

Telangana High Court

Ganta Jai Kumar vs State Of Telangana on 20 May, 2020

Bench: M.S.Ramachandra Rao, K.Lakshman

HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K. LAKSHMAN

Writ Petition (PIL) No. 75 of 2020

Between:

Ganta Jai Kumar, S/o.G.Vinod Kumar

...Petitioner

And

1. State of Telangana, Rep. by Chief
Secretary and
others.

...Respondents

Date of Judgment pronounced on : 20.05.2020

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

And

HONOURABLE SRI JUSTICE K. LAKSHMAN

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked
to Law Reporters/Journals: : Yes

3. Whether His Lordships wishes to see the fair copy
Of the Judgment? : Yes/No

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HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K.LAKSHMAN

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> HEAD NOTE:

!Counsel for the Petitioner : Sri V.Venkata Ramana, learned Senior
Counsel for Sri P.Prabhakar.

^Counsel for the respondents : Learned Advocate General.

? Cases referred

1. (2017) 2 SCC 609
2. (2007) 2 SCC 181
3. (1978) 1 SCC 405, at page 417
4. AIR 1952 SC 16
5. (2016) 10 SCC 726
6. (1992) 1 SCC 441
7. (1996) 4 SCC 37
8. (1984) 3 SCC 161
9. (2019) 8 SCC 607, at page 625
10. State of Punjab v. Ram Lubhaya Bagga ... (1998) 4 SCC 117
11. State of Punjab v. Mohinder Singh Chawla ... (1997) 2 SCC 83
12. 1978 (1) SCC 248 = AIR 1978 SC 597
13. AIR 1950 SC 27
14. (1981) 1 SCC 608
15. 1976 (1) SCC 521 (SCC p. 571, para 33)
16. (2017) 10 SCC 1
17. (1973) 4 SCC 225
18. 1942 AC 206

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HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K.LAKSHMAN

Writ Petition (PIL) No. 75 of 2020

ORDER : (Per Sri Justice M.S.Ramachandra Rao)

This Writ Petition is filed as a Public Interest Litigation by petitioner, an Indian citizen who is a resident of Hyderabad, to declare the action of the State of Telangana and other respondents in not permitting the "private hospitals" and "diagnostic centers" which are equipped with necessary equipment and personnel and willing to conduct diagnostic tests for COVID-19 virus and to admit patients for isolation and treatment of COVID-19 virus as arbitrary, illegal and without power, if necessary by setting aside order in RC.No.Spl/COVID-19/DMHO/Hyderabad/2020 dt.11.4.2020 of the District Medical and Health Officer, Hyderabad (4th respondent) canceling permission granted earlier; and consequently direct the respondents to permit private hospitals and diagnostic centers which are equipped with necessary equipment and personnel and willing to conduct diagnostic tests for COVID-19 virus and to admit patients for isolation and treatment of COVID-19 virus.

2. Therefore the petitioner is challenging the prohibition by the respondent No.s 1-4 both in respect of "private hospitals" as well as " private diagnostic centers/laboratories."

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3. The petitioner has arrayed the State of Telangana rep. by it's Chief Secretary as 1st respondent; the said State's Principal Secretary of Medical, health and Family Welfare Department as 2nd respondent; the said State's Director of Public Health and Family Welfare as 3rd respondent; and the District Medical and Health Officer, Hyderabad as 4th respondent.

4. We deem it appropriate to implead suomotu the Indian Council of Medical Research rep. by it's Director General, (COVID-19), Health Research Department, Ansari Nagar, New Delhi-110029 (for short 'ICMR') as a party respondent No.5 in this Writ Petition.

The initial order of the 1st respondent Government dt.21.3.2020 permitting all hospitals, Government and Private, to treat with Covid-19 cases.

5. Initially, the 1st respondent had issued on 21.3.2020, G.O.Ms.No.13, invoking the provisions of the Epidemic Diseases Act,1897 containing in Clause 5,6,11 and 13 provisions enabling all hospitals, Government and Private, to provide COVID-19 corners for screening of suspected cases of COVID-19, as and when so required by any of the authorities specified in regulation 4 (Clause 5); that the said hospitals are to record the history of travel of the person to any country or area where COVID-19 has been reported as well as the history of contacts of the suspected or confirmed case of COVID-19 (Clause 6); that the private health care institutions intending to test COVID-19 must notify the State IDSP unit (Clause 11); and that the authorities empowered under Regulation 4 were empowered to isolate

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and/or admit into an identified hospital, any person who develops symptoms simulating that of COVID-19 infection as per the case definition criteria published by the World Health Organization (WHO).

Consequent order dt.11.4.2020 of the District Medical and Health Officer, Hyderabad (respondent no.4) permitting all private hospitals to treat COVID-19 cases and not to perform any other elective procedures or surgeries

6. This order was intended by the District Medical and Health Officer, Hyderabad to see that even private hospitals would concentrate on only COVID-19 cases and would not spend their time and facilities for other ordinary elective procedures and surgeries.

