

(1999) 04 MAD CK 0016

In the Madras High Court

Case No : Criminal Original Petition No. 167 of 1998

C. Vijaya

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 19-04-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 380, 457

Citation : (1999) 04 MAD CK 0016

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : P. Rathinam, for the Appellant; N.R. Elango, G.A., for Respondents 1 and 3, R. Natarajan. Addl. P.P. for Pondicherry and D. Stephen, for Respondents 4 to 9, for the Respondent

Judgement

M. Karpagavinayagam, J.—This case relates to an incident involving sorry state of affairs in which Vijaya of 22 years old a Dalit, alleged

untouchable"" woman, had been subjected to the ""violent touch"" by her being gang raped by the police personnel attached to the Union Territory

of Pondicherry, who are said to be the custodian of law.

2. The said victim of the rape has approached this Court seeking several prayers. The main prayers in this petition are to direct C.B.C.I.D. Police,

Villupuram the third respondent herein to add the appropriate sections under the Scheduled Castes and the Scheduled Tribes (Prevention of

Atrocities) Act, 1989 in the charge sheet and present it before the Special Court, to furnish the copies of the documents filed before the Court to

the petitioner and to direct the Pondicherry Government, the second respondent to pay the relief amount to the petitioner as per the Act and to pay

compensation for the negligence and violation of law shown by it.

3. The case of the petitioner as culled out from the material averments in the affidavit of the petitioner, the affidavit filed by the Inspector of Police,

C.B.C.I.D., the third respondent and other documents filed before this Court could be stated as follows:

(a) On 29/30.7.1993 mid-night at 1.00 a.m., the Pondicherry Police personnel, the respondents 4 to 9 attached to Pondicherry Grand Bazaar

Police Station came in Police Van from Pondicherry to Sitharasur Village in Ananthapuram Police Station limit in Villupuram District in search of

one Vellaiyan in connection with the theft case registered in Crime No. 442/93 under Sections 457 and 380 I.P.C. The victim Vijaya, the

petitioner was sleeping at her Aunt's residence in Sitharasur. The Police personnel came to the said house and woke her up and enquired her as to

the whereabouts of the said Vellaiyan, who is her cousin. They also insisted her to accompany them in their vehicle to identify the field of the said

Vellaiyan situate near Vellamai village. When she was reluctant to go with them, they threatened her. Therefore, she got into the Van. On the way

at Athiyur village she was asked to show her parents house. Then, they went to her parents place. There the parents also were picked up by the

police. The victim Vijaya was kept in the cabin of the vehicle and her parents were kept in the back side of the Vari. Her parents were totally

unaware of her presence in the vehicle. On the way, the vehicle was stopped and the Police personnel asked her to get down from the vehicle and

to accompany them to show the house of ex-convict Govindan. Thereafter, they took her to a thatched shed belonging to one Vadakkathiyar, the

father of the said Vellaiyan, erected in the hilly area of Vellamai village, in order to show the hideouts of the said Vellaiyan. But, in the thatched

shed itself she was raped by five Police personnel one after another. It was about 3.00 a.m. on 30.7.1993. Thereafter, they brought her back to

the van and came to Athiyur village and dropped her parents in their house and then they came to Sitharasur village in the same van and the victim

Vijaya was dropped at her aunt's house from where she was originally taken.

(b) On 30.7.1993 morning her mother came to the aunt's house at Sitharasur village where the victim narrated her the entire story. Immediately

thereafter, at about 9.00 a.m. the victim Vijaya and her mother went to Ananthapuram Police Station to report the matter. But, the Sub-Inspector

of Police, Ananthapuram Police Station shouted and insulted them and refused to register the complaint. Since no action was taken by the police,

the victim Vijaya was given treatment in Primary Health Centre, Ananthapuram on 2.8.1993.

(c) Subsequently, a petition was sent to the District Collector of Cuddalore on 3.8.1993 complaining about the custodial rape by the Pondicherry

police personnel. On receipt of the said complaint, the Sub-Collector, Tindivanam. Head Quarters Deputy Tahsildar and Revenue Inspector,

Gingee came to the village and enquired her and recorded statements from the other witnesses. The victim Vijaya continued to get treatment in the

Primary Health Centre, Ananthapuram till 8.8.1993. After discharge from the hospital, she gave a complaint on 13.8.1993 in Ananthapuram Police

Station which was registered in Crime No. 276/93 u/s 376 I.P.C. against the Pondicherry Police personnel. The Inspector of Police took up

investigation and referred the victim girl to the District Head-quarters Hospital. Cuddalore on 14.8.1993. On the basis of the report of the Deputy

Collector. Tindivanam the District Collector. Cuddalore directed District Revenue Officer, Villupuram to conduct a Fact Finding Enquiry and

submit a report. On 7.2.1994, after the enquiry was over, the District Revenue Officer sent a report in C1/636/93 giving a finding that the victim

Vijaya was gang-raped by five Police personnel of Pondicherry.

