

(1987) 04 AP CK 0007

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1822 of 1985

Poola Bhaskara Vijayakumar

APPELLANT

Vs

State of Andhra Pradesh and Another

RESPONDENT

Date of Decision : 24-04-1987

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 23, 23(1), 23(2)

Citation : AIR 1988 AP 295

Hon'ble Judges : P.A. Choudary, J

Bench : Single Bench

Advocate : P.B. Vijaya Kumar, for the Appellant; A.G., for the Respondent

Judgement

1. This is a writ petition of the genre of public interest litigation. While studying Criminology as part of his third year B.L. degree Course, the petitioner one day on 16th February, 1985 visited the Central Jail at Visakhapatnam. There he noticed the condition of prisoners in the matter of their working, for the prison authorities without getting almost any payment in return. He found the prison authorities extracting work from the prisoners under going rigorous imprisonment without paying wages at all or paying nominal wages. He concluded that the prisoners convicted of rigorous imprisonment are thus being exploited and are being subjected to forced labour. Moved by his humane heart which was grieved by the conditions of the prisoners, he filed this writ petition seeking relief of an appropriate writ from this Court under Art. 226 of the Constitution compelling authorities, to pay prisoners wages for their work.

2. I commend the public spirit and endeavour of the petitioner who has not yet ceased to weep over others' sorrows and sufferings. The glow of his early thought did not decline in feelings dull decay. His efforts in the interests of those locked up behind the high and not easily accessible walls and almost forgotten and uncared minority of our society is praiseworthy. I, therefore, entertain this writ petition overruling the traditional objection raised by the Advocate General to the maintainability of this writ petition on the ground that the petitioner is not

an aggrieved person and, therefore, has no locus standi to maintain this writ Petition. I add to say that in public law unlike in private law many more are welcomed and accepted as aggrieved persons.

3. The petitioner's case is that extraction of work by the State from the prisoners convicted of rigorous imprisonment without paying for such work is contrary to the mandate of Art. 23 of the Constitution of India which has forbidden the practice of forced labour in our Republic. The petitioner argues that even those prisoners convicted to hard labour are entitled to be paid for the work done by them or extracted from them. He says non-payment to rigorous convicts amounts to State violating Art. 23 of the Constitution. It needs no elaborate argument to show that the State cannot act contrary to or in violation of fundamental rights which are in essence so many limitations on the exercise of State power. It is an established position of the Constitution that State powers are a collection of legal powers and they cannot be exercised contrary to the Constitution. It is equally accepted that the prisoners too are entitled to the enjoyment of such of those fundamental rights enumerated in Part III of our Constitution provided the enjoyment of those rights is not inconsistent with their legal and physical condition of imprisonment to which they have been reduced by reason of their conviction. A prisoner may not enjoy, for example, the right to move throughout the territory of India but he may practice his religion while being a prisoner. The well known judgment of the Supreme Court in *State of Maharashtra Vs. Prabhakar Pandurang Sangzgiri and Another*, upheld the right of a prisoner to send his manuscript of a scientific book out of the jail for publication. That judgment is based on facts that firstly there is no law prohibiting a prisoner from publishing a book. Secondly nor such an activity is inconsistent with his detention. Payment of wages to a rigorous imprisoned convict is not forbidden either directly or indirectly by any law. Nor payment is inconsistent with the legal condition of the convicted prisoner. Both can co-exist. But the question is Art. 23 of the Constitution can form the basis for the assertion that a prisoner has a right to be paid wages. (The word "wages" is used not in scientific sense but in its common sense.) I find the answer to that question in the negative. Art. 23 of the Constitution forbids trafficking in human beings and practice of begar and similar forms of forced labour. The legal consequence of this constitutional injunction is that a human being should not be treated as a commodity or a chattel. Article 23 is a constitutional attempt to establish human dignity. Law cannot recognise or tolerate the institution of forced labour. The question is whether extraction of work without payment from the prisoners can be called practice of forced labour within the meaning of Art. 23 and can be compared to trafficking in human beings and begar. I am not inclined to hold that extraction of work from prisoners convicted to hard labour by courts can be regarded as a form of forced labour similar to trafficking in human beings and begar and condemn the institution of hard labour on that ground. Judicial verdict imposes hard labour more as a punishment of the prisoner and less as a means to incline to extraction of useful work from the prisoner.