7. In the light of the G.O.Ms.No.13 dt.21.3.2020 of the 1st respondent Government, proceedings Rc.No.Spl/COVID-19/DMHO/HYD/2020 dt.11.4.2020 were issued by the District Medical and Health Officer, Hyderabad in respect of testing and treatment in all private hospitals of COVID-19 patients (hereinafter referred to as the 'initial order dt.11.4.2020') which states:

" All private Hospitals in Hyderabad District are hereby ordered not to perform any elective procedures/ Surgeries in view of Covid-19 Pandemic to enhance the availability of health care facilities to COVID-19 patients;

If in any case with severe acute respiratory infection needs admission, admit in isolation rooms/wards and report to idsp.dsuhyd@gmail.com .. and samples from such cases are to be sent to the Gandhi /NIMS Hospital by following due procedure ...;

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If a patient is found to be positive for COVID-19, he/she shall not to be shifted anywhere but treated at the same facility in isolation....;

All private hospitals are instructed to arrange for separate isolation wards/rooms to be used for COVID-19 cases;

If any deaths due to COVID-19 positive ensure for disposal of dead body as per the guidelines on Death Body Management communicated by the Government of India."

The District Medical and Health Officer, Hyderabad cancels the above order on the same day by another order without assigning any reasons resulting prohibiting private hospitals from treating COVID-19 patients

8. Thereafter another proceedings Rc.No.Spl/COVID-19/DMHO/HYD/2020 dt.11.4.2020 was issued, later on the same day, by the District Medical and Health Officer, Hyderabad (hereinafter referred to as the 'later order dt.11.4.2020') which states:

" Adverting to the subject cited above, orders issued by this office regarding certain instructions on treating only emergency cases at notified hospitals in Hyderabad District vide reference 6th cited are hereby cancelled with immediate effect."

The summary of the above is that initially the Government permitted all private hospitals to deal with COVID-19 cases from 21.3.2020 till 11.4.2020 but the District Medical and Health Officer, Hyderabad, in his first order dt.11.4.2020, while permitting the private hospitals to deal with COVID-19 cases introduced a prohibition against them from dealing with ordinary elective procedures and surgeries so that the entire attention could be towards treating the COVID-19 patients even by private hospitals.

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However subsequently by another order dt.11.4.2020, on the same day, the District Medical and Health Officer, Hyderabad canceled the earlier order issued on the same day.

The result is that private hospitals were totally prohibited from treating COVID-19 patients.

Contentions of petitioner

9. Petitioner contends that the action of the respondent No.s 1-4 in not permitting any private diagnostic institution to conduct screening or diagnostic tests and any private hospital to either take the COVID-19 patients for isolation or for treatment for reasons which are not revealed in the above order to the citizens.

10. Petitioner contends that all patients who are suspected to be suffering from COVID-19 virus are being shifted to the Government Hospitals identified for the purpose or to the Government isolation centers for treatment or for observation; that facilities there are totally inadequate, dismal, lacking hygiene; and that methods of treatment adopted in those hospitals are very ordinary and simple medication in view of the cost factor involved in the event of adapting or trying new methods of treatment.

11. He relies on Art.21 of the Constitution of India and contends that the said article guarantees the Fundamental Right to life and personal liberty which includes the right of person to choose his own doctor and hospital as per his choice; that under the guise of taking steps to

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prevent the spread of the Pandemic, the State cannot restrict the liberty and freedom of a citizen to choose his own doctor and hospital and force him to take treatment from Government sources particularly in view of the limited resources of the Government.

12. He contends that there are at least 25-30 laboratories in the City of Hyderabad which have the equipment and are regularly conducting tests for other viruses; that they are also willing to conduct tests for COVID-19 virus; that these laboratories are already approved for virology testing under the Clinical Establishments Act,2010 and they are already conducting tests for viruses like HIV, Influenza, Hepatitis B and Hepatitis C; that several vendors like Mylab, Roche are manufacturing and selling the COVID-19 testing kits; that guidelines of ICMR and other Government Organizations are being followed; and that no special training is required to conduct these tests.

13. He contends that though certain Private Corporate Hospitals like Apollo Hospital, Yashoda Hospital, Kamineni Hospital, Krishna Institute of Medical Sciences, Star Hospitals etc are ready and willing to start separate facilities and isolation wards for containment of COVID-19, they are not being allowed to treat the suspected COVID-19 patients by the respondents.

14. He contends that if some of the patients, who can afford , wish to take private treatment in Private Hospitals, the respondents cannot

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restrict the same and such conduct would be unreasonable and illogical.

15. He refers to Sec.2 of the Epidemic Diseases Act, 1897 and contends that there is nothing in it's provisions which enables or empowers the respondent No.s 1-4 to prevent or restrain the Private diagnostic institutions and Private hospitals from either conducting tests for determination of the disease or from treating the patients with symptoms or disease either as out- patients or in-patients.

16. It is contended that apart from lack of hygiene and unsanitary conditions in the Government facilities for COVID-19 patients, the patients are not being allowed to carry cell phones and are not being allowed to communicate with their kith and kin. News items in this regard have also been filed by petitioner. (Ex.P-6, Ex.P-8).

17. He has also filed a news item published in "Deccan Chronicle" newspaper on 16.4.2020 that even the Union of India is not trusting the figures being put out by the respondents.

