

PETITIONER:
SHARAD KUMAR TYAGI

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH & ORS.

DATE OF JUDGMENT 18/01/1989

BENCH:
NATRAJAN, S. (J)
BENCH:
NATRAJAN, S. (J)
DUTT, M.M. (J)

CITATION:
1989 AIR 764 1989 SCR (1) 257
1989 SCC (1) 736 JT 1989 (2) 21
1989 SCALE (1) 138

ACT:

National Security Act 1980 Sections 3(2), 7(2) and 11--Detenu-Demanding Chauth for gundagardi of mango--On refusal to pay-Threatening contractors and shop-keepers--Reports lodged with police--Whether incidents affect 'Law and Order' or 'maintenance of public order'--Detention order--Whether valid.

Advisory Board--Representation by friend--Duty of detenu to make the request.

Detention order--Challenge to---On ground of delay in arrest of detenu--When sustainable.

HEADNOTE:

On April 5, 1988 an order of detention was passed against the petitioner in the writ petition under s. 3(2) of the National Security Act. He could not be served with this order and taken into preventive custody as he was absconding. He was treated as an absconder and resort was had to s. 7(2) of the Act. A proclamation was obtained against him under Sections 82 and 83 of the Criminal Procedure Code 1973 and was executed on May 5, 1988. He surrendered thereafter in Court on July 4, 1988 and was sent to the District Jail where he was served the detention order and the grounds of detention on July 5, 1988.

In the grounds of detention three incidents were enumerated indicating that the petitioner had acted in a manner which was against the maintenance of public law and order situation. The incidents were:

(1) On July 8, 1987 the petitioner had gone along with his associates and threatened the contractor of a mango garden that fees for goondagardi (Chauth) should be paid to him and assaulted the contractor. The matter was reported to the police who registered a case under Sections 301 and 323 I.P.C..

(2) On February 11, 1988 the petitioner threatened a shopkeeper that he should pay Rs. 10,000 immediately failing which he would killed. The shopkeeper reported the matter to the police who had

258
registered a case under s. 506 I.P.C.

(3) On March 3, 1988 the petitioner taking a Revolver in

his hand moved in the market area and, threatened the shopkeepers if they do not pay 'Chauth' they could not open their shops. On account of this threat the entire market was closed.

The grounds of detention also informed the petitioner that he could make a representation under s. 3 of the Act and that the matter would be submitted under s. 10 to the Advisory Board, and that he could make any representation for the consideration of the Board.

The meeting of the Advisory Board was fixed on August 2, 1988. The Board considered the written and oral representations of the petitioner and gave a report that there was sufficient cause for the detention of the petitioner. The State Government accepted the report of the Advisory Board and passed a further order on August 17/18, 1988 confirming the detention of the petitioner.

In the writ petition to this Court the detention order was assailed on the following grounds:

(1) The three grounds set out in the grounds of detention are not incidents which would affect the maintenance of public order or the even tempo of the life of the community.

(2) the third incident has been concocted in order to give credibility to the detention order. (3) The petitioner was denied the opportunity to have the assistance of a friend when he appeared before the Advisory Board, and (4) That the Central Government had not considered the petitioner's case when the State Government sent a report under section 3(5) of the Act and the nonapplication of mind by the Central Government vitiates the detention of the petitioner.

Dismissing the writ petition,

HELD: 1 .(a) The demand for chauth from the contractor and the attack launched on him would show that it was not a case of singling out a particular contractor for payment of chauth but a demand expected to be complied with by all owners or contractors of mango groves in the locality. In such circumstances the demand made and the attack launched would undoubtedly cause fear and panic in the minds of all the owners and contractors of mango groves in that area, and this would have affected the even tempo of life of the community. [265E-F]

259

l.(b) The incident in the second ground must also be viewed in the same manner in which the first incident has been construed as indicated above. It is not as if the demand and the threat following it were made against Ashok Kumar in an isolated manner. On the other hand, the demand had been made as part of a scheme to extort money from all the shopkeepers under a threat that their continuance of business and even their lives would be in danger if chauth was not paid. This demand would have certainly made all the shopkeepers in that locality feel apprehensive that they too would be forced to make payments to the petitioner. and that otherwise they would not be allowed to run their shops. [265G-H; 266A-B]

l.(c) In so far as the incident in the third ground is concerned, the petitioner is stated to have taken a revolver with him and threatened all the shopkeepers in the market, that if anyone failed to pay 'chauth' he would not be allowed to open his shop and he would have to face the consequences. This incident cannot be considered as merely causing disturbance to the law and order situation but must be viewed as affecting the even tempo of life in the market. [266B-D]

l.(d) Whether an act relates to law and order or to public order depends upon the impact of the act on the life

of the community. In other words if the reach and effect and potentiality of the act disturb or dislocate the even tempo of the life of the community, it will be an act which will affect public order. [266E, G]