(d) Consequent to the above report, the Government of Tamil Nadu issued a G.O.Ms. No. 834, Public (Law and Order-E) Department dated

31.8.1994 sanctioning Rs. 25,000/- as ex-gratia to the victim. The Government further ordered in D.O.Lr. No. 2136/L & O - E/93-6 dated

28.3.1995 directing the C.B.C.I.D. the third respondent to take up the case for further investigation from the Inspector of Police Ananthapuram.

Accordingly on 20.4.1995 the C.B.C.I.D. took up further investigation. On 31.5.1996 the accused persons, the respondents 4 to 9 attached to

the Pondicherry Grand Bazaar Police Station were summoned to appear before the teamed Judicial Magistrate No. 1 Ulundurpet for Identification

Parade. The C.B.C.I.D. Police again moved before the learned Judicial Magistrate. Gingee on 30.4.1997 to summon the accused to Court and to

send them for medical examination. Accordingly, all the accused came and appeared before the court on 12.5.1997 and subjected for medical

examination on 13.5.1997. Thereafter, the third respondent - C.B.C.I.D. Police finished the investigation and filed the charge sheet on 23.6.1997

against all the six accused, that is the respondents 4 to 9, the Police personnel attached to the Grand Bazaar Police Station, Pondicherry for the

offences under Ss.366 and 376 (2)(a) (iii) and (g) of I.P.C. This was taken on file by the learned Judicial Magistrate, Gingee on 2.7.1997 in

P.R.C. No. 4/97.

4. Mainly having aggrieved over the failure on the part of the third respondent-C.B.C.I.D. Police to file the charge sheet by adding the relevant

sections of the S.C./S.T. Act also in addition to the I.P.C. offences and the failure in having arrested the respondents 4 to 9, the Pondicherry

Police personnel in a very serious case of custodial rape, the petitioner has approached this Court seeking for the reliefs indicated above.

5. Mr. Rathinam, the counsel for the petitioner would vehemently submit that the C.B.C.I.D. Police, who acted upon the orders of the Government

to take up the investigation from Ananthapuram Police on the basis of the report of the District Revenue Officer holding that the victim Vijaya

belongs to Irula caste, a Scheduled Tribe, ought to have arrested the persons concerned and filed the charge sheet not only for the I.P.C. Offences

but also for the offences under the S.C./S.T Act.

6. The learned Government Advocate appearing for the third respondent, would contend on the strength of the counter filed by him before this

Court, that though the third respondent do not controvert any other factual details given in the affidavit of the petitioner, the victim Vijaya, the

charge sheet could be filed only for the offences under the I.P.C. since there is no allegation that the offence of rape was committed on the victim

Vijaya belonging to Scheduled Tribe on the ground that such victim is a member of the Scheduled Tribe and as such, Section 3 (2) (v) of the Act

cannot be invoked and that they have actually requested the Pondicherry Government through the Tamil Nadu Government through a Government

letter for securing those accused, but however, they could not secure them.

7. On perusal of the petition, affidavits and other documents filed before this Court and case diary and charge sheet copies produced before this

Court by the Police, it is clear that there are prima facie materials to prove that the victim Vijaya was gang-raped by the Police personnel attached

to the Pondicherry Grand Bazaar Police Station. There is also no dispute in the fact that the victim Vijaya belongs to Irula community, which is a

Scheduled Tribe. Admittedly, the charge sheet has been filed before the Judicial Magistrate, Gingee for the offences under Sections 366 and 376

(2) (a) (iii) and (g) of I.P.C.

8. The materials available on record would reveal that the Police personnel, respondents 4 to 9 attached to the Pondicherry Police took the victim

from Sitharasur Village on the pretext of searching and identifying one Vellaiyan, who was involved in a theft case registered in Crime No. 442/93

and committed rape on her at 3.00 a.m. in the night near Vellamai village. These allegations would certainly attract the offences u/s 366 I.P.C.,

namely, kidnapping or abducting a woman in order to force her to have illicit intercourse and Section 376(2) (a) (iii) and (g), police officers while

the woman in their custody committing the gang-rape on her. Therefore, the C.B.C.I.D. Police, on the basis of the materials collected during the

course of investigation correctly filed the charge sheet for these offences.

