

## **AIDS AND THE COURTS**

### **8. Smt. Lucy R.D'Souza and etc. etc., Petitioners v. State of Goa and others, Respondents.**

Writ Petn. Nos. 109 and 175 of 1989 and Cri. W.P. No.34 of 1989, D/4-12-1989.

V.A. MOHTA AND DR. G.F. COUTO, JJ  
AIR 1990 BOMBAY 355

V.A.MOHTA, J:- Section 53(1)(vii) of the Goa, Daman and Diu Public Health Act, 1985-(the Act) empowers the State Government to isolate persons found to be positive for Acquired Immuno Deficiency Syndrome (AIDS), for such period and on such conditions as may be considered necessary and in such Institutions or wards thereof as may be prescribed. A common point raised in these three petitions is whether the said provision is unreasonable, and therefore, violative of rights under Articles 14, 19(1) (d) and 21 of the Constitution of India.

2. The Act aims at advancing the public health. Section 2(15) defines the term 'infectious disease' as meaning an infectious disease as defined in Section 47 and includes notified diseases as defined in Section 57. Chapter VII relates to prevention, notification and treatment of diseases. Section 47 enumerates the list of infectious diseases and empowers the Government to declare by notification certain diseases to be infectious. Section 49 relates to provisions and maintenance of isolation hospitals and wards. Section 51 mandates every Medical Practitioner to give information about certain diseases to certain authorities. Section 53 empowers removal of infected persons to a hospital under four circumstances mentioned in sub-sections (i) to (iv).

3. The Act was made when Goa was a Union Territory along with Daman And Diu. State of Goa, soon after its formation amended the Act by the Goa Public Health (Amendment) Act, 1987, which was published in the Official Gazette on 17.12.1987. Several diseases including AIDS were added in the statutory list of infectious diseases contained in Section 47. Sub-sections (vi) to (xv) were added to Section 53 (i). Sub-section (vi) makes it mandatory not to refuse collection of blood for investigation of AIDS or any other communicable infectious disease if the Health Officer has reasonable grounds to suspect that the person is suffering from any of those diseases. Sub-section (vii) make it mandatory to isolate persons found to be positive for AIDS by serological tests. Sub-sections (vii) to (xv) enumerates the care and/or precaution to be taken in the case of patient suffering from AIDS or other infectious disease. The Act was further amended by the Goa Public Health (Amendment ) Act, 1989, which was published in the Official Gazette on 15.6.1989. The mandatory requirement of isolation of an AIDS patient contained in sub-section (vii) of Section 53 was converted into the discretionary requirement and authority of the Health Officer in the matter was withdrawn and given to the State Government. Further a proviso to clause (xv) was added.

4. Section 53 with its face-lifting upto date reads thus:

"53 (1) : If it appears to the Health Officer that any person is suffering from an infectious disease, and that such person -

(i) is without proper lodging or accommodation, or

(ii) is without medical supervision directed to the prevention of the spread of the disease, or

(iii) is lodging in a place occupied by more than one family; or

(iv) is in a place where his presence is a danger to the people in the neighbourhood; and

(v) should be removed to a hospital or other place at which patients suffering from such disease are received for treatment, the Health Officer may remove such persons or cause him to be removed to such hospital or place;

(vi) no person including a foreigner shall refuse collection of blood for investigation of acquired immuno deficiency syndrome or any other communicable/infectious diseases if the Health Officer has reasonable ground to suspect that such person is suffering from acquired immuno deficiency syndrome or other infectious disease as defined under the Act;

(vii) In the case of a person who is found to be positive for acquired immuno deficiency syndrome by serological test, the Government may isolate such person for such period and on such conditions as may be considered necessary and in such Institution or ward thereof as may be prescribed;

(viii) all such persons admitted in prescribed wards/hospitals shall be provided with materials, equipment, etc. which shall not be used for any other purpose;

(ix) the parenteral medication of the patients suffering from acquired immuno deficiency syndrome shall be given through disposable sets/syringes;

(x) the linen, mattresses, etc. used for the deceased patients who were suffering from acquired immuno deficiency syndrome shall be immediately destroyed by burning;

(xi) all the staff working for the management of the patient suffering from acquired immuno deficiency syndrome shall be effectively protected with long rubber gloves, sterilized linen and mask;

(xii) persons handling the dead bodies of patients who suffering from acquired immuno deficiency syndrome shall be instructed to ensure that they do not come into contact with any secretions such as saliva; etc.

