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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 19.05.2021

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W.P.(C) 4936/2021 and C.M. Nos.15154/2021 & 16371-73/2021

RK GOSSAIN

..... Petitioner

versus

GOVERNMENT OF NCT OF DELHI & ORS.

..... Respondents

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W.P.(C) 5153/2021

KANHAIYA SINGHAL & ANR.

..... Petitioners

versus

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY DELHI & ORS.

..... Respondents

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W.P.(C) 5033/2021

SHOBHA GUPTA

..... Petitioner

versus

UNION OF INDIA THROUGH MINISTRY OF
LAW AND JUSTICE AND OTHERS

..... Respondents

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**W.P.(CRL) 7/2021 and CRL.M.A. 45/2021, 6706/2021 & 6987-
88/2021**

INDIA UNDERTRIAL PRISONER
SUPPORT FORUM

..... Petitioner

versus

STATE (N.C.T.) OF DELHI

..... Respondent

Through:

Mr. Lalit Valecha & Ms. Sadaf Ilyas Khan, Advocates along with petitioner in person in W.P.(C) 4936/2021.

Petitioners in person in W.P.(C) 5153/2021

Petitioner in person in W.P.(C) 5033/2021

Mr. Mohit Mathur, Senior Advocate with Mr. Anubhav Taneja, Advocate for the petitioner in W.P.(CRL) 7/2021

Mr. Santosh Kumar Tripathi, Standing Counsel with Mr. Aditya P. Khanna & Mr. Shashank Tiwari, Advocates for the respondent/ GNCTD in W.P.(C) Nos.4936/2021 & 5153/2021.

Mr. Sanjay Lao, Standing Counsel (Crl.), and Mr. Karanjeet Sharma, Advocate for respondent/ GNCTD in W.P.(CRL) 7/2021

Mr. Kanwal Jeet Arora, Secretary, Delhi State Legal Services Authority, in person.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

VIPIN SANGHI, J. (ORAL)

1. These four writ petitions have been preferred in public interest, which deal with more or less the same subject matter. We, therefore, propose to dispose them of by this common order. The respective prayers made in these writ petitions are the following:

Prayer in W.P.(C) 4936/2021

“i. Issue a writ, order or direction in the nature of Mandamus, thereby, directing the Director General of Prisons to file a detailed affidavit apprising this Hon'ble Court regarding exact Number of Covid-19 positive cases in the three jails in Delhi as on date;

ii. Issue a writ, order or direction in the nature of Mandamus, for framing guidelines for release of prisoners on interim bail or special parole in view of the prevailing Covid-19 situation in the three jails in the capital;

iii. Issue a writ, order or direction in the nature of Mandamus, thereby, directing the Govt. of National Capital of Delhi to file an affidavit to the effect that adequate RT-PCR testing infrastructure is available for conducting the test and that no citizen is being denied RT-PCR test in all Govt. and private recognized laboratories;

iv. Issue a writ, order or direction in the nature of Mandamus, thereby, directing the Govt. of National Capital of Delhi to provide test results to the patients who have undergone RT-PCR test, immediately through Whatsapp and hard copies and not later than 24-hours without waiting for them to be uploaded on the ICMR's website;

v. To issue any other appropriate writ, order or direction which this Hon'ble Court deems just and proper, in the facts and circumstances of the present matter.”(emphasis supplied)

Prayer in W.P.(C) 5153/2021

“(a) Issue appropriate writ, order and/or direction/s to respondent no. 1 & 2 for mandatory RT-PCR test of prisoners/ inmates lodged in Jails of Delhi;

(b) Direct the respondent no. 1 & 2 to set up a non-covid medical facility with necessary medical equipment and medical staff for the treatment of non-covid jail patients;

(c) Issue appropriate directions for the de-congestion of Delhi Prisons in light of submissions made in the present petition;

(d) Issue or pass any writ, direction or order, which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.” (emphasis supplied)

Prayer in W.P.(C) 5033/2021

“A. To immediately release all the under trials and convicted prisoners on interim bail/parole with maximum imprisonment upto 7 years and fine (i.e. non – heinous crime) in Tihar Jail, Mandoli Jail and Rohini Jail

B. To direct the police to not arrest the accused persons not involved in violent crimes without the order of the court.

C. Temporarily release prisoners previously released and those who have surrendered on the basis of good conduct (under trials as well as convicted) in Tihar Jail, Mandoli Jail and Rohini Jail convicted of heinous crime with more than seven years of imprisonment.

