
(2009) 12 GAU CK 0079

In the Gauhati High Court

Case No : C.M. Appeal No. 169 of 2009 in Writ Petition (C) No. 92 of 2009

Smt. Gopa Roy

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226, 32
Prisons Act, 1894 — Section 3, 3(1), 3(2), 3(3), 3(4)

Citation : (2010) 1 GLD 466

Hon'ble Judges : T.NK. Singh, J

Bench : Single Bench

Judgement

T.NK. Singh, J.—Heard Mr. A.L. Saha, learned counsel appearing for the petitioner as well as Mr. T.D. Majumder, learned Addl. Govt. Advocate for the State-respondents.

2. By this Misc. application, the petitioner prays for a direction to the respondents to get treatment of her son Shri Snehangshu Roy an undertrial prisoner in connection with West Agartala P.S. Case No. 97 of 2008, by the sector of his own choice and/or for a direction to the State-respondents to refer her son to the Medical Board with a specific direction to give opinion regarding the effect of providing no treatment to the accused-Shri Snehangshu Roy from 18.5.2008 to 21.5.2008. The petitioner also stated that the fundamental right of her son i.e. accused-Shri Snehangshu Roy, has been violated by not arranging appropriate health care timely and as a result, caused total damage of his one ear and partial damage of his another ear as well as loss of his youthful strength and vigor while in custody and alleged that her son is still suffering from severe bodily pain in general and pain in his ears and testis in particular.

3. The Court, passed an order dated 30.3.2009 in the connected writ petition W.P. (C) No. 92 of 2009, directing the State-respondents "to constitute a Medical Board in which the Head of the ENT Department, AGMC to GB Panth Hospital should be a member for examination of the petitioner's son. The Superintendent

of Central Jail, Agartala is directed to produce the said Shri Snehangshu Roy before the Medical Board for his examination. The entire exercise be done within a period of ten days from today and after examination of the petitioner's son the Superintendent of Central Jail, Agartala shall furnish the report of the Medical Board before this Court by 13.4.2009 positively."

Pursuant to the said direction of this Court, a Medical Board was constituted and the said Board submitted its report vide No. F. 4(2)-Med/94-95, dated 9th April, 2009 that, the Board is of the opinion that the patient will not be benefited from a referral at outside State i.e., AIIMS, for his present illness i.e. Sensory Neural Deafness (Both ear). He is advised to continue treatment as suggested by E.N.T. Department of Agartala Government Medical College, Agartala, Tripura (West). The said Report of the Medical Board reads as follows:

"No. F. 4(2)-Med/94-95 Government of Tripura Office of the Chairman, Standing Medical Board, Agartala Government Medical College, Tripura (West) Dated, Agartala, the 9th April, 2009

Board has examined Sri Snehangshu Roy, and previous record of his treatment. The Board is in the opinion that the patient will not be benefited from a referral at outside State i.e. AIIMS, for his present illness i.e. Sensory Neural Deafness (Both ear). He is advised to continue treatment as suggested by E.N.T. Department of Agartala Government Medical College, Agartala, Tripura (West).

This is issued in connection with the Transmission of the Hon"ble Courts order dated 30.3.2009, with case No. W.P.(C) 92 of 2009 and reference No. 1717-18/HC/AGT/B/CR/2009 dated 30.3.2009 issued by the Dy. Register (Judl.) Gauhati High Court, Agartala, Branch, Agartala.

Sd/- Member Sd/- Member Sd/- Co-OPT. Member Sd/- MEMBER SECRETARY
Sd/-CHAIRMAN

4. In the present Misc. application, the petitioner also stated that the Medical Board has not given any decision as to whether better medical treatment i.e in AIIMS, New Delhi or other places, would restore the hearing capacity of the accused-Shri Snehangshu Roy and also treatment of the right ears and other parts of his body such as lower abdomen, private parts and pain in the spinal cord etc., may be recommended and it is not clear from the report of the Medical Board as to whether the Medical Board had considered the communication dated 1.4.2009 of the petitioner in this connection. It is also alleged that in the State of Tripura, all of the modern medical and health care facilities are not available and also that even all medical diagnostic tests are not conducted in the State of Tripura for want of facilities and that is why the Medical Board has been referring Hon"ble Ministers, Government Officers are employees outside the State of Tripura on regular basis for better treatment and diagnosis.