In the instant case, it cannot be said that the demands made and threats given by the petitioner to the contractors and shopkeepers as mentioned in the three grounds would have its reach only to the limited extent of affecting the law and order situation, and not go so far as to affect the maintenance of public order. [267E]

Dr. Ram Manohar Lohia v. State of Bihar, [1966] 1 SCR 709; Arun Ghosh v. State of West Bengal, [1970] 3 SCR 288; Nagendra Nath Mondal v. State of West Bengal, [1972] 1 SCC 498; Nandial Roy v. State of West Bengal, [1972] 2 SCC 524 referred to and Gulab Mehra v. State of U.P., [1987] IV SCC 302, distinguished.

2. It is not possible to accept the contention that third incident referred to in the grounds of detention is a concocted altair. The records go to show that H.C. Khajan Singh had promptly reported the incident at the police station and the truth of his report had been verified by Inspector R.C. Verma. [267H; 268A]
260

State of U.P. v. Kamal Kishore Saini, AIR 1988 SC 208 at 213 referred to.

3. Though the Advisory Board had permitted the detenu to appear along with a friend the detenu had failed to take a friend with him. He did not also represent to the Advisory Board that he did not have adequate time to get the services of a friend and that he required time to have the services of a friend. Such being the case, he cannot take advantage of his own lapses and raise a contention that the detention order is illegal because he was not represented by a friend at the meeting of the Advisory Board. He did not also choose to represent to the Advisory Board that he was not given sufficient time to secure the service of a friend. [271C-D; 272B]

4.(a) The Central Government had in fact considered the report sent by the State Government under section 3(5) of the Act, and saw no reason to revoke the detention order in exercise of its powers under s. 14. [272D]

4.(b) The petitioner was absconding and proclamations were made under sections 82 and 83 Cr.P.C. and it was only thereafter the petitioner had surrendered himself in Court. The challenge to the detention order on ground of delay in arrest is not sustainable. This is not a case where the petitioner was freely moving about but no arrest was effected because his being at large was not considered a hazard to the maintenance of public order. [272F]

JUDGMENT:

CRIMINAL ORIGINAL JURISDICTION: Writ Petition (Crl.)
No. 359 of 1988.

(Under Article 32 of the Constitution of India.)

R.K. Jain, R.K. Khanna and A.S. Pundir for the Petitioner.

Yogeshwar Prasad, Mrs. Rachna Gupta, Mrs. Rachna Joshi, Dalveer Bhandari, Ms. C.K. Sucharita and Ms. A. Subhashini for the Respondents.

The Judgment of the Court was delivered by

NATARAJAN, J. This petition under Article 32 of the Constitution of India has been filed by the petitioner to seek the issue of appropriate writs for quashing an order of detention passed against

261

him under Section 3(2) of the National Security Act (hereinafter the 'Act') by the State of Uttar Pradesh and for his release from custody. On April 5, 1988 an order of detention was passed against the petitioner under Section 3(2) of the Act but the petitioner could not be served the order of detention and taken into preventive custody as he was absconding. Consequently he was treated an absconder and resort was had to Section 7(2) of the Act and a proclamation was obtained against him under Sections 82 and 83 of the Criminal Procedure Code on May 4, 1988 and the said order was executed on May 4, 1988. Thereafter the petitioner surrendered himself in Court on July 4, 1988 and he was sent to the District Jail at Meerut where he was served the detention order and the grounds of detention on July 5, 1988.

