
(1994) 02 MAD CK 0036

In the Madras High Court

Case No : Writ Petition No's. 8710, 9630, 9705, 10158 and 11768 of 1992

Dr. M. Karunanidhi

APPELLANT

Vs

State of Tamil Nadu and another

RESPONDENT

Date of Decision : 04-02-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21
Prisons Act, 1894 — Section 40, 59

Citation : (1994) CriLJ 2599 : (1994) 1 LW(Cri) 162 : (1995) 1 RCR(Criminal) 80

Hon'ble Judges : Thangamani, J;M. Srinivasan, J

Bench : Division Bench

Advocate : R. Shanmughasundaram, Mr. S.S. Vasudevan and Mr. T. Kalaimani, for the Appellant; Mr. I. Subramanian, Additional Public Prosecutor, for the Respondent

Judgement

Srinivasan, J.—In all these cases, the common question is whether G.O.Ms. No. 972, Home (Prison-B) dated 8-6-1992 is unconstitutional

and invalid. The learned Additional Public Prosecutor points out that W.P. No. 8710 of 1992 has become infructuous inasmuch as the persons on

whose behalf of the petition was filed are not in detention. But, we do not want to dismiss the petition on the ground that it has become infructuous

since we are considering the same question in the other writ petitions.

2. The Prisons Act, 1894 (Central Act IX of 1894) empowers the Government to make rules. Section 59 provides for the same. Section 40 of the

said Act provides that due provision shall be made for the admission at proper times and under proper restrictions, into every prison of persons

with whom civil or unconvicted criminal prisoners may desire to communicate. Care being taken that, so far as may be consistent with the interest

of justice, prisoners under trial may see their duly qualified legal advisors without the presence of any other person. Under Sec. 59, the Tamil Nadu

Prison Rules have been framed by the State Government. Rule 541(1) thereof is to the effect that unconvicted criminal prisoners and civil prisoners

shall be granted all reasonable facilities at proper times and under proper restrictions for interviewing or otherwise communicating either orally or in

writing, with their relatives, friends and legal advisers. The State Government passed G.O. Ms. No. 972, Home (Prison-B), dated 8-6-1992

introducing a proviso to the said rule, which is in the following terms :-

Provided that in respect of accused and undertrial prisoners under the Terrorists and Disruptive Activities (Prevention) Act, 1987 (Central Act 28

of 1987), only legal adviser and close family relatives, namely, father, mother, husband, wife, brother, sister, son and daughter of such prisoner

shall alone be allowed for interviewing such prisoners. If the prisoner does not have any such close relative, then distant relatives alone shall be

allowed to have interview, after obtaining orders of the Government in the Home Department. Under no circumstances, friends shall be allowed to

interview the prisoner.

It is the validity of the said proviso that is challenged in these cases. The contentions urged on behalf of the petitioners are mainly two-fold. (1) The

proviso makes a discrimination against the prisoners under Central Act 28 of 1987, (hereinafter referred to as the "TADA Act"). It is contended

that the persons are under-trial prisoners under the said Act cannot be treated as a separate class. It is submitted that persons who are convicted

for grave offences are given a better treatment but the proviso prevents the under-trial prisoners under the said Act from enjoying their

Constitutional rights. (2) The proviso is arbitrary and it imposes an unreasonable restriction on the rights of the prisoners recognised by law. In the

view we are taking, it is not necessary to refer to the other contentions urged on behalf of the petitioners.

3. The stand taken by the State Government is that the friends and distant relatives who got permission to interview remand prisoners and under-

trial prisoners under TADA Act are always indulging in indiscipline inside and outside the prison premises. The accused and under-trial prisoners

instigate their friends to create problems outside. After viewing the situation,

especially in the case of the prisoners under the TADA Act, the Government thought fit to bring the amendment and introduced the proviso. It is submitted by learned counsel that it is open to the Government to impose restrictions for reasons of security. The Government can, according to him, take into account the various factors including the nature and gravity of the offences involved. It is submitted that each case has to be determined on the relevant circumstances as decided by the Supreme Court in A.K. Roy and Others Vs. Union of India (UOI) and Others, . Reliance is placed upon the following observations of the Supreme Court in

Paragraph 108 of the judgment (at page 382 of Cri LJ) :-

It is difficult for us to frame a Code for the treatment of detenus while they are held in detention. That will involve an exercise which calls for examination of minute details, which we cannot undertake. We shall have to examine each case as it comes before us, in order to determine whether the restraints imposed upon the detenu in any particular case are excessive and unrelated to the object of detention.

