule of the

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Constitution. The safeguards in regard to preventive detention are incoporated under Article 22 of the Constitution. Article 22(4) provides:

"No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless--

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7): or

xxx xxx xxx xx xx xx xx xx xx

Article 22(5) provides:

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

These are the two important constitutional safeguards. The Advisory Board is a constitutional imperative. It has an important function to perform. It has to form an opinion whether there is sufficient cause for the detention of the person concerned. There is no particular procedure prescribed for the Advisory Board since there is no lis to be adjudicated. Section 11 of the Act provides only the broad guidelines for observance. The Advisory Board however, may adopt any procedure depending upon varying

circumstances. But any procedure that it adapts must satisfy the procedural fairness. We need not deal with this aspect in detail since the Advisory Board consists of person who are, or have been or are qualified to be appointed as Judges of a High Court. They are men of wisdom and learning. Their report as envisaged under sec. 11(2) of the Act should provide specifically in a separate part whereof as to

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"whether or not there is sufficient cause for the detention of the person concerned." That opinion as to sufficient cause is required to be reached with equal opportunity to the State as well as the person concerned, no matter what the procedure. It is important for laws and authorities not only to be just but also appear to be just. Therefore, the action that gives the appearance of unequal treatment or unreasonableness--whether or not any substance in it--should be avoided by the Advisory Board. We consider that it must be stated and stated clearly and unequivocally that it is the duty of the Advisory Board to see that the case of detenu is not adversely affected by the procedure it adopts. It must be ensured that the detenu is not handicapped by the unequal representation or refusal of access to a friend to represent his case.

In the instant case, since the Advisory Board has heard the high ranking officers of the Police Department and others on behalf of the Government and detaining authority, it ought to have permitted the detenu to have the assistance of a friend who could have made an equally effective representation on his behalf. Since that has been denied to the detenu, the High Court, in our opinion, was justified in quashing the detention order.

It was, however, sought to be made out for the State that the police officers were present before the Board only to produce the record and they did not do anything further. But the record shows otherwise. The officers were not there only to produce the records. They were in fact heard by the Advisory Board obviously on the merits of the matter and that makes all the difference in the instant case.

In the result, we agree with the conclusion of the High Court and dismiss this appeal.

R.S.S. Appeal dismissed.