D. Release prisoners who are suffering from some or the ailment in Tihar Jail, Mandoli Jail and Rohini Jail;

E. Segregate and provide proper facility and arrangement for examination and treatment of prisoners

F. Direct the interim released of prisoners having critical medical condition.

G. Pass any other order(s) which this court may deem fit and proper in the interest of justice and the general public of the NCT of Delhi.” (emphasis supplied)

Prayer in W.P.(CRL) 7/2021

“a) Issue an appropriate writ, order and/or direction in the nature of ‘Mandamus’ thereby directing the release of those under trial prisoners who are facing trial under and have spent half of their maximum sentence in lower offences;

b) Issue an appropriate writ, order and/or direction in the nature of ‘Mandamus’ thereby directing the Undertrial Review Committee and Jail Superintendent to verify the undertrial prisoners facing trial under multiple charges but have undergone sentence in lesser charge to be put in the category of prisoners to be released on bail;

c) Issue an appropriate writ, order and/or direction in the nature of ‘Mandamus’ thereby directing the Undertrial Review Committee, Jail authorities to provide fresh status of under trial prisoners on weekly basis who have undergone sentence in lesser charge to be put in the category of prisoners who can be considered to be released on bail within a week from time they are eligible in this category;

d) Issue an appropriate writ, order and/or direction in the nature of ‘Mandamus’ thereby directing the DLSA to provide statistical information of under trial prisoners in lesser charge on their website and where bail is applied through DLSA and its disposal rate.

e) Issue an appropriate writ, order and/or direction in the nature of ‘Mandamus’ thereby directing the release of Undertrial who have undergone custody of 3 years or more where trial is conducted by a magistrate.

f) Allow undertrial prisoner who have completed half of lessor sentence in multiple offence to avail the benefits of S.436 A and approach concerned courts for bail directly.

g) Pass such other or further order/orders as this Hon'ble Court may deem fit in the larger interest of justice."

(emphasis supplied)

2. We have highlighted the substantive reliefs sought in these four petitions, and those not highlighted are primarily to achieve the highlighted reliefs.

3. We find that practically none of the substantive prayers survive in the first three petitions i.e. W.P.(C) No. 4936/2021, 5153/2021 & 5033/2021. To the extent they survive, they are being dealt with by us. The prisoners are being tested for Covid-19 through Rapid Antigen Test (RAT) as well as the RT-PCR Test. So far as the reliefs sought for release of the prisoners – both UTPs and convicts are concerned, they substantially stand addressed in the light of the decisions of the High Powered Review Committee (HPC), taken in its meetings held on 04.05.2021 and 11.05.2021 in the light of the decision rendered by the Supreme Court on 07.05.2021. There is no challenge to the recommendation of the HPC in these petitions.

4. The grievance raised by Mr. Singhal that the non-Covid patients are being neglected, does not appear to be correct, since there are Jail Hospitals in every Jail which are treating such patients, and wherever necessary, they are being taken to larger referral hospitals for treatment of non-Covid-19 ailments.

5. Mr. Singhal has drawn our attention to one instance where in Case FIR No.811/2016, PS-New Usmanpur, Delhi, the learned Trial Court was informed by the State in its status report, that Pulmonary Function Test

(PFT), which was required to be conducted on the accused, could not be conducted since that test was not available in the CJ-10 Dispensary, and Dr. Baba Saheb Ambedkar Hospital, along with Lok Nayak Hospital and Deen Dayal Upadhyay Hospital have all been converted into 100% Covid Facility. Therefore, the PFT on the accused could not be done at present. He submits that in all such cases, the State should take the responsibility of getting the requisite test conducted in some other hospital, which may not be a fully Covid-19 dedicated facility. The report submitted by the Medical Officer in-charge in the said case further went on to state that “*At present the medical condition of the inmate is stable and satisfactory*” and that prescribed medications are being provided to him by the Jail Dispensary. On our query, Mr. Singhal states that the said inmate was granted interim bail by the Trial Court. Mr. Singhal submits that in every case, it may not be possible for the Jail inmate to approach the Court, and in all such cases, where the referral hospital is a 100% Covid facility, the Jail Authorities should get the relevant test/ investigation and treatment conducted at another hospital, which may not be 100% Covid facility.