18. Counter affidavit has been filed by the respondents through the 3rd respondent refuting these contentions.

Whether there is any public interest in this Writ petition

19. It is firstly contended by the respondent No.s 1-4 that the Writ Petition does not disclose any public interest, that it is engineered by

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vested interests and appears to be filed as a proxy of private hospitals in the State of Telangana.

20. When the petitioner is contending that all citizens should have a right to choose where they can undergo tests and treatment if tested positive for COVID-19, and the respondent No.s 1-4 cannot compel them to use only Government operated facilities, it cannot be said that there is no public interest in the matter. The petitioner is not certainly espousing a cause personal to him.

21. Next, no material is filed by the respondent No.s 1-4 to show that the Petitioner is not acting bonafide except making a bald allegation that it is engineered by vested interests and appears to be filed as a proxy of private hospitals in the State of Telangana. Without any basis, the respondent No.s 1-4 cannot seek to make this allegation and seek to non-suit the petitioner. The respondent No.s 1-4 cannot treat this litigation as adversarial because it is not adversarial.

22. It is alleged by the respondent No.s 1-4 that they have taken appropriate steps on war footing basis ever since the first case of COVID-19 was reported in the State of Telangana and that their efforts have resulted in containing the spread of the virus in the State and petitioner is unaware of the same.

23. As of today, there are a number of private laboratories which have been approved by the ICMR for COVID-19 testing but so far as private hospitals are concerned no list has been published by the

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ICMR as to which private hospitals have been permitted to deal with COVID-19 patients' treatment.

The ICMR approved private laboratories in the State of Telangana

24. Admittedly, the ICMR has approved the following laboratories in the private sector on 17.3.2020 (Ex.P10):

S.No.	Names of States	Names of Laboratory and Address
12.	Telangana (12)	<p>61. Laboratory Services, Apollo Hospitals, 6th Floor, Health Street Building, Jubilee Hills, Hyderabad.</p> <p>62. Vijaya Diagnostic Centre Pvt. Ltd., Street No.19, Himayath Nagar, Hyderabad.</p> <p>63. Vimta Labs Ltd., Plot No.142, Phase 2, I.D.A., Cherlapally, Hyderabad.</p> <p>64. Apollo Health and Lifestyle Limited, Diagnostic Laboratory, Bowenpally, Secunderabad.</p> <p>65. Dr. Remedies Labs Private Ltd., A3, Titus Plaza, Sharma Commercial Complex, Punjagutta, Hyderabad.</p> <p>66. Pathcare Labs Pvt. Ltd., Medchal, Hyderabad.</p> <p>67. American Institute of Pathology and Lab Sciences Pvt. Ltd., Citizens Hospital, Serilingampally, Hyderabad.</p> <p>68. Medcis Pathlabs India Pvt. Ltd, Plot Nos.16 & 17, Swathi Plaza, Anand Nagar, New Bowenpally, Secunderabad.</p> <p>69. Department of Lab Medicine, Yashoda Hospital, 9th Floor, 1-1-156 & 157, Alexander Road, Secunderabad.</p> <p>70. Biognosys Technologies (India) Pvt. Ltd. #8-148/174/11, N.R.I. Colony, Near Aleap Industrial Area, Medchal, Malkajgiri.</p> <p>71. Dept. of Lab Medicine, Star Hospitals, A Unit of Unimed Health Care Pvt. Ltd.8-2-594/B, Road No.10, Banjara Hills, Hyderabad.</p> <p>72. Tenet Diagnostics, Plot No.51, Kineta Towers, Journalist Colony, Road No.3, Banjara Hills, Hyderabad.</p>

25. It is contended by the respondent No.s 1-4 that petitioner had relied on newspaper reports to substantiate his plea and that such news reports cannot be relied upon by this Court.

A. No legal basis is indicated in the counter affidavit for the respondent No.s 1-4 to compel citizen to get tested and treated in only Government hospitals like Gandhi Hospital for treatment

26. But this defence does not answer the legal basis for the State to compel the citizens to have samples tested only in Gandhi Hospital/NIMS/other State identified laboratories mentioned in para 12 of it's counter and not in any other ICMR approved private sector testing facilities (which are 12 in number and which are mentioned in Ex.P 10 dt.17.4.2020) and compelling suspected COVID-19 patients to go only to Gandhi Hospital for treatment.

B. Absence of reasons vitiates the later order dt.11.4.2020 passed by District Medical and Health Officer, Hyderabad withdrawing the facility of testing and isolation/treatment in private sector hospitals

27. The impugned proceeding gives no reason at all why the earlier proceedings Rc.No.Spl/COVID-19/DMHO/HYD/2020 dt.11.4.2020 issued by the District Medical and Health Officer, Hyderabad (4th respondent) permitting testing and isolation/treatment in all private hospitals, was withdrawn same day at a later point of time by a later order.

28. It is the basic principle of administrative law that every action of the State which affects the rights of citizens must be supported by

reasons so that a Court, can, while judicially reviewing it, know that there is application of mind to the issue by the authority concerned, ::13::

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which passed the said order. Absence of reasons would undoubtedly vitiate the later order dt.11.4.2020.

29. J. Ashoka v. University of Agricultural Sciences¹, the Supreme court declared:

"24. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable."