5. The respondents, by filing affidavit in the present application, stated that, the petitioner cited several disputed facts to create cloud in the mind of this Court

and as such the instant Misc. application filed by the petitioner is liable to be dismissed in limine. On 2.8.2008, the learned Chief Judicial Magistrate directed to arrange for medical check-up of the petitioner's son, accused-Shri Snehangshu Roy by an ENT Specialist of Agartala Govt. Medical College and GBP Hospital and that the accused undertrial prisoner-Shri Snehangshu Roy was provided with medical treatment timely at the Central Jail Hospital. The Medical Officer of the Central Jail Hospital examined him and prescribed medicines. As per direction of this Court's order, a Medical Board was also constituted, in which the Head of the ENT Department, AGMC & GBP Hospital was one of the Members. Over and above, the accused-Shri Snehangshu Roy was provided treatment of his ears by the Specialist of the ENT Department of AGMC and GBP Hospital and the other complaints of abdominal pain, in the testis and low back pain by the Medical Officers of the Central Jail Hospital, AGMC as well as GBP Hospital. The Ultra Sonography of testis, C.T. Scan of the brain, X-rays and other pathological investigations were also conducted by the specialist of the AGMC and GBP, Agartala but the results were found normal. As per the direction of this Court, the copies of the medical prescriptions, medical test report, entries of the Medical Officers, Minutes Book and the extract of sick register of the Central Jail Hospital were also supplied to the petitioner, the copies of those documents were also produced before this Court. In the affidavit, the respondents clearly stated that the petitioner's son-Shri Snehangshu Roy was attended by the Medical Officers, Central Jail Hospital from time to time as per his complaint on 3.6.2008, 22.7.2008, 28.7.2008, 1.8.2008, 4.8.2008, 14.8.2008, 30.8.2008, 4.9.2008, 24.9.2008, 8.10.2008, 22.10.2008, 10.11.2008, 30.4.2009, 11.5.2009, 4.6.2009 and 22.6.2009. The respondents, in the affidavit, further contended that the petitioner's son was responding well at the time of his treatment on those dates.

6. The Standard Minimum Rules for the treatment of prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution No. 663 (XXIV) of 31st July, 1957 and 2076(LXII) of 13th May, 1977 are:

Medical services

22.(1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

23.(1) In women's Institution there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

24. The medical officers shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25.(1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

26.(1) The medical officer shall regularly inspect and advise the director upon:

- (a) The quantity, quality, preparation and service of food;
- (b) The hygiene and cleanliness of the institution and the prisoners;
- (c) The sanitation, heating, lightening and ventilation of the institution;
- (d) The suitability and cleanliness of the prisoner's clothing and bedding;
- (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities;

(2) The director shall take into consideration the reports and advice that the medical officer submits according to Rules 25(2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; If they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

7. It is now well settled law that, right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, be he a convict or under-

trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the Right to Life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights. The Fundamental Rights, which also include basic human rights, continue to be available to the prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by the Supreme Court. Hon"ble Justice S. Saghir Ahmad, as he then was, in *State of Andhra Pradesh v. Challa Ramkrishna Reddy and Ors.* AIR 2000 SC 2803 (Para Nos. 23, 24, 25, 26 and 28 of the AIR) observed that:

23. "Prison" has been defined in Section 3(1) of the Prisons Act, 1894 as any jail or place used permanently or temporarily under the general or special orders of State Government for the detention of prisoners. Section 3 contemplates three kinds of prisoners. Subclause (2) of Section 3 defines "criminal prisoner" as a prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction or by order of a Court-martial. "Convicted criminal prisoner" has been defined in Section 3(3) as a prisoner under sentence of a Court or Court-martial and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1992 or under the Prisoners Act, 1871. The corresponding provision in the new Code of Criminal Procedure is not being indicated as it is not necessary for purposes of this case. "Civil prisoner" has been defined in Section 3(4) as a prisoner who is not a "criminal prisoner".