4. Our attention is also drawn to the observations made in David Patrick Ward and Another Vs. Union of India (UOI) and Others, . The following passage is referred to :-

If the authorities concerned have taken a conscious decision, as is disclosed from their counter-affidavits that the need of security requires that the petitioners should be kept in Naini Jail at Allahabad and have come forward to offer all facilities to the officers of the British High Commission desirous of visiting them at Naini Jail, Allahabad to have easy access to the petitioners, we find it difficult to grant the prayer in the petition seeking the shifting of the petitioners from Naini Jail, Allahabad to Tihar Jail, Delhi 28

But in this case, having regard to its facts and a conscious decision taken by the respondents, from the point of view of security, to detain the petitioners in Naini Jail, Allahabad, we do not think we could concede to their request to shift them to Tihar Jail at Delhi, more so, when the counter-affidavit indicates that whenever visits are desired by officers of British High Commission, proper arrangements will be made in that behalf.

5. It is submitted that in the present case, the proviso is introduced by the Government after taking into account all the relevant facts and in

particular the security risk involved in permitting the distant relations and friends to interview the under-trial prisoners under the TADA Act. Finally

it is contended by learned counsel that in any event, the validity of the proviso must be upheld by applying the doctrine of reading down.

6. It is by now well settled that the prisoners should not be deprived of their constitutional rights inside the prison. The Supreme Court has laid

down the guidelines with regard to the handling of prisoners inside the prison by the authorities in *Sunil Batra Vs. Delhi Administration and Others*

etc., . For the purpose of this case, it is sufficient to refer to the following passage in the judgment (at page 1115 of Cri LJ) :-

Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison

inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents,

and other family members cannot be denied in the light of Art. 19 and its sweep. Moreover, the whole habitative purpose of sentencing is to soften,

not to harden, and this will be prompted by more such meetings. A sullen, forlorn prisoner is a dangerous criminal in the making and the prison is

the factory; Sheldon Krantz rightly remarks : Sheldon Krantz, *Corrections and Prisoners Rules*, Pp. 129-130.

In 1973, the National Advisory Commission argued that prisoners should have a "right" to visitation. Task Force Report, *Corrections* (1973) at

page 66. It also argued that correctional officials should not merely tolerate visiting but should encourage it, particularly by families. Although the

Commission recognised that regulations were necessary to contend with space problems and with security concerns, it proposed that priority be

given to making visiting areas pleasant and unobtrusive. It also urged that correctional officials should not eaves drop on conversations or otherwise

interfere with the participants' privacy. Thus, although there may be current limitations on the possible use of the Constitution on visitations by

family and friends, public policy should dictate substantial improvements in this area, in any event. We see no reason, why the right to be visited

under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that

liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected.

7. In *Francis Coralie Mullin Vs. Administrator, Union Territory of Delhi and Others*, the question as regards the interview by the legal adviser

with the prisoner has been considered in detail. While doing so, the Court also referred to the relevant rule which restricted the interview by

relatives to one in a month and observed that it was unreasonable and arbitrary. The Court also held that the restriction imposed with regard to the

interview with the legal adviser of the choice of the prisoner in the particular rule was unconstitutional. The Court said (at page 314 of Cri LJ) :-

9. Now obviously when an under-trial prisoner is granted the facility of interviews with relatives and friends twice in a week under Rule 559A and

a convicted prisoner is permitted to have interviews with his relatives and friends once in a week under Rule 550, it is difficult to understand how

sub-clause (ii) of clause 3(b) of the Conditions of Detention Order, which restricts the interview only to one in a month in case of a detenu can

possibly be regarded as reasonable and non-arbitrary, particularly when a detenu stands on a higher pedestal than an under-trial prisoner or a

convict and, as held by this Court in *Sampat Prakash Vs. State of Jammu and Kashmir*, restrictions placed on a detenu must "consistent with the

effectiveness of detention, be minimal." We would therefore unhesitatingly hold sub-clause (ii) of clause 3(b) to be violative of Arts. 14 and 21 in

so far as it permits only one interview in a month to a detenu. We are of the view that a detenu must be permitted to have at least two interviews in

a week with relatives and friends and it should be possible for a relative or friend to have interview with the detenu at any reasonable hour on

obtaining permission from the Superintendent of the Jail and it should not be necessary to seek the permission of the District Magistrate, Delhi, as

the latter procedure would be cumbrous and unnecessary from the point of view of security and hence unreasonable. We would do so far as to say

that even independently of Rules 550 and 559A, we would regard the present norm of two interviews in a week for prisoners as furnishing a

criterion of what we would consider reasonable and non-arbitrary.

8. In this background, the validity of the G.O. has to be considered. The first contention of the petitioners is that the proviso makes a hostile

discrimination against the prisoners under the TADA Act. It is their contention that there is no nexus between the classification of TADA prisoners

and the other prisoners and the object of the proviso. It is submitted that security risk is present in the case of all prisoners and the TADA

prisoners cannot be classified into a separate group. There is no merit in this contention. The Act itself was passed in order to make special

provisions for the prevention of and for coping with the Terrorist and Disruptive activities and matters connected therewith or incidental thereto.