30. In Rajesh Kumar v. CIT² also similar view was expressed in the following terms:

" 23. ... it is beyond any cavil that ordinarily unless excluded by operation of a statute, the superior courts while exercising power of judicial review shall proceed on the basis that assignment of reasons is imperative in character. When an authority, be it administrative or quasi-judicial adjudicates on a dispute and if its order is appealable or subject to judicial review, it would be necessary to spell out the reasons therefor."

31. A Constitution Bench of the Supreme Court in Mohinder Singh Gill v. Chief Election Commr³ held that it is important to give reasons in a statutory order and the impermissibility of the State supporting it's decision by offering reasons in a counter affidavit later in the following terms:

"8. ... when a statutory functionary makes an order

based on certain grounds, its validity must be judged by

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(2017) 2 SCC 609

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(2007) 2 SCC 181

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(1978) 1 SCC 405, at page 417

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the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji4:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

32. Thus even in the instant case, the respondents, without giving reasons in the impugned later order dt.11.4.2020 cannot seek to furnish reasons in the counter affidavit filed in this Court and absence of reasons in the said order vitiates it.

C. The Right to health is part of the right to life under Art.21 of the Constitution

33. Every human being has a basic and natural born instinct to protect himself and his kith and kin from danger - be it from human, animal or one in the nature of a disease, by utilizing all the means available in

his power. The State cannot incapacitate him by restricting his choice

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AIR 1952 SC 16

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particularly when it comes to a disease which affects his life/health or that of his kith and kin.

34. It is settled law that Art.21 of the Constitution of India confers on the citizens of India a fundamental right to life and personal liberty. Right to health is integral part of the Right to life and is a facet of Art.21.

35. In *Devika Biswas v. Union of India*⁵, the Supreme Court reiterated the settled legal position that the 'right to health' is a facet of the 'right to life' guaranteed by Art.21 of the Constitution of India.

It held:

"107. It is well established that the right to life under Article 21 of the Constitution includes the right to lead a dignified and meaningful life and the right to health is an integral facet of this right. In *CESC Ltd. v. Subhash Chandra Bose*⁶ dealing with the right to health of workers, it was noted that the right to health must be considered an aspect of social justice informed by not only Article 21 of the Constitution, but also the Directive Principles of State Policy and international covenants to which India is a party. Similarly, the bare minimum obligations of the State to ensure the preservation of the right to life and health were enunciated in *Paschim Banga Khet Mazdoor Samity v. State of W.B*⁷

108. In *Bandhua Mukti Morcha v. Union of India*⁸ this Court underlined the obligation of the State to ensure that the fundamental rights of weaker sections of society are not exploited owing to their position in society.

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(2016) 10 SCC 726
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(1992) 1 SCC 441
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(1996) 4 SCC 37
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(1984) 3 SCC 161

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109. That the right to health is an integral part of the right to life does not need any repetition."

36. In Assn. of Medical Superspeciality Aspirants & Residents v. Union of India⁹ recently, the Supreme Court of India emphasized the primary duty of the State to 'provide all facilities' to make meaningful the right of a citizen to secure his health. It said:

"25. It is for the State to secure health to its citizens as its primary duty. No doubt the Government is rendering this obligation by opening government hospitals and health centres, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities to employ best of talents and tone up its administration to give effective contribution, which is also the duty of the Government¹⁰.

26. Right to health is integral to the right to life. Government has a constitutional obligation to provide health facilities¹¹. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter, and facilities for reading, writing and expressing

oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."(emphasis supplied)

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(2019) 8 SCC 607, at page 625

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State of Punjab v. Ram Lubhaya Bagga ... (1998) 4 SCC 117

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State of Punjab v. Mohinder Singh Chawla ... (1997) 2 SCC 83
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37. Thus as per the judgments of the Supreme Court, the right to health is a facet of Art.21.

According to the Supreme Court, restrictions on the right to life must satisfy the test of reasonable, just and fair procedure.

38. According to the Supreme Court of India, it is imperative that any restriction of right of the citizens in that regard must be by a procedure prescribed by "law" and such "law" must be reasonable, fair and just. It cannot be arbitrary, whimsical or fanciful.

39. In Maneka Gandhi v. Union of India¹², Bhagwati J in the Supreme Court had declared:

" 5.It is clear from the provisions of the Passports Act, 1967 that it lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney-General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in

A.K. Gopalan case¹³ in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazl Ali, J., who was in a minority, went to the farthest limit in saying

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1978 (1) SCC 248 = AIR 1978 SC 597

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AIR 1950 SC 27

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that the procedure must include the four essentials set out in Prof. Willis' book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law". Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in A.K. Gopalan case which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21."(emphasis supplied)

40. The said principle was reiterated in several cases including

Francis v. State¹⁴.

41. In Assn. of Medical Superspeciality Aspirants & Residents (9

supra), the Supreme Court again reiterated this principle:

" 26. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and the restriction would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

D. Freedom of a citizen to approach any private laboratory and hospital

approved by ICMR

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(1981) 1 SCC 608

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42. As stated by the Supreme Court, the right to health of a citizen is a fundamental right under Art.21 and restriction thereupon must be reasonable, fair and just.