24. Thus, according to the definition under the Prisoners Act, there is a convict, there is an under-trial and there is a civil prisoner who may be a detenu under preventive detention law. None of the three categories of prisoners lose their Fundamental Rights on being placed inside a prison. The restriction placed on their right to movement is the result of their conviction or involvement in crime. Thus, a person (prisoner) is deprived of his personal liberty in accordance with the procedure established by law which, as pointed out in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, must be reasonable, fair and just.

25. The rights of prisoners, including their Fundamental Rights have been culled out by this Court in a large number of decisions, all of which may not be referred to here. In *State of Maharashtra Vs. Prabhakar Pandurang Sangzgiri and Another*, it was held that conditions of detention cannot be extended to deprivation of other Fundamental Rights and the detenu, who had written a book in "Marathi", could not be prohibited from sending the book outside the jail for its publication. In *D. Bhuvan Mohan Patnaik and Others Vs. State of Andhra Pradesh and Others*, , it was laid down that convicts are not denuded of all the Fundamental Right they possess. Chandrachud, J. (as he then was) held:

The Secretary of one"s person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen

as if it were a part of an unwritten law of crimes. Such instructions are against the very essence of a scheme of ordered liberty. "See D. Bhuvan Mohan Patnaik and Others Vs. State of Andhra Pradesh and Others,

26. In Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi, Krishna Iyer, J. observed as under:

True, conferred with cruel conditions of confinement, the Court has an expanded role. True, the right to life is more than mere animal existence, or vegetable subsistence. True, the worth of the human person and dignity and divinity of every individual inform Articles 19 and 21 even in a prison setting. True constitutional provisions and municipal laws must be interpreted in the light of the normative laws of nations, wherever possible and a prison, does not forfeit his part III rights." "(See AIR 1978 SC 1517 Para 14).

28. Thus, the Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this Court.

8. The under-trials who are presumably innocent until convicted are by being sent to jail. Hon"ble Justice V.R. Krishna Iyer, as he then was, in Sunil Batra Vs. Delhi Administration and Others etc., observed that whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods "right, just and fair". A prisoner wears the Armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through "writ" aid. The Apex Court (Hon"ble Justice V.R. Krishna Iyer spoke for the Court) in Sunil Batra's case (supra), (3 Judges) in para Nos. 27, 28 and 29 of the AIR held that:

27. Once jurisdiction is granted and we affirm in unmistakable terms that the Court has, under Article 32 and so too under Article 226, a clear power and, therefore, a public duty to give relief to sentences in prison settings the next question is the jurisprudential backing for the play of that jurisdiction. Here again, Batra has blazed the trail and it blinds.

28. Are prisoners persons? Yes, of course. To answer in the negative is to convict the nation and the Constitution of dehumanization and to repudiate the world legal order, which now recognizes rights of prisoners in the International Covenant on Prisoner's Rights to which our country has signed assent. In Sunil Batra Vs. Delhi Administration and Others etc., this Court has rejected the hands off doctrine and it has been ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration. Our constitutional culture has now crystallized in favour of prison justice and judicial jurisdiction Sunil Batra Vs. Delhi Administration and Others etc.,

The jurisdictional reach and range of this Court's writ to hold prison caprice and

cruelty in constitutional leash is incontestable, but teasing intrusion into administrative discretion is legal anathema, absent breaches of constitutional rights of prescribed procedures.

29. The U.S. Supreme Court, in like situations, has spoken firmly and humanistically, and these observations have the tacit approval of our Court in Batra's case. Justice Douglas put it thus (ibid p. 422):

Prisoners are still "persons" entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process.

Justice Marshall strongly seconded the view : (ibid p. 412).

I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a "liberty" entitled to due process protection.