9. As rightly pointed out by the learned Government Advocate, Section 3 (2) (v) of the S.C./S.T. Act cannot be applied in the instant case, as the

victim was not raped on the ground that the victim was a member of a Scheduled Tribe. Section 3 (2) (v) provides as under:

Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code (45 of 1860)

punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a

Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.

10. The investigation done in this case discloses that the gang rape was committed when the victim was in the custody of the Police personnel not

on the ground that she belongs to a Scheduled Tribe, so as to insult the said Tribe, but this offence was committed since she was a young woman

taking advantage that she was in their custody. Therefore, there may not be any difficulty to conclude that Section 3(2) (v) of the Act cannot be

invoked.

11. But, the third respondent miserably failed to take into account Section 3(1) (xi) and (xii) of the S.C./S.T. Act. These sections would state as

follows:

Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, assaults or uses force to any woman belonging to a Scheduled Caste

or a Scheduled Tribe with intent to dishonour or outrage her modesty and being in a position to dominate the will of a woman belonging to a

Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed, shall be

punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine

12. As narrated above, the facts as such would reveal that the victim, while she was in the custody of the police, who was taken to the other village

in order to identify one Vellaiyan, was raped by the Police personnel one after another by using their position as Police personnel and dominated

the will of the victim belonging to a Scheduled Tribe and exploited her sexually. It is also clear from the statements of the witnesses and the victim

that she belongs to Irular caste, a Scheduled Tribe. Therefore, the third respondent-C.B.C.I.D. Police ought to have handed over the further

investigation to the Deputy Superintendent of Police, who is competent under Rule 7 of the Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Rules, 1995 to conduct further investigation with regard to the offences under the S.C./S.T. Act and to file the charge sheet. Obviously,

this was not done. This failure, in my view, definitely would cause prejudice to the interest of the victim in this case.

13. At this stage, Mr. Stephen, the learned counsel appearing for the respondents 4 to 9 would point out, on the strength of the counter filed by

them, that this Court u/s 482 of Cr.P.C. cannot direct the third respondent or the Court of Session to add the appropriate sections under the

S.C./S.T. Act.

14. This submission, in my view, totally lacks substance. When this Court finds out an apparent injustice caused to the victim by not filing the

charge sheet for the appropriate offences, this Court cannot shut its eyes merely accepting the contention of the counsel for the respondents 4 to 9

without going to the rescue of the victim to rectify the grave injustice.

15. As laid down by the Apex Court in M/s. Pepsi Foods Limited and another v. Special Judicial Magistrate and others (1998 L.W. (Cri.) 72) this

Court can exercise its powers u/s 482 Cr.P.C. or by invoking the jurisdiction under Articles 226 and 227 to set right the injustice regardless of the nomenclature under which the petition has been filed. It is settled law that the High Court can exercise its power of judicial review in criminal matters.

16. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , the Apex Court examined the extraordinary power under Article 226 of the

Constitution and also, the inherent powers u/s 482 of the Code and said the same could be exercised by the High Court either to prevent abuse of

the process of any Court or otherwise to secure the ends of justice. While laying down certain guidelines where the Court will exercise jurisdiction

under these provisions, it is also stated that these guidelines could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise

of such power could depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any

Court or otherwise to secure the ends of justice. The powers conferred on the High Court under Articles 226 and 227 of the Constitution and u/s

482 of the Code have no limits but more the power more care and caution is to be exercised while invoking these provisions.

17. In the light of these principles, in my view, suitable direction should be issued in this petition in order to secure the ends of justice.

18. In view of the above circumstances, the first respondent-the Secretary of the Home Department as well as the Superintendent of Police,

Villupuram, is directed to depute a Deputy Superintendent of Police as required under Rule 7 of the Scheduled Castes and Scheduled Tribes

(Prevention of Atrocities) Rules, 1995 to further investigate and collect additional materials in support of the plea of the victim that she belongs to

Scheduled Tribe and to file an additional charge sheet on the basis of the materials already available and other materials in support of the caste

subsequently collected by adding the relevant provisions of the S.C./S.T. Act as indicated above after further investigation.

19. It is now noticed that the charge sheet filed before the Judicial "Magistrate, Gingee, who in turn committed to the Sessions Court, is pending in

S.C. No. 140 of 1998 before the Assistant Sessions Court, Tindivanam. Therefore, the Assistant Sessions Court, Tindivanam is directed to send

the papers to the Special Court situated under this Act.