43. It is of utmost importance that each and every case (suspects/confirmed) of COVID-19 is isolated and provided appropriate treatment and their contacts traced at the earliest to break the chain of transmission. It is important that support and cooperation of the private sector is enlisted, in this regard. This is the policy which has been declared by the Ministry of Health and family Welfare, Government of India in it's "Guidelines for notifying COVID-19 affected persons by Private Institutions" notified recently.

44. Ministry of Health and Family Welfare, Union of India emphasizes the importance and support of private sector which is clear from the following extract from the Union Government's notification put up on the web site of the said Ministry:

"In the wake of the prevailing COVID-19 situation and in order to strengthen the containment measures, it is of utmost importance that each and every case (suspects/confirmed) of COVID-19 is isolated and provided appropriate treatment and their contacts are traced at the earliest to break the chain of transmission. It is important that support and cooperation of private

sector is enlisted, in this regard."

45. It is pursuant thereto that the ICMR has notified the private laboratories which can be permitted to test suspects for COVID-19 infection.

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46. The fact that an authority like the ICMR, which is part of the Government of India, Ministry of Health and Family Welfare has thought it fit to permit private laboratories to perform the COVID_19 tests instead of a total prohibition shows that the said procedure followed by the ICMR comes clearly within the principle of just, fair and reasonable procedure under Art.21.

47. In the counter affidavit filed by the respondent no.s1-4, there is no attempt made to satisfy the Court that the total prohibition of testing and treatment by the private sector would amount to just, fair and reasonable procedure. On the face of it, a total prohibition of a constitutional right is not contemplated by Art.21 and the said Article requires that every restriction must satisfy a just, fair and reasonable procedure. That is the reason why the total prohibition order 11.4.2020 (the later order) of the District Medical and Health Officer, Hyderabad is liable to be struck down as being in total defiance of the provisions of the Constitution.

48. Thus, in the instant case the freedom of the citizen of the State to get tested in a laboratory of his choice or get treated in a private hospital of his choice is curtailed by the State without support of any

"law", much less a reasonable, fair and just law. It's action is thus patently arbitrary and unreasonable and violates Art.21 of the Constitution of India and is unsustainable.

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49. The learned Advocate General for the State of Telangana then sought to contend that there is a state of emergency in the State in view of the Covid-19 pandemic and that such emergency justifies the State action.

50. We are unable to agree. Admittedly, no emergency has been declared by the Government under Art.356 of the Constitution of India, though there is a pandemic situation undoubtedly.

51. In this connection, we may point out that the Supreme Court in *ADM, Jabalpur v. Shivakant Shukla*¹⁵, a plea similar to the one raised by the Advocate General was accepted. There the Court was considering the question whether an order issued by the President under Art.359(1) of the Constitution suspends the right of every person to move any court for enforcement of right to personal liberty granted by Art.21 upon being detained by any law providing for preventive detention. The Supreme Court held (H.R. Khanna, J.

dissenting) that :

"33. Liberty is confined and controlled by law, whether common law or statute. It is in the words of Burke a regulated freedom. It is not an abstract or absolute freedom. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible Government which has been evolved. If extraordinary powers are given, they are given because the emergency is extraordinary, and are limited to the period of the emergency."

1976 (1) SCC 521 (SCC p. 571, para 33)

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52. The basis of the above decision was that Constitution was supreme and if it ordains that a person who is detained otherwise than in accordance with law would not be entitled to enforce the right of personal liberty, the Court was duty bound to give effect to it.

53. But this decision was expressly overruled by a 9 Judge Bench of the Supreme Court in *K.S.Puttaswamy v. Union of India*¹⁶. Speaking for the majority, Chandrachud J observed:

"136. The judgments rendered by all the four Judges constituting the majority in *ADM, Jabalpur* are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in *Kesavananda Bharati*¹⁷, primordial rights. They constitute rights under Natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilised State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the State without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article 372 of the Constitution. Khanna, J. was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that (2017) 10 SCC 1 (1973) 4 SCC 225 ::23:: MSR,J & KL,J wp(pil)_75_2020 right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the State on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of Law which imposes restraints upon the powers vested in the modern State when it deals with the liberties of the individual. The power of the Court to issue a writ of habeas corpus is a precious and undeniable feature of the Rule of Law.

137. A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of Law will protect their rights and liberties against any invasion by the State and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Khanna, J. must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.

138. ..

139. ADM, Jabalpur must be and is accordingly overruled."

54. Art.359 has been amended by the Constitution (44th Amendment) Act to say that the President can't suspend the right to move a court for violation of Art. 20 and Art.21 even in an emergency and seek appropriate relief.

55. As Chandrachud J notices in K.S.Puttaswamy (16 supra) :

"141. As a result of the Forty-fourth Amendment to the Constitution, Article 359 has been amended to provide that during the operation of a proclamation of emergency, the power of the President to declare a suspension of the right to move a court for the ::24:: MSR,J & KL,J wp(pil)_75_2020 enforcement of the fundamental rights contained in Part III shall not extend to Articles 20 and 21."

56. We may also add that the famous statement of Lord Atkin in *Liversidge v. Anderson*¹⁸ that:

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."

is very appropriate.

