

(2011) 06 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : HCP No. 148 of 2011 and CMP No. 35 of 2011

Syed Ali Shah Geelani

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 10-06-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 22

Citation : (2011) 3 JKJ 413

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Judgement

Hasnain Massodi, J.—The right to personal liberty is core concept of our Constitution. The Framers, alive to the importance of right to

personal liberty placed it alongside and on the same pedestal as the right to life. The right to personal liberty in reality, is an integral and inseparable

part of right to life, as there would be no meaning to right to life with personal liberty curtailed. The Article 21 of the Constitution of India where-

under right to life and personal liberty is guaranteed represents the spirit and essence of all other fundamental rights guaranteed under Part III of the

Constitution. In other words freedom of speech and expression, freedom of association, freedom of trade, freedom of religion., So on and so

forth, are only fundamental aspects of the right to life and personal liberty. If for one or the other reason the fundamental rights except right to life

and personal liberty would not have been guaranteed still the right to life and personal liberty would have brought within its spread and sweep all

such fundamental rights.

2. It is to be remembered that right to life and liberty is not conferred under Article 21 of the Constitution. This right has always been there and

Article 21 of the Constitution also such other Constitutional and Statutory Provisions are nothing but an endeavour to protect this right. The right in

the words of justice Harlan in ""Griswold v. Connecticut 381 US 479 1065"" is not ""a series of isolated points"" but a ""rational continuum"".

In M. Achul v. V. Fano 427 US 15 (1976) Justice Stevens, joined by Justice Brennan and Justice Marshall, dissenting with the view that a prisoner

had no Constitutional protection/interest in avoiding his transfer from a ""medium security prison"" to a ""maximum security prison"", stated that the

Courts ""conception of liberty was fundamentally in correct"", Justice Stevens proceeded to observe:-

if a man were creature of the State, the analysis would be correct. But neither the Bill of Rights nor the Laws of Sovereign States created the

liberty which the Due Process Clause protects. [I] had thought itself evident that all men were endowed by their Creator with liberty, as one of the

cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred

by specific laws or regulations"". The Constitution Bench of Supreme Court in M. Nagaraj and Others Vs. Union of India (UOI) and Others, (Para

20) held:-

It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any

Constitution by reason of the basic fact that they are members of the human race."" The Apex Court (9 Judge Constitutional Bench) again in I.R.

Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others, para 109 and 49), has observed:

It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution.....Fundamental

rights occupy a unique place in the lives of civilized societies and have been described in judgments as ""transcendental"", ""inalienable"", and

primordial"". What are the limits of right to personal liberty? When and under what circumstances right of personal liberty may be curtailed and

whether the restrictions on the right to personal liberty of the petitioner as alleged in the petition are sustainable? are important questions raised in

the present petition. Before we embark on an exercise to find answer to the questions so raised, it would be appropriate to have a closer look at

the grievance voiced in the petition.

3. The petitioner is an octogenarian and claims to be fighting, as a political leader, for the rights of the people through peaceful and political

methods. The petitioner as stated by the respondents in their reply is an Ex-Legislator of the Jammu and Kashmir Assembly, has twice successfully

contested elections to the State Assembly and also contested election to the Parliament. The petitioner is ailing and has been under medical

treatment for last few years. The petitioner's grievance is that the respondents off and on without any lawful justification impose restrictions on the

movement of the petitioner, place the petitioner under house arrest and restrain his relations, friends and acquaintances from visiting the petitioner.

It is alleged that the petitioner is practically forced to be in solitary confinement in his house, for days together. The petitioner in para 5 and 6 of the

petition has given the dates on which the restrictions were imposed on petitioner's movement and the petitioner restrained from receiving visitors. It

is averred that during the year 2010 the petitioner was put under house arrest and forced to remain confined in his

residential house at Hyderpora, Srinagar for about 140 days. The petitioner after his return from Delhi is said to have been put under house arrest

from 3rd March, 2011 to 18th March 2011 and thereafter on 24 March and 26th April 2011. It is insisted that the frequent restrictions on the

movement of petitioner amount to infringement of right to life and personal liberty guaranteed under the Constitution of India. The petitioner on the

strength of the averments made in petition inter alia seeks a direction to respondents to lift the ""siege"" and ""cordon"" on the residence of the

petitioner and allow the petitioner and his family members free movement without any restraint on their liberty.

4. The respondents in their reply have denied that the petitioner has been ever placed under house arrest, or the respondents restricted his

movement or prevented visitors from visiting the petitioner. The respondents, while referring to the facts and events set out in the petition, insist that

admission on part of petitioner that the petitioner went to Delhi to get medical treatment, and participate in ""India Today Conclave"" received a

representative of Amnesty International at his residence, were indicative of the freedom of ingress and egress that petitioner enjoys from his

residence. The respondents, while insisting that they are under legal duty to restrain and even arrest any person suspected to be involved in

militancy related activities from visiting the petitioner and also to protect the petitioner from any threat to his life, point out that a number of senior

political workers and members of civil society have been gunned down by the militants and against the said backdrop a constant vigil is required to

be kept on the visitors to the petitioner's residence. The petitioner because of his having been ex-legislator of the J&K Assembly and a prominent

politician according to the respondents, deserves to be afforded adequate protection. The respondents to buttress their case that the petitioner is a

free man"" have given details of his outdoor political activities during the period referred to in petition.