In the grounds of detention three grounds were set out for the detention of the petitioner and they read as follows:

1. On 8.7.87 at about 9.30 P.M. in the night at Kasba Sardhana, Police Station Sardhana (Meerut) you alongwith your other companions went to the garden of Lala Om Prakash Jain which is in the possession of Yusuf S/o Ismail on contract. You said to Yusuf etc. who were present there that they do not pay the (CHAUTH) fee for GUNDAGARDI of the Mango, therefore, you using abusive language said "Kill the Salas, so they may vanish for ever and you people with an intention to kill Yusuf etc. assaulted them. On the information of Shri Yusuf a case has been registered against you as Crime No. 211 under Sections 307, 323 I.P.C., which is under consideration of the Court. Due to your aforesaid misdeed terror in Sardhana and in District Meerut terrorism has spread and in this way you have acted in such manner which is against the Maintenance of Public Law and order situation.

2. On 11-2-88 at about 11.00 A.M. in the day at the Binauli Road in Kasba and Police Station Sardhana you alongwith your companion Vinay Kumar went to the Shop of Shri Ashok Kumar and you threatened Shri Ashok Kumar that he should pay Rs. 10,000 (Ten thousand) by tomorrow or day after tomorrow otherwise he will be killed. On the basis of information of Shri Ashok Kumar Crime No. 48 under Section 506 I.P.C. has been diarised which is under consideration. Due to your aforesaid indecent terror in Kasba Sardhana and in the District of Meerut terrorism has prevailed and in this way you have acted in such manner which is against the maintenance of the Public Law and Order situation.

262

3. On 3.3.88 in the Kasba of Sardhana, Police Station Sardhana, District Meerut, you taking a Revolver in your hand in the market of Sardhana said to the Shopkeepers that who so-ever will not pay money (CHAUTH), he cannot open the shop in the market, due to which the shops were closed in the market. H.C. Khajan Singh with the help of other employees when tried to arrest you then you ran away on the Motor Cycle alongwith your companion while firing in the air. Information to this effect has been got diarised by HC.

Khajan Singh at Police Station in G.D. No. 14 at 10~10 hours and investigation to this effect has been done by the Investigation Inspector Shri R.C. Verma and on investigation the aforesaid incidents were found correct and entry to this effect has been carried out at G.D. No. 33. By your aforesaid indecent activity in Sardhana and in District Meerut terrorism has prevailed and in this way you have acted in such manner which is against the provisions of Maintenance of Public law and Order situation.

The grounds of detention also set out the following:

(1) The petitioner if he so desires could make representation under Section 8 of the Act to the Home Secretary, Ministry of Home, State Government through the Superintendent of Jail at the earliest possible;

(2) That the papers relating to the petitioner's detention would be submitted under Section 10 of the Act to the Advisory Board within three weeks from the date of detention and that if the representation is received late it would not be considered by the Advisory Board;

(3) That if the petitioner so desired he could also make representation to the Government of India by addressing the representation to the Secretary, Government of India, Ministry of Home (Internal Security Department), North Block, New Delhi through the Superintendent of the Jail, and

(4) That if under the provisions of Section 11(1) the petitioner desired to have a personal hearing by the Advisory Board he should specifically make mention of it in his representation or he should inform the State Government of his desire through the Jail Superintendent.

263

It is common ground that the petitioner made a representation to the Government against his detention and the order passed therefore. Therein he had set out that he wished to have the services of a friend at the time of the meeting of the Advisory Board to make representations on his behalf. The representation was received by the District Magistrate, Meerut on July 15, 1988. After receipt of the comments of the SSP, Meerut the representation along with the comments of the District Magistrate were sent to the State Government on July 21, 1988. Even prior to it the copies of the representation were forwarded to the State Government and the Advisory Board on July 19, 1988. The representation was considered and rejected by the State Government on July 28, 1988 and the petitioner was informed of the same through the Jail Superintendent, Meerut.

The meeting of the Advisory Board to consider the case of the petitioner was fixed on August 2, 1988 and a Radio-gram was sent by the State Government to the District Magistrate and the Superintendent District Jail, Meerut informing the date of the meeting of the Advisory Board. The Radio-gram further set out as follows:

"Board further directs that either District Magistrate or Superintendent of Police to appear before the Board on the date of hearing with all relevant records and on request of the detenu his best friend (non-advocate) may also be allowed to appear with him." A copy of the Radio-gram was sent to the Jail Superintendent and it was shown to the petitioner and his acknowledgement was obtained. The Advisory Board considered the written and oral representations of the petitioner and gave a report that there was sufficient cause for the detention of the petitioner. The State Government accepted the report of the Advisory Board and passed a further order on August 17/18, 1988 confirming the detention of the petitioner. Thereafter the petitioner has come forward with this petition under Article 32 of the Constitu-

tion.