57. This above decisions of the Supreme Court are a complete answer to the plea of the Advocate General that because there is a medical emergency or a war emergency, anything can be done by the State including arbitrarily restricting the right to health conferred under Art.21 on a citizen of the State. An emergency of any sort is not an excuse to trample on the rights under Art.21 and the Courts have the power to see that the State will act in a fair, just and reasonable manner even during emergencies. Whether the State has done so or not is judicially reviewable in the light of the law laid down by the Supreme Court.

The Epidemic Diseases Act,1897

58. We shall now refer to Sec.2 of the Epidemic Diseases Act,1897 states:

"Section 2 : Power to take special measures and prescribe regulations as to dangerous epidemic disease:

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(1) When at any time the State government is satisfied that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government if it thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may take measures and prescribe regulations for 9 (****)

(b) the inspection of persons traveling by railway or otherwise, and the segregation, in hospital, temporary accommodation or otherwise, of persons suspected by the inspecting officer or being infected with any such disease.

10 (****)"

59. As rightly contended by the petitioner, we find that there is no power in Sec.2 of the Epidemic Diseases Act, 1897 either to prevent private hospitals from testing suspected any victim of an epidemic such as COVID-19 patients or treating confirmed infected patients. In fact in that era (pre 1900), the concept of private sector participation in health care was hardly there in India.

60. What the Sec.2 prohibits and what it permits, in a case where there is a dangerous epidemic, disease for which the ordinary ::26:: MSR,J & KL,J wp(pil)_75_2020 provisions of the law are insufficient. In such a case the State may take, require or empower any person to take "such measures" and by public notice such "temporary regulations" to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the out break of such disease or the spread thereof.

61. The Ministry Of Health and Family Welfare, Union of India and the ICMR cannot be said to have ignored these provisions of the Epidemic Diseases Act,1897 and this Court has good reason to believe that the Union of India and the ICMR did give due consideration to this provision of law while permitting testing and treatment of COVID-19 patients by private laboratories and hospitals.

62. On the other hand by issuing a set of guidelines called "Guidelines for notifying COVID-19 affected persons by Private Institutions", the Union of India had clearly applied it's mind to the provisions of the above Act which permit the Government "to take measures necessary to prevent the outbreak and spread thereof" by permitting private laboratories and hospitals also to be involved in the said prevention and outbreak and spread of the epidemic.

63. The State Government, in it's counter, has not questioned the wisdom of the Union Government and the ICMR in permitting private laboratories to achieve the very object of prevention and spread of the epidemic. On the other hand, the respondent No.s 1-4 appear to have ::27:: MSR,J & KL,J wp(pil)_75_2020 to come to the opposite conclusion, contradicting the wisdom of the Union of India and an expert body like ICMR.

64. In fact we find that the ICMR has notified on 3.5.2020, 111 private laboratories and 310 Government laboratories. It is obvious that by permitting 111 private laboratories to conduct COVID-19 tests across the country, the Union Government and ICMR were trying their best to take the private sector on board and to achieve the goal of stopping the spread of the epidemic.

65. We therefore hold that the respondent No.s1-4 have no logical or legal basis to come to an opposite conclusion and come forward with total prohibition.

Certain other reasons why the respondents' actions cannot be sustained

66. It is not the case of the respondent No.s1-4 that there is a cure for the COVID-19 virus, that only Gandhi Hospital in the State of Telangana has got a vaccine for it, and so everybody in the State of Telangana, who is infected with the virus has to go to the said hospital. May be the facilities in the said Hospital or other designated Government Hospitals are very good, but that does not mean that the respondent No.s1 - 4 can, under the guise of taking steps to prevent the spread of the Pandemic, restrict the liberty and freedom of a citizen to choose his own doctor and hospital and force him to take a test for COVID-19 infection or treatment from Government sources, if found to be infected with the said virus.

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67. It is stated by respondent No.s1-4 that the justification for the State to compel citizens to have COVID-19 tests in Gandhi Hospital/NIMS is that such testing is done free of cost to citizens; that after a COVID-19 case is identified epidemic control measures are required to be taken by identifying and tracing contacts, isolation/quarantine them, create containment zones, buffer zones, initiate disinfection etc; that there is need to coordinate multiple departments of the State Government such as Revenue, Police, municipal, health etc. According to the respondent No.s1-4 there has to be a 'single line of control'.

68. Free of cost testing for the virus can be given by the respondent No.s1-4 to those who cannot afford the private laboratory/private hospital facilities and it can thus the State can conserve it's financial resources which have been greatly reduced by the lockdown it has imposed for more than 2 months.

69. The excuse of coordination among various departments of the State of Telangana or contact tracing, containment etc., can hardly be a reason to restrict the citizen's right to get quick test from an ICMR approved private laboratory or get treatment in a private hospital of his choice. The private laboratories or the private hospitals can also be directed by the respondent No.s1-4 to report the COVID-19 positive cases so that all the measures mentioned above can then followed up by the respective departments. (Infact this was what was contained in ::29:: MSR,J & KL,J wp(pil)_75_2020 the initial order dt.11.4.2020 passed by the District Medical and Health Officer, Hyderabad.)