9. The Apex Court in D.K. Basu Vs. State of West Bengal, held that the arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by the Director, Health Services of the State or Union territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

10. The Apex Court, later on in Dilip K. Basu Vs. State of West Bengal and others, held that "More than seven months have elapsed since the directions were issued. Through these petitions, Dr. Singhvi, the learned Amicus Curiae, who had assisted the Court in the main petition, seeks a direction, calling upon the Director General of Police and the Home Secretary of every State/Union Territory to report to this Court compliance of the above directions and the steps taken by the All India Radio and the National Network of Doordarshan for broadcasting the requirements. We direct the Registry to send a copy of this application, together with a copy of this order to respondents 1 to 31 to have the report/reports from the Director General of Police and the Home Secretary of the concerned State/Union Territory, sent to this Court regarding the compliance of the above directions concerning arrestees. The report shall indicate in a tabular form as to which of the "requirements" has been carried out and in what manner, as also which are the "requirements" which still remain to be carried out and the steps being taken for carrying out those. Report shall also be obtained from the Directors of All India Radio and Doordarshan regarding broadcasts made."

11. The National Human Rights Commission, number of times stated that technical considerations for shifting a patient to the hospital cannot outweigh

right of the health care and as such, his right to life. Some of the observations and findings made by the National Human Rights Commission are summarized as follows:

The Commission has stated that technical considerations for shifting a patient to the hospital cannot outweigh the right of the patient to proper health care and as such, his right to life. The Commission expressed its anguish at the utter lack of sensitivity on the part of prison authorities of the District Jail, Banda, UP while handling the case of an undertrial, prisoner, Babu Lal, who succumbed to his burn injuries. The Commission views it as a classic case of systemic failure resulting in a loss of life which possibly could have been saved. The Commission observed that records show that instead of taking prompt action to follow the advice of the Surgeon of the District Hospital, Banda, the jail authorities entered into a bureaucratic tussle with the police authorities on the point as to who was responsible for providing guard (escort) and transport for taking the victim prisoner to Lucknow Medical College for treatment. Babu Lal, an undertrial prisoner who was admitted in the District Jail, Banda with burn injuries was sent to the District Hospital, Banda under police escort. He expired while undergoing treatment in the hospital on 22 November, 2000. The Commission while looking into his case found a disturbing fact:

The Magisterial Inquiry Report reveal that Babu Lal was brought to the District Jail on 4 November, 2000 with serious burn injuries. The Jail Superintendent referred the deceased to the District Hospital where he was admitted for treatment under Dr. M.L. Anandani. On November 2000, the deceased was discharged from the hospital at the request of police guard and was thereafter lodged in District Jail, Banda. From the records it is noticed that when the deceased was discharged from the Hospital on 8 November, 2000, Dr. M.L. Anandani, Surgeon, District Hospital had recommended that the patient be shifted to Burn and Plastic Surgery Ward, Medical College Lucknow, after making an entry in the Jail record and if for any reason he could not be sent there immediately, the patient be readmitted in the District Hospital. It appears that despite the advice of Dr. Anandani, the patient was not sent to Lucknow for specialized treatment and on 9 November 2000 the deceased was readmitted in District Hospital, Banda in a serious condition. Dr. M.L. Anandani wrote letters on 13th, 15th and 22nd November, 2000 for shifting the patient to Lucknow for further treatment pointing out that his condition was very serious. From the Magisterial Inquiry Report, it transpires that despite repeated recommendations of the doctor first made, as early as 8 November, 2000, the patient was not shifted to Medical College Lucknow for specialized treatment and the authorities concerned kept on exchanging communications for sorting out the issue as to who would provide escort for shifting the patient from Banda to Lucknow. Because of this approach adopted by the authorities the patient could not be given proper medical treatment. The Commission stated, "this reflects sadly on the concern of the State authorities for human life.