20. In the meantime, the Deputy Superintendent of Police, who is deputed by the Superintendent of Police, is directed to conduct further

investigation u/s 173 Cr.P.C. and collect other further materials to show that the victim belongs to a Scheduled Tribe and then file an additional

charge sheet before the Special Court. He is further directed to see that the investigation is over and file the additional charge sheet within two

months from the date of receipt of this order. After receipt of the additional charge sheet, the Special Court shall frame the appropriate charges

against the accused and go on with the trial.

21. The next important prayer is to direct for the compensation to be paid to the victim by the authorities concerned for the negligence and

violation of law shown by them.

22. The Chief Secretary, Union Territory of Pondicherry is the second respondent. On his behalf, the Superintendent of Police (South),

Pondicherry has filed the counter-affidavit. It is stated that the Pondicherry Government has no authority to play any role in regard to the incident

took place in the Tamil Nadu area and as such, the petitioner is not entitled for payment of any compensation amount from the Government of

Pondicherry.

23. On a perusal of the affidavit filed by the petitioner, it is seen that already Tamil Nadu Government sanctioned Rs. 25,000/- as ex-gratia amount

to the petitioner, in pursuance of G.O.Ms. No. 834 Public (Law and Order) Department, dated 31.8.1994 on the basis of the report of the

District Revenue Officer in No. C1/636/93 dated 7.2.1994 stating that the victim was gang-raped by five Police personnel of Pondicherry. Thus, it

is clear that the Tamil Nad Government did not shirk its responsibility in making the payment of relief amount of Rs. 25,000/- to the victim of rape

by simply stating that the Tamil Nadu Government has no role to play, since the offence was committed only by the Pondicherry Police personnel.

Therefore, the Union Territory of Pondicherry represented by the Chief Secretary, the second respondent herein, who chose to file a counter-

affidavit before this Court through the Superintendent of Police, cannot escape from owning responsibility for the inhuman acts committed by its"

public servants, the Police personnel attached to the Grand Bazaar Police Station.

24. As a matter of fact it is specifically averred in the affidavit filed by the petitioner that the second respondent, that is, the Chief Secretary of the Pondicherry Government having known fully well that a case of gang-rape was registered against the respondents 4 to 9 attached to the Pondicherry Police, the public servants, did not take proper action against them. The affidavit of the Inspector of Police, C.B.C.I.D. also would make it clear that the Tamil Nadu Government wrote a letter to the Pondicherry Government requesting to secure the Police personnel, the accused in the rape case in order to arrest them and produce before the Court. Despite this letter, they were not secured. Though there is a stray reference in the counter-affidavit filed by the Superintendent of Police, Pondicherry on behalf of the second respondent that the administration of the Government of Pondicherry has taken action in the matter of complaint made against the Police personnel and the proceedings are pending, there were no details as to what are those proceedings and what is the action taken and against whom and there is no reply in the counter for the statement made by the third respondent - C.B.C.I.D. that in spite of the request by the Tamil Nadu government, they were not secured by the Pondicherry Government. These things would reveal that the contention of the counsel for the petitioner that the respondents 4 to 9, the Police personnel, the accused in a rape case are under the protective wings of the Pondicherry Government, cannot be ruled out.

25. The gang-rape was committed on 30.7.1993. Immediately, the matter was reported to the Crime Sub-Inspector, Ananthapuram. He refused to entertain the complaint. After enquiry by the Revenue Officials, the Inspector of Police, Ananthapuram was constrained to receive the complaint on 13.8.1993 and to register the case against the respondents 4 to 9 u/s 376 I.P.C. Though nearly two years have elapsed, no proper investigation was conducted by the Inspector of Police, Anandiapuram Police Station. In the meantime, on receipt of the report of the District Revenue Officer finding that there are materials against the Police personnel of Pondicherry, the State Government ordered for taking over the investigation by the C.B.C.I.D. on 28.3.1995. Accordingly, further investigation was taken up on 2.4.1995. Identification Parade was conducted on 31.5.1996 by the learned Judicial Magistrate No. 1, Ulundurpet. The accused were subjected to medical examination on the order of the learned Judicial Magistrate,

Gingee, on 13.5.1997. The charge sheet was filed on 23.6.1997. In the meantime, all the Police personnel the accused were allowed to freely attend their work in Pondicherry. As a matter of fact, they filed several applications for anticipatory bail before the Sessions Court and the High Court and the same were dismissed. As indicated earlier, on the request of the third respondent, Tamil Nadu Government addressed the Pondicherry Government for arresting these accused u/s 41 (1) (i) of Cr.P.C. However, they were not secured.