70. Admittedly, in the State of Telangana and previously the composite State of Andhra Pradesh from which it was carved out on 2.6.2014 there is a scheme for at least last 20 years called "Arogyasri" run by it's "Arogyasri Health Care Trust" where it facilitates poor people to be given diagnosis and treatment in designated Private health care institutions which are reimbursed by the State later.

71. The State cannot forget that because of it's Hospitals' inability to provide quality proper medical care to all the poor, it has encouraged Private Sector Medical Health Care in the State and schemes such as the "Arogyasri" scheme run by it's "Arogyasri Health Care Trust".

72. The Covid-19 pandemic has exposed the poor medical infrastructure in the States where there are too few Hospitals/Primary Health centers, too few Doctors and nurses in Government sector, lack of medicines, and general poor quality medical infrastructure with honourable exceptions. In fact the long lockdown was imposed to ramp up the medical infrastructure - buy more medicines, create more isolation facilities, get more ventilators, import a lot of testing kits etc. In this scenario to cast aspersions on all Private Sector hospitals/ private testing laboratories, may not be proper, ironically when respondent No.s 1-4 permit the poor to go some of such private ::30:: MSR,J & KL,J wp(pil)_75_2020 corporate hospitals for treatment for other diseases under the "Arogyasri" scheme.

73. When there are 12 ICMR approved laboratories in the State of Telangana for testing suspected COVID-19 cases as per the ICMR list dt.17.4.2020 (Ex.P10) mentioned above, and several of Arogyasri approved hospitals in the private sector which are trusted by the State to treat poor people, and in contrast, there are very few testing facilities (9) and only a few Government designated hospitals for treatment/isolation, the respondent No.s 1-4 cannot compel people to get testing in NIMS/Gandhi Medical Hospital or only the other designated laboratories decided by it and for treatment/isolation only in it's designated hospitals, when people are willing to pay the cost and get their blood samples tested in these private ICMR approved laboratories or private sector hospitals having the requisite infrastructure.

74. Moreover, the lock down is slowly being eased to reduce the financial hardship to the State and private businesses; on 11.5.2020, even train travel bookings were started by Indian Railways; Liquor outlets have been opened by that date; in orange and green zones certain limited industrial activity has also been allowed to commence. After easing of lock down at some point of time, it is widely expected that infections would increase.

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75. The State of Telangana has a population of about 3.5 Crores, and the few Government testing centers/ few Government designated hospitals, cannot reasonably be expected to deal with the possible huge surge in infections.

76. As already stated above by us, the State, by allowing people who can afford the private lab testing and treatment/isolation services can preserve it's limited facilities for the poorest of the poor by giving them free of cost testing and treatment.

77. It is alleged by the respondents that there is danger of spread of the disease and panic in the people if private entities are trusted with testing and treatment/isolation.

78. This fear is baseless because even in private sector laboratories or hospitals, the doctors, nurses and paramedical staff would take adequate care to protect their own lives and others and take steps to stop the spread of infection. They would also have to set up isolation wards/quarantine facilities.

79. In our opinion, only such hospitals in the private sector who have the capacity for treatment /isolation as per the standard operating procedure/ guidelines prescribed by the ICMR, can be allowed to treat/isolate such patients.

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Dangerous to suppress figures of infected persons/dead persons caused by the COVID-19

80. Some of the experts have warned against inadequate testing by some of the States because the figures of the infected/the deaths caused by COVID-19, would then be misleading.

So the respondents cannot say that if private laboratories are permitted to test, there would be indiscriminate testing.

There have been articles in the press that some State Government's figures of the infections/deaths due to COVID-19 are being doubted even by the Union of India forcing it to send teams from Ministry of Health, New Delhi to verify the factual situation on the ground.

These news items cannot be dismissed as false. Just as an infected person cannot hide his infection because he may die and also put others at risk, the respondents cannot also hide the COVID-19 infected/dead persons' statistics as early diagnosis and isolation/quarantine would prevent the spread of infection to others.

81. It has also been stated by the learned Advocate general that the State is allowing testing as of date of only 'symptomatic' patients suspected of COVID-19 and not 'asymptomatic' patients i.e patients who do not show visible symptoms of the COVID-19 virus. Therefore a person who is 'asymptomatic' cannot get any test in any Government approved laboratory today. If private laboratories ::33:: MSR,J & KL,J wp(pil)_75_2020 approved by ICMR can test such individuals if they so desire and are willing to pay for it, the State cannot object to it.

82. As already set out above, it is the policy of the Ministry of Health and family Welfare, Government of India as declared in it's "Guidelines for notifying COVID-19 affected persons by Private Institutions" that support and cooperation of the private sector is enlisted, in containment and treatment of the COVID-19.

83. Though the actual time required to get results for an RT-PCR test to test a suspect for COVID-19 virus is said to be only about 6 hours, due to large queues of samples in limited authorized laboratories, it would take considerable time (maybe even a week) for the results to come back. This would cause hardship to citizens.

84. Many instances have come to light in the press wherein serious patients who suffered from non-COVID ailments like fractures, heart attack or brain stroke etc., were denied admission in hospitals as they were directed to first get themselves tested for COVID-19. (The Government of India later clarified that private hospitals cannot insist on COVID-19 tests for all patients coming to them for dialysis and heart problems.)