In his petition, the petitioner has raised several grounds to assail his detention, one of them being the non-furnishing of the investigation report of Shri R.C. Verma, Inspector of Police who had verified the truth and correctness of the report of HC 1057 Khajan Singh about the incident which took place on March 3, 1988. However, during the hearing of the writ petition no arguments were advanced in respect of this ground of objection.

Mr. Jain, learned counsel for the petitioner assailed the order of detention on the following grounds:

264

(1) All the three grounds set out in the grounds of detention even if true, are not incidents which would affect the maintenance of public order and at best they can be construed only as offences committed against individuals or incidents which are likely to affect the law and order situation.

(2) The third ground is a concocted incident in order to give credibility to the detention order by making it appear that the petitioner was indulging in anti-social acts which affected the maintenance of public order.

(3) The petitioner was denied opportunity to have the assistance of a friend when he appeared before the Advisory Board on August 2, 1988.

Besides these contentions Mr. Jain also raised a fourth contention that under Section 3(5) of the Act the State Government is enjoined to send a report within seven days to the Centre Government, of the detention of any detenu under the Act together with the grounds on which the order had been made and on receipt of such a report the Central Government is bound to consider the matter and either approve the detention or revoke the same in exercise of its powers under Section 14 of the Act. In this case there was no material to show that the Central Government had performed its duty under the Act.

Since this contention was not raised in the petition and since the Central Government had not been impleaded a party respondent, the petitioner's counsel filed a petition and sought leave of Court for raising an additional ground and for impleading the Central Government as a party respondent. These prayers were acceded and on notice being issued to the Central Government, the Central Government made its representation through counsel.

The contentions of the petitioner in his petition have been refuted by the respondents in their counter affidavits, one by the second respondent, District Magistrate, Meerut and the other filed by Shri P.N. Tripathi, Upper Division Assistant, Confidential Section-8 of U.P. (Civil), Secretariat, Lucknow on behalf of the first respondent, the State of U.P.

We will now examine the merits of the contentions of the petitioner in seriatum. The first contention is that the three grounds

265

mentioned in the grounds of detention could by no stretch of imagination be construed as acts which would affect the maintenance of public order or the even tempo of life of the community. Mr. Jain, learned counsel for the petitioner referred to *Gulab Mehra v. State of U.P.*, [1987] IV SCC 302 and urged that the first ground of detention in that case

also pertained to the detenu therein threatening to shoot the shopkeepers of Khalasi Line locality if they failed to give money to him and the shopkeepers becoming terror stricken and closing their shops. This Court had construed the ground as only affecting law and order and not the maintenance of public order. Mr. Jain argued that grounds 1 and 2 were threats meted out to individual persons regarding which criminal cases have been registered and the 3rd ground was identical to the one noticed by this Court in Gulab Mehra's case. Consequently, it was argued that we should also hold, as was done in Gulab Mehra's case that the grounds set out against the petitioner would at best affect only the law and order situation and would not pose a threat to the maintenance of public order. We have given the matter our careful consideration but we find ourselves unable to agree with the contention of Mr. Jain. In ground No. 1, the petitioner had gone with his associates and threatened one Yusuf, the contractor of a mango grove that fees for goondagardi (Chauth) should be paid to him and the petitioner and his associates assaulted Yusuf saying that they will "Kill the salas". On Yusuf reporting the matter to the police a case was registered under Sections 307 & 323 I.P.C. against the petitioner and his associates. The demand for chauth from the contractor and the attack launched on him would show that it was not a case of singling out a particular contractor for payment of chauth but a demand expected to be complied with by all owners or contractors of mango groves in the locality. In such circumstances the demand made and the attack launched would undoubtedly cause fear and panic in the minds of all the owners and contractors of mango groves in that area and this would have affected the even tempo of life of the community. Similarly, the second ground pertains to the petitioner going to the shop of one Ashok Kumar and making a demand of Rs. 10,000 and threatening him that unless the money was paid on the following day or the day after the shopkeeper would be killed. The shopkeeper had reported the matter to the police authorities and a case has been registered against the petitioner u/s 506 I.P.C. This incident must also be viewed in the same manner in which the first incident has been construed. It is not as if the demand and the threat following it were made against Ashok Kumar in an insulated manner. On the other hand, the demand had been made as part of a scheme to extort money from all the shopkeepers under a threat that their continuance of business and even

266

their lives would be in danger if chauth was not paid. The demand made on Ashok Kumar would have certainly made all the shopkeepers in that locality feel apprehensive that they too would be forced to make payments to the petitioner and that otherwise they would not be allowed to run their shops.