The Commission emphasized that "Right to Life" is a basic human right guaranteed as fundamental right under the Constitution of India. Therefore, it is the obligation of every State functionary to protect the life of a detainee in his custody and ensure proper medical treatment for him or her as and when required. Quoting Section 1058 of the UP Jail Manual which provides for the procedure for removal of a detainee in jail to the district hospital for treatment the Commission stated that it is obvious that a prisoner can be shifted from Jail to District hospital on advice of the Civil Surgeon after obtaining sanction from Inspector General. In matters of urgency if in the opinion of Civil Surgeon, there is danger to the life of a prisoner, he can be transferred to the District hospital for specialized treatment and a report can be submitted to Inspector General thereafter for formal sanction". Though the section is silent about the procedure to be followed for transferring the patient (detainee) to a specialized hospital located in another district yet the spirit of Section 1058 of UP Jail Manual demanded that prompt action for his transfer to Lucknow Medical College should have been taken when it was so advised by the Medical Surgeon of the District Hospital. Perhaps, slight urgency and sensitivity shown in this case could have avoided such an unfortunate incident. The Commission observed there is a dire need for systemic change and training to sensitize the law enforcement agencies. It directed the Chief Secretary, UP and DGP, UP to personally look into the matter and bring about appropriate systemic changes so that such unfortunate incidents are prevented in the future. They have also been directed to organize training programmes for the law enforcement officers to apprise them of the provisions of Jail Manual and also to sensitize them to show respect towards human rights of the detainees. The Commission recommended that appropriate directions be issued to all concerned that whenever a human life is involved and the case is of urgent nature, prompt action for proper medical treatment of the detainees should be taken by the officials concerned. The Commission hoped that the State authorities would promptly act on the recommendations of the Commission and bring about systemic changes under intimation to the Commission.

12. For the foregoing discussions, it is clear that the petitioner's son who requires special treatment shall be treated by the specialists. But this Court has no expertise to decide what type of special treatment will be required by the petitioner's son and who would be the competent Specialist to treat the petitioner's son. In the absence of the expert opinion, this Court is not in a position to direct the respondents to treat the petitioner's son by a doctor of his own choice. Therefore, this Court needs the opinion of Expert. The Apex Court (3 Judges) in *Sunil Batra's case* (supra), held that the principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 the Constitution like a brooding omnipresence and the procedure contemplated by Article 21 of the Constitution must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be

satisfied. The question is whether the claim of the petitioner for treatment of her son, who is an under-trial prisoner, by a doctor of his own choice is reasonable or not in the present case that, the petitioner is a laymen who has no expertise in the field of Medical Science. This Court is of the considered view that, mere asking by giving some reasons which are not technically sound, for treatment of her son by a doctor of his own choice shall certainly be unreasonable. But the matter cannot end here, inasmuch as, it involves the fundamental right of the petitioner's son who requires special treatment. The best course would be that the Medical Board constituted in terms of the earlier order of this Court dated 30.3.2009, shall re-examine the petitioner's son-Shri Snehangshu Roy to decide:

(i) what type of special treatment will be required for the alleged damage caused to the ears of the petitioner's son and also the pain on different parts of his body such as lower abdomen, private parts and spinal cord etc.;

(ii) whether the facilities available in the State of Tripura will be sufficient enough to cater the special treatment so required by the petitioner's son;

(iii) whether the present special treatment of the petitioner's son by the present Specialists will be sufficient enough or not for the type of special treatment required for the petitioner's son.

13. The Medical Board is accordingly directed to re-examine the petitioner's son-Shri Snehangshu Roy, an under-trial prisoner, after informing the date on which the petitioner's son is to be examined by them to the petitioner within 15(fifteen) days from the date of passing this order. The respondents are also directed to do the needful as per the opinion of the Medical Board within 10(ten) days from the date of receiving the opinion from the Medical Board. It goes without saying that, if anything found wrong, thereby resulting to damage of ears and other parts of the body of the petitioner's son because of lack of care from the side of the respondents, the respondents would be liable for that.

14. With the aforesaid observations and directions, the Misc. application is disposed of. The Registrar is directed to furnish the copies of this order to the learned Counsels appearing for the parties in the course of the day.