26. The irony is that the respondents 4 to 9, the accused appeared before the Judicial Magistrate No. 1, Ulundurpet on 31.5.1996 and appeared before the Judicial Magistrate, Gingee on 30.4.1997, in pursuance of the direction of the Court. This shows that they were very much available for arrest. For the reasons best known to the authorities concerned, the Police personnel were not arrested, despite the fact that the anticipatory bail applications filed by them were dismissed by this Court on several occasions.

27. In the light of these factors, I cannot but come to the conclusion that the Pondicherry Government has not only shirked its responsibility by not taking proper action against the Police personnel who were the accused in the gang rape, but also failed to secure them and hand over them to the Tamil Nadu Police. This is not a case where police can say that the arrest of the accused is not necessary, especially when identification parade and potential test are all necessary things to be done in this case.

28. It is settled law that the State is responsible for the tortuous acts of its employees and that for police atrocities, the State should pay compensation to the victim. A rule as to compensation at the beginning of the prosecution awarded to a victim, who otherwise will be required to take recourse to proceedings by way of a suit for damages or receive any compensation at the conclusion of trial, has been recognised by this Court as well as the Apex Court as a rule of justice and fair play. These principles are laid down in Rudul Sah v. State of Bihar (AIR 1983 S.C.

1096), Sebastian M. Hongroy v. Union of India (AIR 1984 S.C. 1026) and Padmini v. State of Tamil Nadu and two others (1993 L.W. (Crl.) 487, D.B. of this Court).

29. In the instant case, as discussed above, there are prima facie materials as against the Police personnel for the offence of gang rape. As a matter

of fact, the third respondent - C.B.C.I.D., on the basis of the materials that the respondents 4 to 9 used the police van PY 01 B 1033 to go to

Sitharasur village from Pondicherry and at Sitharasur village they took the victim to her parents place and after taking them also, she was taken to

the hilly area of Vellamai village where she was raped, filed the charge sheet, The Police personnel who are responsible for the gang rape on the

victim are undoubtedly the employees of the Union Territory of Pondicherry. Therefore, the Union Territory is bound to compensate the victim.

30. It cannot be said, as held by the Apex Court, that the acts done by the officials were individual wrongs or misdeeds. It cannot be overlooked

that the concerned Police personnel had acted duly under the powers vested in them by the Union Territory. The powers vested in the police

officials cannot shield them, when the exercise of powers is wrongful or total oblivion of the rights and liberties of the victim. The State cannot have

protective umbrella to disengage themselves from their liability to pay compensation on the ground that the wrongs committed not in Pondicherry

but in Tamil Nadu. Equally they cannot say that they are not liable to pay compensation on the ground that the wrongs committed by their officials

should make them alone liable.

31. Under these circumstances, I think that the ends of justice would be met if the second respondent, viz., the Chief Secretary to the Pondicherry

Government is directed to pay a sum of Rs. 1,00,000/- to the victim Vijaya towards compensation for the alleged act of gang- rape committed on

her by the Police, personnel attached to the Pondicherry Police and accordingly he is directed. The said amount shall be paid to the victim within

two months from the date of receipt of this order.

32. The Special Court after trial shall dispose of the matter uninfluenced by any of the observations made in this order, since these observations

have been made only for the limited purpose of disposal of this petition.

33. With the above observations, the petition is disposed of. The Public Prosecutor of Pondicherry is directed to intimate the result of this order to

the second respondent. The Registry is directed to issue a copy of this order to the Public Prosecutor, Pondicherry forthwith enabling him to send

the same to the second respondent.

34. Before parting with this case, with reference to the allegation against the

Chief Judicial Magistrate, Pondicherry, who is said to have conducted enquiry on the basis of the complaint given by the victim to the Human Rights Commission, I do not propose to give any finding, since it is for the victim to take appropriate steps by bringing to the notice of the Chairman of the Human Rights Commission under whose authority the learned Chief Judicial Magistrate. Pondicherry has conducted himself as Enquiry Officer. However, I cannot but express my displeasure over the alleged misconduct of the Chief Judicial Magistrate, Pondicherry in going to the village of the victim and putting questions using filthy language and interrogating the Professor of Tindivanam who helped in drafting the petition on behalf of the victim for sending the same to the Human Rights Commission and stating that a false complaint was filed by the victim in order to get Rs. 50,000/-. Though I do not go into the allegations in order to find out truth or otherwise, if these allegations are true, I would only say that this is quite unfortunate on the part of the Chief Judicial Magistrate to have conducted himself in such a manner under the garb of enquiry.