(xiii) the dead body of patient who was suffering from acquired immuno deficiency syndrome shall be enclosed in a polythene bag and tied with knots at both the ends and sealed before further action for its cremation/burial or despatch abroad as the case may be;

(xiv) no transplant operation of any kind shall be performed unless the donor as well as the receptor is confirmed to be free from acquired immunodeficiency syndrome through serological investigation.

(xv) all the Blood Banks shall send the blood specimen for ELIZ test to the Surveillance Centre of the Goa Medical College and only after obtaining the negative result, it shall be used for the patients;

Provided that in the case of emergency, where blood transfusion is deemed necessary without waiting for the report of ELIZA test, written consent of the patient or guardian or relative shall be obtained before such blood transfusion."

5. Mr. Anand Grover, the learned counsel for the petitioners, has raised the following four contentions before us; (a) provision for isolation is based on wrong scientific material and foundation; (b) object sought to be achieved by isolation is nullified by the provision; (c) discretion to isolate is unguided and uncontrolled; and (d) the provision for isolation is procedurally unjust in the absence of the right of hearing.

6. We will take up for consideration points (a) and (b) simultaneously, since they are intertwined. Human Immuno Deficiency Virus (HIV) destroys body's immune system. AIDS is a disease caused by HIV. Some persons affected by HIV may be lucky enough not to suffer from AIDS, but that is rare. People with AIDS cannot fight out usual body infections and they usually die. Science with all its progress, yet does not know the origin of the HIV. At one state, mystery shrouded around the transmission routes of the HIV. Present thinking is that HIV is transmitted mainly through (1) sexual contact with an affected person (2) sharing contaminated needles or syringes (3) transfusion of infected blood or blood products (4) contact with body fluids such as tears, saliva, semen, urine, faeces, breast milk etc; and (5) infected mother during pregnancy or delivery. The disease is spreading fast and is threatening human life despite all efforts at International level. No safe, effective and affordable treatment for the disease is yet found out. AIDS has invaded human race in a big and rapid way, but there does not appear any chance of its rapid receding. Its impact on human society-economic, social, political, cultural is increasing. With such devastating effects no wonder there is a great fear about that disease and inevitably also some degree of prejudice in the society. Research into the causes and cure of the disease is going on and is still incomplete. From time to time varying and some times even conflicting expert reports are published by various Organisations including World Health Organisation (WHO). It appears that AIDS still continues to be a subject upon which much has remained to be said.

7. Not that there has been no break through at all in the field of prevention and/or cure. There is virtually unanimity among experts that education and counselling of the patient is the most important and effective weapon to be used in the war against AIDS. The basic question is whether isolation of patient under any circumstance is wholly unscientific or counter-productive.

8. Isolation, undoubtedly, has several serious consequences. It is an invasion upon the liberty of a person. It can affect a person very adversely in many matters including economic. It can also lead to social ostracization. But in matters like this individual rights has to be balanced with the public interest. In fact liberty of an individual and public health are not opposed to each other but are well in accord. Even if there is a conflict between the right of an individual and public interest, the former must yield to the latter. That apart, isolation is not merely in the interest of the society. In a given case, it may also be in the interest of an AIDS patient, because he may become desperate and lose all hopes of survival and therefore, has to be saved against himself. Perhaps, bearing in mind all these factors, the experts have considered isolation as one of the preventive measures.

9. In this connection, we extract the following lines from the publication issued by the Brown University an "Managing AIDS Patients.' The Health care Professional's Survival Guide.

"Isolation precautions should be used wherever AIDS associated conditions such as infectious diarrhea or tuberculosis are diagnosed or suspected."

Government of India's National Institute of Communicable Diseases in its publication of July 1986 has also suggested surveillance of certain groups as a preventive measure.

10. Isolation can sometimes be counter productive, since the patient may go underground or may not disclose the ailment and science and not discrimination is that ideal way of dealing with the situation, but 'ideal' is not always 'Practical' in life. When such a high risk to the public health exists, erring on safer side may be permissible. It is pertinent to notice that there is a division of opinion as to whether body fluids, such as tears, saliva, semen, faeces, breast-milk etc; can also be the transmission routes of the virus. What was considered definite yesterday may not be so considered to-day may not be so considered tomorrow.