Our first Prime Minister who has spent so many years of his life in jail some of them with hard labour in his autobiography a rule of U. P. Jail Mandal to show this real purpose of imposition of rigorous imprisonment. The essence of rigorous imprisonment as established by our penal system is to condemn the prisoner to inconvenience and unpleasantness. Forced labour in Art. 23 connotes employment of labour productively and not as punishment but without the consent of the labourer. If extracting prison work is held to be contrary to Art. 23 on the assumption that it is forced labour a major part of our prison punishment should immediately collapse. In that event, even payment of wages by the State to a prisoner freedom of the worker to reject employment. To be free the worker should have the engage himself in the work offered or to refuse to engage himself it that particular work. Lord Atkin's famous dictum in *Nokes v. Doneaster Collieries Ltd.* 1940 A. C. 104 this aspect of the contract of employment peculiar to capitalism. A prisoner" undergoing rigorous imprisonment imposed being held unconstitutional the context of forced labour in Art. 23 cannot be being to apply to prison labour. Crucial extraction of work as a part of punishment cannot, therefore be rejected to. It must, therefore, be accepted that forced labour is different from labour extracted as punishment. It is for this reason that the will amendment to the American Constitution excepts by way of abundant caution punishment imposed for crimes from the category of involuntary, servitude and that even Art. 8 of the covenant human rights as forced or compulsory labour. It is difficult to believe that Art. 23 of the Constitution is designed to away silently and stealthily with these well-known avid well- established systems of punishment involved in imposition of rigorous imprisonment and recognised by the civilised world, or otherwise. A major part of our Indian Penal Code has to be declared invalid. There is not enough of textual or historical support. Art. 23 of the Constitution or its imposition of rigorous imprisonment is unconstitutional.

4. But what then is the true scope of Article 23 of the Constitution? In answering that question, we should note that Article 23 is in passive voice and does not reveal who the subject is. What is significant is the declaration contained in Art. 23 that contravention of the Prohibition contained therein against forced labour of trafficking in human beings is made into an offence. An offence is a constitution of crime, not merely acting ultra vires. An offence could not normally be envisaged by a nation's Constitution to be examined by the State. For these textual reasons, I am of the opinion that Art. 23 is not intended by the constitution to be a fundamental right directly available against the State. Relevant historical evidence also strengthens this conclusion. The corner stone of our nation, which our Constitution undoubtedly is laid for the erection of a liberal, democratic, egalitarian welfare State But it must be remembered that the Indian State is erected on the uncleared debris of a feudal social order. As our chequered political and social history failed to ensure the growth of indigenous institutions appropriate for a modern liberal State the task of sweeping away the medieval social and political remnant of inequality and inhumanity and erecting in their place a modern, liberal and egalitarian State is assumed by the

Constitution itself. Many of our fundamental rights attempt to remove those remnants of feudal order. This constitutional scavengery of modernising our social order is performed mostly by our fundamental rights like Arts. 17 and 23. Article 17 which abolishes untouchability is not in the main a limitation on the power of the State power as and admonition to the society. So is Art. 23. These Articles belong to a category of fundamental rights which the Germans call *Dritwirkung der Grundrechte*. Under these constitutional Provisions the State is put under a constitutional obligation to refuse recognition and enforcement to the rights arising out of such obnoxious feudal transactions and to or wide remedies to the affected individuals for the redressal of violation of his rights by other private individuals. Such rights do not envisage possibility of their violation by the state. This, in my opinion, is the true scope "of Art. 23. Thus understood Art. 23 should be held to be more a prohibition directed against the social practices of one member of the society against another rather than a prohibition against the State. I am, therefore, of the opinion that the concept of forced labour in Art. 23 has nothing to do with the protection against the direct action of the State.