It so far as the 3rd incident is concerned, it is seen that the petitioner had taken a revolver with him and threatened all the shopkeepers in the market of Sardhana that if anyone failed to pay "chauth" he would not be allowed to open his shop and he would have to face the consequences. On account of this threat the shop owners downed the shutters of their shops and at that point of time H.C. Khajan Singh happened to reach the market. Seeing what was happening H.C. Khajan Singh attempted to apprehend the petitioner but he managed to escape on his motor cycle after firing several shots in the air with his revolver. H.C. Khajan Singh had at once returned to the station and made an entry in the general diary about this incident.

This incident cannot be considered as merely causing

disturbance to the law and order situation but must be viewed as one affecting the even tempo of life in the market. The shopkeepers had closed their shops and they as well as the public in the market area would have felt terrified when they saw the petitioner moving with a revolver and demanding 'chauth' payment by the shopkeepers.

Whether an act would amount to a breach of law and order or a breach of public order has been considered by this Court in a number of decisions and we may only refer to some of them viz. Dr. Ram Manohar Lohia v. State of Bihar, [1966] 1 SCR 709; Arun Ghosh v. State of West Bengal, [1970] 3 SCR 288; Nagendra Nath Mondal v. State of West Bengal, [1972] 1 SCC 498 and Nandlal Roy v. State of West Bengal, [1972] 2 SCC 524. In Gulab Mehra's case (supra) after noticing all these decisions, it was set out as follows:

"Thus from these observations it is evident that an act whether amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentiality of the act is so deep as to affect the community at large and/or the even tempo of the community then it becomes a breach of the public order."

267

In State of U.P. v. Hari Shankar Tewari, [1987] 2 SCC 490 referring to S.K. Kedar v. State of West Bengal, [1972] 3 SCC 816 and Ashok Kumar v. Delhi Administration, [1982] 2 SCC 403 it was held as follows:

"Conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really turn out to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle. Thus whether an act relates to law and order or to public order depends upon the impact of the act on the life of the community or in other words the reach and effect and potentiality of the act if so put as to disturb or dislocate the even tempo of the life of the community, it will be an act which will affect public order."

Viewed in this perspective, it cannot be said that the demands made and threats given by the petitioner to the contractors and shopkeepers as mentioned in the grounds would have its reach only to the limited extent of affecting the law and order situation and not go so far as to affect the maintenance of public order. We are therefore, unable to sustain the first contention urged on behalf of the petitioner.

Learned counsel for the petitioner then contended that no credence should be given to the last mentioned ground because the names of the shopkeepers who had closed their shops out of fear for the petitioner or the names of the witnesses to the incident have not been set out in the grounds.

It was further contended that the 3rd incident has been concocted in order to give a colour of credibility to the detention order. The counsel argued that in the report made by Inspector R.C. Verma for an order of detention being passed against the petitioner, a number of instances were

given but in spite of it the police authorities felt diffident about the adequacy of the materials and had therefore concocted the third incident given as ground no. 3. We do not find any merit in this contention because the records go to show that H.C. Khajan Singh had promptly reported the incident at the police station and the truth of his report had been verified by Inspector R.C. Verma.

268

It is not therefore possible to accept the contention that the 3rd incident referred to in the grounds of detention is a concocted affair.

In Gulab Mehra's case upon which reliance was placed by Mr. Jain, we find that the facts therein were quite different. The first ground of detention in that case pertained to the detenu demanding money from the shopkeepers of Khalasi Line but no shopkeeper had come forward to complain about the detenu and only a picket employed at the police station had made a report. The second ground related to the detenu lobbing a comb at a police party when it tried to effect his arrest. It was in those circumstances, this Court deemed it appropriate to quash the order of detention. In the present case, it may be seen that specific reports had been given by Yusuf and Ashok Kumar about the incidents forming grounds 1 and 2 and cases had been registered against the petitioner. In so far as the 3rd ground is concerned, H.C. Khajan Singh was himself a witness to the threats given by the petitioner to the shopkeepers with a revolver in his hand and the firing of the revolver by the detenu while leaving the place. The report of H.C. Khajan Singh has been verified by Inspector R.C. Verma and found to be true. It is thus seen that the facts in the two cases have no similarity whatever. On the other hand the observation in *State of U.P. v. Karnal Kishore Saini*, AIR 1988 SC 208 at 213 would be of relevance in this case. It was held in that case that if firing is made in a public street during the day time, the incident would undoubtedly affect public order as its reach and impact would disturb public tranquility and it would affect the even tempo of the life of the people in the locality concerned. Therefore the decision in *Gulab Mehra's case* (supra) cannot be of any avail to the petitioner.