11. It has always to be remembered that matters like this essentially fall in the realm of policy. This policy decision is taken by those who are in charge of advancing public health and who are equipped with the requisite know-how. We find ourselves too ill-equipped to doubt the correctness of the Legislative wisdom. Even if there is any doubt about its correctness, its benefit must go in favour of the policy maker. We are quite conscious that Courts are not powerless to examine the correctness of a policy decision. But such power has to be very cautiously exercised, field of exercise being very limited. Settled legal principle is that there is a presumption that the Legislature understands and appreciates the needs of its people; good faith and knowledge of the existing conditions has also to be presumed in its favour. There is no weighty evidence - either, intrinsic or extrinsic - on the basis of which the above presumption or other presumption of constitutionality of a statute is rebutted.

12. It appears that the State of Goa is the only State which has made a provision like this. This circumstance was sought to be used in support of the contention about the provision being unusual, unreasonable and unscientific. Validity of an enactment cannot be measured by such yardsticks, as rightly submitted by the learned Advocate General.

AIDS is many times considered as a foreign invasion. Goa is a well known international tourists spot and is considered to be a high risk for AIDS even in the Government of India Publication. If in the background the State was obliged to take a lead in the matter, there is nothing surprising or objectionable. We are informed that in the Rajya Sabha a Bill No. XX of 1989 styled as 'The Acquired Immuno Deficiency Syndrome(AIDS) Prevention Bill, 1989' had been recently introduced. Section 5 of that Bill provides for removal of a person to a hospital or other place for special care or treatment where the authority considers it necessary to do so in the interests of such person and also to prevent the spread of HIV infection. Section 7 provides for precautionary steps to be taken by the designated authority to prevent the spread of HIV infection.

13. The enormity of the problem can be gauged from the figures of AIDS affected persons given in various publications presented before us and readily relied upon by both parties.

1987 - 5 to 10 million

1991 - 50 to 100 million.

This demonstrates that present preventive measures have failed to prevent the spread of the disease and there is necessity to explore fresh areas. It has to be remembered that one of the Directive Principles of State Policy specified improvement of public health as the primary duty of the State (Article 47).

14. In this back-ground, we find it difficult to accept the submission that there is no scientific basis whatsoever for considering isolation as one of the proper measures for prevention of AIDS or that the object sought to be achieved by isolation is nullified by the impugned provisions of Section 53(1) (vii).

15. We may at this stage note some of the authorities to which our attention was drawn by both the parties. In the case of *Bachan Singh. v. State of Punjab*, (AIR 1980 SC 898 and AIR 1982 SC 1325) by majority judgment validity of death penalty has been upheld on the ground that it was a matter of policy decision upon which experts disagreed. Minority view has been that there is no rational nexus whatsoever between the death penalty and the legitimate penological goal and therefore, the death penalty is arbitrary. In *Mithu v. State of Punjab*, AIR 1983 SC 473 Section 303, IPC has been struck down as arbitrary on the ground that (i) the very assumption that life convicts are a dangerous breed of humanity as a class (which is the basis of Section 303 IPC) was not supported by scientific reasons and (ii) it took away the discretion of the court in the matter of punishment. The case of *D.S. Nakara v. Union of India*, AIR 1983 SC 130 has held that classification in revised pension formula between pensioners on the basis of particular date of retirements was arbitrary. The case of *Ajay Canu v. Union of India*, AIR 1988 SC 2027 deals with the validity of the A.F. Motor Vehicles Ruled which makes wearing of Helmet compulsory upon a two wheeler rider. Validity has been upheld observing that it was a policy matter and there cannot be any fundamental right against any act aimed at doing some public good. Now law laid down in all the above authorities is well settled, and therefore, their elaborate discussion is not necessary. The real controversy has been about its application in the instant matter.

16. Now, point (c) . The law on this point is also well settled and it is this. In case the legislature lays down a definite policy which inspired it and delegation is in favour of the High authority, such a delegation cannot be said to be uncontrolled or unguided. The Legislative policy of Section 53 (1) (vii) of the Act is absolutely clear. It is to prevent the spread of AIDS in public interest. The authority to take decision in the matter of violation vests in the highest authority viz; the State Government itself. Moreover, the State Government has formulated a policy for its own guidance which is as under:

"(i) Foreign National, if found HIV positive, he should be isolated at the AIDS Centre, Mapuse and thereafter deported to his parent country;

(ii) In case of any Indian National, if he is from outside this State and found HIV positive, his parent State to be informed and he should be allowed back to his State or to his place of residence or work;

(iii) In case of a Goan or a local resident of Goa State, he may not be interned, instead he should be allowed to go to his place of work or residence on the condition that he visits that nearest Primary Health Centre for follow-up, at least once a month or for taking treatment, if any, a special card be given to the AIDS/ HIV person. A laminated card with photo be issued to him, so also a photo of the person be kept for our record;

(iv) In case he fails to report to Primary Health Centre or nearest health care Centre, he is liable to be isolated."