5. The language of sub-clause (2) of Art. 23 does not in my view militate against the above reasoning. The sub-clause,(2) of Art. 23 no doubt says that Art. 23(i) shall not be understood as preventing the State from supposing compulsory service for public purposes. Thereby the sub-,clause might give rise to an impression that the prohibition contained in the main Art. 23(1) possibly applies to State action also. But on a close look it appears to me that sub-clause (2) is enacted more by way of abundant caution and should also be understood as an independent provision. Imposing compulsory service for public purpose cannot be considered as trafficking in human beings or begar. That is the incidence of citizenship. The justification for enacting sub-clause ,to Art. 23 has to be found in the anxiety of the Constitution to foreclose. a possible argument that such an incidence of citizenship may also fall under the prohibited category of the forced labour.

6. A prisoner in serving out his sentence and performing hard labour attached to his sentence of rigorous imprisonment cannot be said to be doing any service for any-public purpose.

7. For the above reasons, I hold that imposition of rigorous imprisonment with hard labour attached to it does not amount to extracting forced labour from the prisoner and it, is not contrary to Art. 23 of the. Constitution. I am in full agreement with the American Constitutional rule referred to by, Warren, C. J. in *Estes v. Texas* 14 Led 2d 543 ,at pages 562, "-;63 that, "For the Constitution to have vitality, this Court must-be able to apply its principles to situations that may not have been fore seen at those principles were adopted Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

My reason for not adopting that invigorating American principle of Constitution to this case is one of principle as 1 attempted to explain in this judgment. To the

above extent I respectfully disagree with the observations made by the Division Bench of the Kerala High Court in *In The Matter of P.,R. E. Of Wages Of Prisoners* AIR 1983 Ker 267 on which the petitioner placed his entire, reliance.

8. From the above it does not follow that this Writ Petition should be dismissed. I am of the opinion that the claim for payment for the work done by the prisoners can be sustained without straining of . the constitutional text under Art. 21 of the Constitution. Article 21 of, the Constitution guarantees to all, persons life, and personal liberty against deprivation otherwise than in accordance with the procedure established by law, and is today regarded by the Indian Constitution as one-of the most important provisions of the fundamental rights. A prisoner does not cease to be a person merely because he is a prisoner: a prisoner may not enjoy his right to full life and personal liberty guaranteed in Art. 21 because . his imprisonment has subtracted a portion of that right. But to the extent that enjoyment of the guaranteed right of Art. 21 is not inconsistent with his condition of imprisonment, a prisoner is still entitled to the protection of Art. 21 of the Constitution. Law no longer is based upon the theory that a convicted person suffers from all public and private legal disabilities. The liberal trend of the modern law of prisons is stated by Halsbury's Laws" of England @IV Edition, Volume,37, at paragraph 1137 in these words, "A sentence of imprisonment does not automatically extinguish a prisoner's legal rights." In Paragraph "1138 of the same Volume it is said, "The ordinary civil and criminal law operates in prisons In spite of his imprisonment, a convicted, prisoner retains all civil rights which are not taken away expressly or by necessary implications In this context, we should note the constitutional fact that the words "life and personal liberty" in Art. 21 are vast in their scope and rich and pregnant in their meaning and are sweeping and residuary in their application. The Supreme Court in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, laid it down that the right under Art. 21 comprehends the right to earn one's livelihood. A person because he is in prison does not lose this right so long as his right under Art. 21 can be exercised by him consistently with his imprisonment. Work is necessary for the preservation of life. In England, therefore, a prisoner is not only entitled but he is also bound to work and he is paid for his work at the rates apporved by the ,Secretary of State. The right of the prisoner to earn his livelihood and to p reserve his life thus imposes a corresponding obligation on the State to provide work to the prisoner and say for it. Such right of the prisoner can only be taken away by a valid law enacted by the found by the constitutional legislature, courts to be fair and reasonable. That.-is the ratio of the two hall-mark decisions of the Supreme Court in *Mithu Vs. State of Punjab*, and *State of Maharashtra Vs. Prabhakar Pandurang Sangzgiri and Another*, (supra),as there is no law enacted by the legislature authorising the State to deny the payment for the work extracted from prisoner the State would be violating Art. 21 in extracting work from the prisoner without payment.