In so far as the 3rd contention is concerned, it was urged that in spite of the petitioner having specifically asked for the assistance of a friend at the time he was heard by the Advisory Board, he was denied opportunity to have such assistance. The petitioner has averred in his petition as follows:

"The petitioner orally as well as in writing requested the Chairman of the Advisory Board to allow him to engage a counsel or at least a person who is acquainted with the law to represent him before the Advisory Board, as the petitioner was illiterate and was not capable of representing his case before the Advisory Board. Unfortunately, the Advisory Board rejected the request of petitioner and did not allow him to engage a legal counsel or at least a person

269

who is acquainted with the provisions of the National Security Act and forced the petitioner to appear before the Advisory Board without any defence helper. This part of the act of the members of the Advisory Board is illegal, unconstitutional and violative of Articles 14, 19, 21 and 22 of the Constitution of India."

In the counter affidavit of the District Magistrate, this allegation has been refuted as follows:

"Averments made in para No. 2 are wrong and denied. The petitioner was detained on 5.7.88 in Distt. Jail, Meerut and his detention is absolutely legal and constitutional. It is wrong to say that the petitioner was not provided an opportunity by the Advisory Board to defend himself. On the contrary, he was heard by the Advisory Board on 2.8.89 and the detaining authority had no objection to his case being represented by a person who is not an advocate. The fact that his request was rejected by the Advisory Board is not in the notice of detaining authority. As per the Tele. dated 26.7.88 of the Home Deptt. of Government of U.P., Lucknow, the petitioner was allowed to appear before the Advisory Board through non-advocate next friend. A copy of the said message is annexed hereto and marked as annexure R-I.

However the petitioner's assertion that he is illiterate is wrong because he knows English and has submitted detailed representation. According to information available, petitioner is an Intermediate. The ratio of the decision in A.K. Royal v. U.O.I., (reported in AIR 1982 SC 709) has not been contravened in any manner in the instant case."

In the counter affidavit on behalf of the State of U .P. it has been stated as follows:

"But it is evident from the record that the Advisory Board had directed the State Govt. through its letter dated 2 Ist July, 1988 that since the petitioner Shri Sharad Tyagi had requested to appear alongwith his next friend, he may be informed to attend the Board's meeting alongwith his next friend (non-advocate) on the date of hearing. The State Government complied with the instructions of the Advisory
270

Board and had sent the necessary directions to the District Authorities through its radiogram message dated 26 July, 1988, a copy of which is annexed hereto and marked as Annexure R-I".

Besides the specific averment made in the counter affidavit, Shri Yogeshwar Dayal, learned counsel for the State of U.P. also drew our attention to the radiogram sent by the Government to the District Magistrate wherein it has been clearly stated that "on request of detenu his next friend (non-advocate) may also be allowed to appear with him." Mr. Yogeshwar Dayal also made available to us the file containing the original records relating to the detention of the petitioner. We find from the records that the radiogram had been served on the petitioner through the Superintendent of the Meerut District Jail. The petitioner has affixed his signature in English therein and also written the word "date" but he has not filled up the date. (It is stated in the counter affidavit that the petitioner is not an illiterate but has studied upto Intermediate). This would falsify the averment in the rejoinder affidavit filed by the petitioner's wife Smt. Shobha Tyagi "that the copy of the telegram annexed to the counter affidavit of the respondent No. 2 was not served upon the detenu; the detenu was never