17. The possibility of misuse of discretionary power cannot be ruled out, for there is no power on earth which is incapable of being misused. But existence of such possibility is not ground for invalidating the source of the power. In case of misuse, that administrative action can be struck down. Discretionary power is not necessarily discriminatory in such cases as held in the leading case of *Ram Krishna Dalmia v. Justice Tendolker*, AIR 1958 SC 538 and a host of other cases. We, therefore, find no substance in this point.

18. All that survives for consideration is the last point (d). There can be no manner of doubt that the principle of *audi alteram partem* has to be normally read even in an administrative action, if it affects a valuable civil right, because fair play demands it. But the said principle cannot be fitted in any straight jacket formula. Its application and extent will vary from case to case. The principle even be excluded if circumstances and fair play so warrant. Exclusion can be express as well as implied . The illustrative list of circumstances where such exclusion by implication can be held, is given in de Smith's '*Judicial Review of Administrative Action*' Fourth Edition at page 184 and onwards - Impracticability of giving a prior notice or opportunity of hearing is one such illustration. Under the head '*Special Situations*', it has been observed; (page 217)

"There are in fact remarkably few situations in which the enforcement powers of public authorities and administrative officers are exercisable without notice. Some of the exceptional situations arise under the Public Health Acts. Thus, a local authority may be under a duty to remove a temporary building when the period during which it has been permitted to remain has expired. A local authority is empowered to examine and test sewers, drains and sanitary conveniences that it believes to be defective; remedy stopped up drains; to order the cleansing or destruction of filthy or verminous articles; and to remove to hospital

an inmate of a common lodging house who is suffering from a notifiable disease giving rise to a serious risk of infection."

The case at hand is thus directly covered by the above observations. Requirement of prior notice or hearing can frustrate the object of isolation and may not be even practicable. There are certain observations even in the case of *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 189 which, apart from laying down that right to life includes the right to livelihood lays down that in appropriate cases principles of natural justice can either be totally dispensed with or moulded as per the demands of the situation. No legal flaw, therefore, can be found in section 53 in the absence of pre decisional hearing.

19. We, however, see no difficulty whatsoever in reading by implication in section 53 a right to post-decisional hearing, however, howsoever minimal it may be e.g. a right of representation against the action of isolation. When we put this aspect to the learned Advocate General, he was fair enough to agree that the State Government will have no objection for conceding a right of consideration of representation if made. We may mention that in the case of *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597 such a right was read by implication and on such reading down the validity of the Passport Act was upheld. Thus, we hold that the Act does not exclude post decisional right of making representation against the decision to isolate and for all these reasons the provisions are not procedurally unjust despite absence of pre decisional right of hearings.

20. For all these reasons, we repel the four pronged attack on the validity of section 53(1) (vii) of the Act and hold that the provisions are reasonable and valid substance as well as procedure wise - and are not violative of either Article 14 or Article 19 (1) (d) or Article 21.

21. The validity of section 53 (1) (vii) - as it stood originally - has been questioned before us only by way of abundant precaution because in case the amended provisions are struck down as ultra vires the original more stringent provision may revive in the absence of such challenge. It is accepted position before us that the petitioners were isolated before the 1989 amendment and have been released from the isolation wards long before.

22. Certain damages are claimed for wrongful isolation but that relief cannot be granted in writ jurisdiction since it depends upon determination of several disputed questions of fact.

23. To conclude the petitions are dismissed and the Rules discharged . No order as to costs.

24. At this stage, Mr.Tamba, the learned counsel for the petitioners orally applies under Article 134-A for certificate of the nature referred to in Article 133(1) of the Constitution. Having regard to the fact that our decision is based upon law already laid down by various Supreme Court decisions. We are not inclined to grant the prayer. Oral application is, therefore, rejected.

Petitions dismissed.