9. Section 53 of the Indian Penal Code no doubt says that offenders are liable for imprisonment of two descriptions namely rigorous imprisonment with hard labour

and simple imprisonment without hard labour but neither Indian Penal Code nor any other law goes further and authorises the State to extract hard labour from the prisoner without payment for the work done by the prisoner. In the absence of such enacted law, it must be held by the courts that the failure of the State to pay for the work extracted from the prisoner amounts to violation of the prisoners right to earn his livelihood. This reasoning cannot be found fault with on the basis that imprisonment will then become the best form of getting employed. Where the State kept the prisoner in its custody, the above implication becomes unavoidable.

10. In the general realm of reason too, one can find no support for the view that the State can deny payment to the prisoner's work or that the State is under no obligation to provide any work to the prisoner. Idleness, particularly forced idleness, is sure to destroy a made life and personal liberty. Contending that a sentence of imprisonment does not cancel an individuals basic human rights to work and to receive payment. at the customary rate, the department of Economic and Social Affairs of the United Nations and expressing conscience of humanity is advocating a far- reaching proposal to integrate prison labour with the free economy of such a nature as to allow, among other things, paying employed prisoners at the going outside rates. A glance at History shows that this is not novel suggestion. Prisoners in Massachusettes (U.S.A.) were being paid for their labour at least from the year 1700 under the laws of that State. Similar legal provisions have been in vogue in other States of the U.S.A. at least from the latter part of the 18th century." Hans V. Hentig writing in Volume 50, Harvard Law Review at page 714 observed:

"If we want to keep the prisoner safely, if we want to protect safely now and later on, we have to give the convict some outlet for his craving for activity. There is only one decisive aspect to prison labor.. the public aspect There is no "productive labor without some conduct for the laboring man himself. The" prisoner's family must be supported or society is charged with an additional burden.

The purpose of imposition of hard labour is not for the purpose of State making profit out of sweat and toil of the prisoner. It is mostly imposed by the statute as a mode of punishment. Paying for the work which the Constitution requires under Art. 21 would not be inconsistent with the purpose behind he imposition of rigorous imprisonment. On he other hand, such payment would benefit the dependents of the prisoner and would help the prisoner to rehabilitate himself with legality and social utility. It will work out much cheaper for the State to pay the Prisoners decently and rehabilitate them to be maximum extent possible than render them socially useless on their release and burdensome to the community. Supporting thie system of payment to the prisoners. Taft and England in their Criminology, Fourth Edition wrote that "Wage, payment allegedly creates friendly attitudes, develops the feeling that one is a useful worker, and permits the accumulation of savings for the future." Barnes and Teeters in their New Horizons

in Criminology, Third Edition wrote, "Ideally the man in prison should receive a wage so that a part of his compensation could be used to help support his family". The present day object of punishment is mostly preventive and reformative. It is no longer retributive. Moses' law of eye for an eye and tooth for a tooth is clearly antiquated. I, therefore, hold that the prisoners would be entitled under Art. 21 of the Constitution to be paid for their labour and the State would be violating the prisoners' right to be and personal liberty by extracting labour from them without payment. The present payments being made by the State are awfully inadequate. In them there is neither consideration for their work nor compassion for their fate. I accordingly direct the State of Andhra Pradesh to pay the Prisoners adequately for the labour extracted from them.

11. The more difficult question then remains is at what rates the prisoners should be paid. The learned Advocate General said that the State is paying at rates which I find to be very normal. I find the Maharashtra State has also introduced the system of payment to the prisoners. The Kerala High Court held in the above decision *In Re: Prison Reforms Enhancement of Wages of Prisoners etc.*, that the prisoners should be paid on the analogy of free labour. There is ample support for this view in some text-books. But before accepting that view and adopting it as a rule of the Court I think it necessary to get the matter examined in greater detail. - However, I am inclined to say that the present rates of wages being paid to the prisoners are awfully inadequate. Considering the fact that the labour is extracted from prisoners partly as a punishment and the Constitution requires the State to provide work for the prisoners and pay for it and rehabilitate them, I am inclined to hold that this matter cannot be decided in this Writ Petition straightway. I think this complex matter requires a further and deeper study by a group of competent penologists, sociologists and economists. I, therefore, direct the State Government to constitute such a committee to consider the various aspects and fix a scale of wages payable to the prisoners which would be fair and considerate to them and would not be unfair to the rest of the society.

12. In the terms indicated above this Writ Petition is allowed. No costs.

13. Petition allowed.