informed that he was entitled to be represented by a friend who is not an advocate." Mr. Jain's contention was that even if the radiogram had been shown to the petitioner, it must have been done belatedly and there would not have been time for the petitioner to contract anyone and make arrangements for a non-advocate friend appearing alongwith him at the meeting of the Advisory Board. We are unable to countenance this argument because of several factors. In the first place, the petitioner has not raised such a plea in his petition. His specific contention was that he had requested the Chairman of the Advisory Board in writing as well as orally to permit him to have the services of a counsel or a person acquainted with the law to represent his case before the Advisory Board but the Advisory Board rejected his request. It was not therefore his case that he was shown the radiogram belatedly and he did not have time to make arrangements for anyone to appear alongwith him before the Advisory Board. Another circumstance which militates the contention of Mr. Jain is that there is no material to show that the petitioner had orally represented to the Chairman of the Advisory Board that he wanted the services of a friend and that he had been shown the radiogram very late. The respondents have filed a copy of the letter sent by the Additional Registrar of the High Court to confirm that the Advisory Board had accorded permission to the petitioner to appear before the Board

271

alongwith a non-advocate friend but in spite of it no one appeared along with the petitioner on the date of hearing, and hence no mention was made in the report of the Advisory Board about the non-appearance of a friend on behalf of the petitioner. Mr. Jain argued that in a number of decisions commencing from A.K. Roy v. Union of India, [1982] 1 SCC 271 it has been consistently held that even though a detenu will not be entitled to have legal assistance, he does have a right to have the assistance of a friend at the time his case is considered by the Advisory Board and hence denial of opportunity to have the assistance of a friend would vitiate the detention. This principle is undoubtedly a well-stated one. It has however to be noticed that though the Advisory Board had permitted the detenu to appear alongwith a friend the detenu had failed to take a friend with him. He did not also represent to the Advisory Board that he did not have adequate time to get the services of a friend and that he required time to have the services of a friend. Such being the case, he cannot take advantage of his own lapses and raise a contention that the detention order is illegal because he was not represented by a friend at the meeting of the Advisory Board. This position is a settled one and we may only refer to the observation of this Court in Vijay Kumar v. Union of India, AIR '1988 SC 934 at 939:

"It appears from the observation made by the High Court that the appellant, without making any prayer before the Advisory Board for the examination of his witnesses or for giving him assistance of his friend, started arguing his own case, which in all probability, had given an impression to the members of the Advisory Board that the appellant would not examine any witness. The appellant should have made a specific prayer before the Advisory Board that he would examine witnesses, who were standing outside. The appellant, however, did not make any such request to the Advisory Board. There is no reason for not accepting the statement

of the detaining authority that the appellant was permitted by the Advisory Board to have the assistance of an advocate or friend at the time of hearing, but the appellant did not avail himself of the same. In the circumstances, we do not think that there is any substance in the contention made on behalf of the appellant that the Advisory Board acted illegally and in violation of the principles of natural justice in not examining the witnesses produced by the appellant at the meeting of the Advisory Board and in not giving permission to the appellant to have the assistance of his friend."

272

From the materials on record, we are satisfied that the appellant was accorded permission to have the services of a friend and the radiogram sent by the Government was duly communicated to him but for some reason he had not availed the services of a friend. He did not also choose to represent to the Advisory Board that he was not given sufficient time to secure the services of a friend. Consequently, the third contention also fails.

We are only left with the fourth and last contention. No grievance was made in the petition that the Central Government had not considered the petitioner's case when the State Government sent a report under Section 3(5) of the Act and the non-application of mind by the Central Government vitiates the detention of the petitioner. This ground of objection was raised only during the arguments and consequently the Central Government was permitted to be impleaded as a party respondent. Learned counsel appearing for the Central Government has stated that the Central Government had in fact considered the report sent by the State Government and saw no reason to revoke the order in exercise of its powers upon Section 14. There is no reason to doubt the correctness of this statement.

One other argument advanced before us was that even though the order of detention had been passed on April 5, 1988, no steps were taken to take the petitioner into custody till he surrendered himself in Court on July 4, 1988. This contention is on the face of it devoid of merit because it has been specifically stated in the counter affidavits that the petitioner was absconding and hence proclamations were made under Sections 82 and 83 Cr. P.C. and it was only thereafter the petitioner had surrendered himself in Court. It is not therefore a case where the petitioner was freely moving about but no arrest was effected because his being at large was not considered a hazard to the maintenance of public order.

In the result we do not find any ground for quashing the order of detention passed against the petitioner. The writ petition is accordingly dismissed.

N.V.K.
dismissed.

Petition

273