Some of the provisions are a departure from the ordinary law, since the common law was found to be inadequate and not sufficiently effective to

deal with the special class of offenders indulging in terrorist and disruptive activities. The legislature considered such crimes to an aggravated nature

which could not be checked or controlled under the ordinary law and enacted deterrent provisions to combat the same. The Supreme Court has

said in *Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat*, that the Act is an extreme measure to be resorted to when the police

cannot tackle the situation under the ordinary penal law and the intendment is to provide special machinery to combat the growing menace of

terrorism in different parts of the country. Hence, there is no merit in the contention that TADA prisoners cannot be classified as a separate group.

The principle of classification among the prisoners is recognised by the Supreme Court in *Francis Coralie's case* AIR 1981 SC 746. In the

passage extracted already, it is pointed out that the detenus under the COFEPOSA Act stand on a higher pedestal than under-trial prisoner or a

convict. Hence, we do not find any error in the classification of TADA prisoners as a separate group.

9. The second contention that the proviso is arbitrary and imposes unreasonable restriction is well-founded. In fact, the language used in the

proviso appears to be somewhat clumsy. The first sentence deals with legal advisor and close family relatives. But it specifies the persons who are

considered to be "close family relatives" for the purpose of the proviso, viz., father, mother, husband, wife, brother, sister, son and daughter of

such prisoner. The sentence also uses the expression "alone". Thus, all the other relatives are excluded from the category mentioned in the first

sentence. The second sentence does not refer to the other relatives, but is uses the expression "distant relatives". Here again, the word "alone" is

used. In W.P. No. 10158 of 1992, the petitioner is the mother-in-law of the prisoner. The prisoner has no other near relation in this country. His

wife is also outside the country. In these circumstances, the mother-in-law wants to have an interview with the prisoner. But, the proviso does not

bring within its ambit, mother-in-law. Can it be said that mother-in-law is a distant relation ? If the proviso contemplates that all persons who are

not mentioned in the first sentence are distant relations, the proviso is wholly arbitrary and unreasonable. For example, it cannot be said that a

wife's brother and father's brother are distant relations. Even such persons are excluded from the named category. If the second sentence had

been made applicable to all the relatives, other than the named relatives, there might not have been any difficulty in understanding it. But, it uses the

expression "distant relatives alone". But, persons who are in fact "close relations and cannot be classified as "distant relatives" have no place at all.

They cannot interview the prisoner under any circumstances as the second sentence provides for "distant relatives alone" without defining the

expression "distant relatives". It is only the distant relatives who can approach the Home Department for permission to interview. Even if the word

"distant" is understood as meaning "other" in the context, the word "alone" will be meaningless. The word "alone" leads us to think that there are

some relatives who are neither close nor distant. Thus the first sentence does not refer to close relatives other than those expressly named while the

second applies only to distant relatives.

10. As regards friends, the last sentence in the proviso reads that "under no circumstances, friends shall be allowed to interview the prisoner". No

discretion is given to the authority. As the proviso now stands, if a prisoner has no "close family relatives" named in the first sentence or any

"distant relatives", no friend of the prisoner can interview him. If the under-trial prisoner has only friends, then he cannot have interview with

anybody from outside world. That is wholly unreasonable as pointed out by the Supreme Court.

11. The contention of the Government is that at the time when the prisoners is taken into custody a list of relatives is obtained from him and the

Government verifies whether the particulars of such relatives are true. Their antecedents are said to have been checked up by the Government. It is

contended that if any other person is to interview the prisoner, the Superintendent of Prison will not have sufficient machinery or time to verify their antecedents and permit them to have interview and that is the reason why such distant relations are made to apply to the Home Department and

get orders. If the object of introducing the proviso is for security reason, then sufficient safeguards can be made otherwise than by the proviso not

introduced. In fact, Rule 530 provides that screens or wiremesh partition shall be put up, if necessary, between the prisoners and the persons

interviewing them to prevent the passage or introduction of any prohibited articles between them. The Government introduced R. 530A providing

for a partition with fibre glass. The validity of that Rule was challenged in this Court in *Nalini v. State of Tamil Nadu*, 1993 LW (Cri.) 606. The

Division Bench which considered the question has referred to the relevant judgments of the Supreme Court and upheld the validity of the said rule.

Ultimately, the Division Bench said thus :-

Keeping in view, the Courts will have to strike a just balance between the right of the prisoner and the preservation of internal order, discipline

and maintenance of institutional security against threat to lives and escape attempts by prisoners, in the background of community as well, the final

picture which emerges out, can be formulated as follows :-

(1) The State Government has power under sections 40 and 59 of the Prisons Act, to introduce Rule 530A in the Tamil Nadu Prison Manual and

the said rule cannot be struck down as ultra vires of the constitution or null and void on any reasonable basis.