85. In our opinion, limiting the testing centers arbitrarily jeopardizes the health of such serious non COVID patients as well and exponentially increases the risks of spread of the disease in COVID positive cases that remain undetected for prolonged periods. It is ::34:: MSR,J & KL,J wp(pil)_75_2020 imperative to reduce the burden on the health care system and ensure that COVID-19 cases get detected and treated at a faster rate.

86. Some State Governments like Delhi, Madhya Pradesh, Tamilnadu and Maharashtra have already roped in the private sector in the fight to control the COVID-19 pandemic.

87. We hold that there is neither legal not logical basis for totally excluding private sector participation in either testing or for treatment/isolation of suspects/ confirmed COVID-19 patients.

88. We are however aware that it might be detrimental to public interest to allow each and every private hospital whether or not they possess adequate number of qualified doctors, qualified nurses, paramedical staff apart from testing kits, PPEs, available beds, isolation facilities, proper hygiene and sanitation, technical equipment to admit COVID-19 patients or isolate them in quarantine.

89. So far as hospitals are concerned, only those private hospitals which have been approved or which would be approved in future, by the ICMR, in our opinion, should be permitted to provide treatment for COVID-19 patients.

90. So we will ensure that only those private hospitals which are certified by ICMR already or would be approved in future as having the appropriate infrastructure and qualified staff can treat/isolate COVID-19 positive patients.

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Relief to be granted

91. Now we proceed to consider what relief is to be granted in this case.

92. For the elaborate reasons given above, we hereby allow the Writ Petition, and we :

(i) declare that the proceedings Rc.No.Spl/COVID- 19/DMHO/HYD/2020 dt.11.4.2020 issued by the District Medical and Health Officer, Hyderabad which states:

" Adverting to the subject cited above, orders issued by this office regarding certain instructions on treating only emergency cases at notified hospitals in Hyderabad District vide reference 6th cited are hereby cancelled with immediate effect."

is violative of Art.14 and Art.21 of the Constitution of India and also the principles of natural justice (for not giving any reasons) and is set aside;

(ii) hold that the respondent No.s 1 - 4 cannot compel residents/citizens of the State of Telangana to get (a) testing for COVID-19 in NIMS/Gandhi Medical Hospital or only in the other designated laboratories decided by them and (b) treatment/isolation only in hospitals designated by them, when the citizens/ residents are willing to pay the cost and get their blood samples tested in the private ICMR approved laboratories or private sector hospitals having the requisite infrastructure by paying the requisite charges;

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(iii) hold that it shall be the right of the citizens and residents of the State of Telangana to get tested on payment basis, if they choose to do so, for COVID-19 in any private laboratory presently approved by the ICMR or may be approved in future at such rates as may be determined by ICMR or any other competent authority of the Union of India;

(iv) hold that it shall be the right of the citizens and residents of the State of Telangana to get treatment on payment basis, if they chose to do so for COVID-19 in any private hospital presently approved by the ICMR or may be approved in future by it; and

(v) direct that all private hospitals, who wish to provide treatment/ isolation for COVID-19 patients (other than the ones already granted such approval by the ICMR), shall make an application to the ICMR offering their facilities for the said purpose; the ICMR shall nominate qualified and experienced persons to scrutinize the said applications and cause inspections made of the available facilities and infrastructure in the said private hospitals, to verify whether they possess adequate number of qualified doctors, qualified nurses, paramedical staff apart requisite equipment and notify the same. This exercise shall be completed within the shortest possible time in view of the grave urgency and rising cases of persons infected by COVID- 19 and deaths caused by it. Only such private hospitals as are approved by the ICMR shall be permitted to treat COVID-19 patients.

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It is needless to observe that all protocols approved by ICMR or other competent authority from time to time shall be followed by the ICMR approved private laboratories and hospitals that have already been or would be approved in future by the ICMR for testing or treating/isolation of COVID-19 suspects/patients; and all possible precautions shall be taken by the ICMR approved private laboratories and hospitals to take good care of the suspects/ confirmed COVID-19 patients; and the ICMR approved hospitals shall keep the respondent No.4 or any other authority designated by respondents 1-4 informed on a daily basis of the persons who are being treated by them for COVID-19 and their health status.

93. We place on record our appreciation for the petitioner for approaching this Court and bringing to our notice this important issue concerning the health and lives of our fellow citizens.

94. As a sequel, miscellaneous petitions pending if any, in this Writ Petition, shall stand closed. No costs.

_____ M.S.RAMACHANDRA RAO, J _____

K.LAKSHMAN, J Date : 20.05.2020 Note : The Registry is directed to forward copy of this order today by e-mail or Speed Post with Acknowledgment Due, to :

The Indian Council of Medical Research, Rep. by its Director General (COVID-19), Health Research Department, Ansari Nagar, New Delhi - 110 029.

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Note : The Registry is directed to upload

immediately copy of the order in the website of the TS High Court today and furnish copy of the order to any party who seeks it, today itself. Note :- L.R. Copy to be marked.

B/o.

Vsv