5. Heard and considered.

6. The right to life and personal liberty is one of the most precious rights enshrined in the Constitution. In the words of Father of the Nation ""To

deprive a man of his natural liberty and to deny him the ordinary amenities of life is worse than starving the body; It is starvation of the soul, the

dweller in the body"". The right is not to be restricted to mere animal existence. It has been held by Supreme Court in *Francis Coralie Mullan v.*

Administrator, Territory of Delhi AIR SCC 608 that:

By the term ""life.....more is meant than mere, animal existence. The ' inhibition against its deprivation extends to all those limbs and faculties by

which life is enjoyed.....every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the

faculties ' of thinking and feeling.....It is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary"".

The Supreme Court in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, holding, that the right to life includes the right to

livelihood quoted with approval following observation made by Field, J. in *Baksey v. Board of Regents* (1954) 347 MD 442.

Life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by

which life is enjoyed"".

7. The Supreme Court over the years has given new dimensions to the right to life and personal liberty guaranteed under Article 21. It has been

held to include right to work, right to livelihood, right to privacy, right to clean and pollution free environment, right to speedy justice, so on and so forth.

8. The right to personal liberty has been held to include within its broad matrix, right to use every faculty and limb, the right to live with basic dignity and also right to carry on such functions and activities as constitute bear minimum expression of the human self. The right to move out from the residence interact with the people, receive visitors thus fall within ambit of the right guaranteed under Article 21 of the Constitution.

9. However, the right to life and personal liberty is not absolute not to be interfered with, under any circumstances, whatsoever. It may be interfered with or restricted in accordance with procedure prescribed under law.

10. The Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, clothed the procedure established by law in Article 21 with fairness, and justness of Article 14 and reasonableness of Article 19. In other words any law that permits restrictions on right to life and personal liberty must be just, fair and reasonable, and so must be the procedure prescribed under such law. The Apex Court in *Ranjan Dwivedi*

Vs. Union of India (UOI), holding that due process was applicable in the matters relating to right to life and personal liberty observed, "It is difficult to hold that due process has not still been infused into Article 21".

11. The restrictions placed on movement of a person, not under arrest and his right to receive visitors thus are not permissible under Article 21 of the Constitution unless the Authority, ordering such restrictions justifies such restrictions on the basis of law, standing the test of justness, fairness and reasonableness.

12. It appears that the petitioner with almost identical grievances approached the Court with the writ petition registered as OWP. No. 901/2009

for restraining the respondents "from interfering with ingress and egress, to and fro from the residence of the petitioner either by himself or by

anyone invited by the petitioner". The Court on 9th October 2009 made it clear that the petitioner was a free man to "leave his house for attending

to the doctors". The writ petition was later disposed of on 23rd October 2009 in terms of the order dated 9th October 2009. The petitioner

alleging disobedience of order dated 09.10.2009 read with order dated 23rd

October 2009 in OWP No. 901/2009 filed Contempt No.

388/2009. The Court on 09.01.2009 in Contempt No. 388/2009 appointed Registrar Judicial, High Court wing Srinagar, as Commissioner for

spot inspection and report. The Commissioner on 10th November 2009 reported that the petitioner was not ""a free man"", implying thereby that the

respondents continued to impose restrictions on the petitioner's movement. The petitioner reiterating the stand taken in the earlier petition, insists

that the respondents continue to restrict the petitioner's movement and that of the movement of people who intend to meet the petitioner. The

respondents, it may be recalled in their reply, have neither justified the restrictions placed on the petitioner nor disclosed the authority where-under

such restrictions are placed. The stand taken by the respondents, on the other hand, is one of total denial of the allegations set out and the

averments made in the petition. The petitioner on his part has not placed on file copy of any order whereby the restrictions have been placed on his

movement. The Court is thus not in a position to examine the circumstances that prompted the respondents to place restrictions on the movement

of the petitioner, his ingress and egress from the residential house and the relations, friends and acquaintances, visiting the petitioner. There

obviously is no material before the Court to opine whether the law pressed into service by the respondents to place restrictions on the petitioner

and procedure adopted while placing such restrictions satisfy the requirements of substantive and procedural due process i.e. justness, fairness and

reasonableness. The respondents however lack authority to use the legal device, if any, available to put restrictions on the movement of a persons

with such a frequency as would virtually amount to arrest and detention of the person whose movement is restricted under such orders. For, if the

respondents are held to have an Authority to place restrictions on the movement of a person and his right to receive visitors in a mechanical manner

without any interruptions, the respondents shall in effect be held to have power to detain a person without adhering to the Constitutional Safeguards

provided under Article 22 Constitution of India. The respondents, again, can not make use of such legal device to deal with day today law and

order problems. Needless to say that respondents have to make use of and fall back upon normal legal tools available to the administrative

machinery to take care of routine problems. The respondent can not make use of extra ordinary legal tools to deal with ordinary situations. The

tendency on part of administrative machinery to make frequent use of individual and collective restriction, to deal with routine law and order

problems, as and escape route to avoid discharge of statutory duties, is to be discouraged. Such a recourse, it needs no emphasis offends Article

21 of the Constitution.

13. For the reasons discussed above the writ petition is disposed of, with the following directions:

(I) The respondents shall not impose restrictions on the movement of the petitioner and his right to receive the visitors, except in accordance with

procedure established by law.

(II) The order if any restricting movement of the petitioner and his right to receive visitors shall be made in writing with a copy served on the

petitioner referring to the law pressed into service to make such order and detailing the grounds, that prompt the respondents to place such

restrictions, so as to enable the petitioner to explain to the respondents that the apprehension are misplaced and restrictions are unwarranted, as

also to enable the petitioner to question such order through appropriate proceedings in the competent Court.

(III) The respondents shall not impose restrictions on the movement of the petitioner with such frequency as would amount to detention of the

petitioner rather than placing restrictions temporarily on his movement and on his right to receive and interact with his relations, friends and

acquaintances who propose to visit the petitioner.

14. Disposed of along-with connected CMP(s).