(2) A distinction will have to be made regarding interviews between defending counsel and prisoners and prisoners and other visitors.

(3) Visitors can have interviews with prisoners in the interview room only with the existence of fibre glass partition. They will have to be frisked,

checked and monitored before interviews, and if need arises after interviews as well. Visitors will not be permitted to touch the prisoners.

Obviously, such touching is not feasible due to existence of fibre glass partition.

(4) Defending counsel normally shall interview prisoners one at a time, on either side, through fibre glass partition, conversation between them

being through intercom facilities, which shall be maintained without any defect and effectively, by prison authorities at all times.

(5) In the event of an emergent need for communication between counsel and prisoner on non-court hearing date, a single prisoner and a counsel

can engage themselves in interview, on the basis of documents which need mutual reading, through an opening in the fibre glass partition, or sliding

of the fibre glass partition to the extent necessary and sufficient for the said purpose. A prisoner will be searched before and after the interview and

similarly the counsel will have to undergo the process of frisking, checking before and after conclusion of such special interviews.

(6) Counsel shall continue to have interviews with prisoners in Court Hall, with the permission of the Designated Judge, on hearing date, either

individually or collectively, with the prisoners subject of course, to security arrangements, which are now in existence, and admittedly not causing

any hindrance, for effective communication, between counsel and client, for the security men are stationed within vision of interviewer and the

interviewed, but at non-hearing distance. In the event of a dire need, with the permission of the Designated Judge, Court sitting, time can be

modulated to facilitate interview in Court Hall, between client and defending counsel.

(7) Interviews between visitors and prisoners can be mentioned through a third intercom instrument kept in the prisoner's side of the interview

room, as is being done now, but such monitoring shall not be done, when defending counsel interview prisoners, the only exception being, when

specific intelligence material is available, needing such monitoring, in which event, counsel shall be apprised of such monitoring, in advance.

(8) Neither the visitor nor the counsel, will be allowed to touch the prisoner under any circumstances, at least so far as the present exigencies, exist.

(9) Whenever circumstances so demand, documentary communication, if any, between counsel and prisoner can be censored, for the need to

detect passing of incriminating material would certainly outweigh the prisoner's right to unmonitored communication with counsel.

12. The observations made by the Division Bench show that there are sufficient safeguards in the Rules and introduction of the proviso to R.

541(1) may be wholly unnecessary. If a visitor is not going to be permitted to touch the prisoner or to have direct contact with him, or to have an

interview with him in the absence of an official, there is no question of any risk of the security by allowing him to have the interview. At any rate, it

will be certainly open to the Government to provide for such safeguards as would ensure that there is no attempt by the prisoner to escape or his

friends or relatives to help him in doing so or engage in any disruptive activities. On the other hand, the proviso now introduced will not serve that

purpose. Even a close relative who is now permitted by the rule to meet the prisoner without approaching the Home Department, but on giving a

requisition to the Superintendent of Prison can help the prisoner to escape or engage in undesirable activities. In fact, it can be said that the close

relatives may be more interested in getting the prisoner out than friends or distant relatives. Thus, the proviso may not enable the fulfilment of the

object for which it is said to have been introduced.

13. The contention of the respondent that the doctrine of "reading down" shall be applied and the validity of the Rules should be upheld, cannot be

accepted. The Supreme Court had occasion to consider the scope of the doctrine in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress

and Others, and observed that where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation

violates the principles of natural justice or the provisions of the Constitution, it cannot be read down to save the said provision from constitutional

invalidity by bringing in or adding words to the same.

14. In the circumstances, the proviso is undoubtedly arbitrary and unreasonable. The restriction imposed on the distant relatives, i.e., to approach

the Government in the Home Department before having an interview with the prisoner is an unreasonable one. So also the prevention of interview

by friends under any circumstance.

15. In the circumstances, we hold that G.O.Ms. No. 972, Home (Prison-B) dated 8-6-1992 is unconstitutional and illegal. The said G.O. is

quashed. In one of the writ petitions, viz., W.P. No. 9630 of 1992, some other reliefs are prayed for. They are not consequential to the quashing

of the G.O. They are entirely outside the scope of the writ petition. In the circumstances, we are not inclined to consider the same.

16. The writ petitions are allowed to the extent of quashing the said G.O. only. In other respects, they are dismissed. There will be no order as to

costs. It is open to the Government to frame rules, which would fall within the guidelines fixed by the Supreme Court in Sunil Batra Vs. Delhi

Administration and Others etc., and the Division Bench in Nalini's case, 1993 LW (Crl.) 606.

17. Petition partly allowed.