6. We may observe that whenever such a position is placed before the Court dealing with bail applications, invariably, the Courts pass directions for medical examination/ treatment of the accused by a non-Covid facility, in case the referral hospital is a 100% Covid facility. It can never be that the accused is left unattended, and denied the investigation/ treatment that he/ she may require. We agree with the submission of Mr. Singhal that the accused cannot be told that the referral hospital is a 100% Covid facility and, hence, his treatment/ investigation cannot be undertaken. To that

extent, we direct the State to ensure that whatever investigation/ treatment is required by the accused, should be provided to him/ her by approaching another hospital which may offer the investigation/ treatment and which is not a 100% Covid facility, in case the referral hospital is a 100% Covid facility.

7. Mr. Mathur, learned senior counsel who appears in W.P.(Crl.) No.7/2021 has raised a grievance with regard to non-consideration of the cases entitled to be considered for release under Section 436A of the Cr.P.C. Mr. Mathur submits that the Under-Trial Review Committee (UTRC) which has been constituted for consideration of cases falling under Section 436A Cr.P.C. has not been meeting and conducting review of the cases.

8. Mr. Kanwal Jeet Arora, Secretary, Delhi State Legal Services Authority, has joined the proceedings and he states that the said Committee is holding review of cases falling under Section 436A Cr.P.C. on a weekly basis. He states that he has already issued requisite directions for this purpose vide letter dated 13.05.2021. He further informs that the National Legal Services Authority (NALSA) has scheduled a Webinar to sensitise all the District Level Committees for holding regular meetings for examination of cases falling under Section 436A Cr.P.C.

9. Mr. Mathur has placed reliance on the judgment of the Supreme Court in ***Re: Inhuman conditions in 1382 prisons*** dated 24.04.2015. By placing reliance on the observations made by the Supreme Court in paragraph 4 of the said decision, Mr. Mathur submits that all cases, including cases in which the offence under the law is one for which punishment of death is

specified as one of the punishments, should be placed before the UTRC for consideration under Section 436A Cr.P.C, and wherever, there are more offences than one alleged against the accused, the punishment prescribed for the lesser offence should be made the basis for deciding the applicability of Section 436 A Cr.P.C. Paragraph 4 of the said decision reads as follows:

“4. In the meeting to be held on or about 30th June, 2015, the Under Trial Review Committee should consider the cases of all under trial prisoners who are entitled to the benefit of Section 436A of the Code. The Ministry of Home Affairs has indicated that in case of multiple offences having different periods of incarceration, a prisoner should be released after half the period of incarceration is undergone for the offence with the greater punishment. In our opinion, while this may be the requirement of Section 436A of the Code, it will be appropriate if in a case of multiple offences, a review is conducted after half the sentence of the lesser offence is completed by the under trial prisoner. It is not necessary or compulsory that an under trial prisoner must remain in custody for at least half the period of his maximum sentence only because the trial has not been completed in time.”(emphasis supplied)

10. At this stage itself, we may also extract Section 436A Cr.P.C., which reads as follows:

“436A Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that

offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.”(emphasis supplied)

11. In our view, the submission of Mr. Mathur is misplaced and is premised on a wrong reading of the decision of the Supreme Court. While observing that it would be appropriate, if in a case of multiple offences, a review is conducted after half the sentence of the lesser offence is completed by the UTP, in our view, the Supreme Court did not intend to read down or dilute the requirements of Section 436A, which clearly exclude consideration of cases which involve an offence for which punishment of death has been specified as one of the punishments. The only meaningful way in which the observations made by the Supreme Court can be understood is that, within the category of cases which can be considered by the UTRC – which would exclude cases involving the offence for which punishment of death has been specified as one of the punishments under the

law, the UTRC should conduct the review after half the sentence of the lesser offence is undergone by the under trial prisoner.

12. Mr. Mathur has submitted that it should be left to the UTRC to appreciate and evaluate whether the offence – which has one of the punishments as death under the law, has been committed. We reject this submission. It is not for the UTRC to evaluate and appreciate the merits of the case while examining the case under Section 436A Cr.P.C. That is the preserve of the Court dealing with the case. Therefore, in all such cases, which involve an offence for which punishment of death has been prescribed as one of the punishments under the law, cannot even be placed before the UTRC under Section 436A Cr.P.C. and there is no question of the Committee undertaking any review under Section 436A Cr.P.C. in such like cases.

13. Even in respect of such cases, the UTRC is not bound to take a decision to direct release of the Under Trial Prisoner (UTP) merely because the UTP has undergone one half of the maximum sentence specified for the lesser, or least offence. The use of the words “*It is not necessary or compulsory*” ***that an UTP must remain in custody for at least half the period of his maximum sentence***, show that it is not mandatory that soon upon the UTP undergoing incarceration for half the punishment for the lesser or least offence, the UTP gets vested with a right to be released under Section 436A Cr.P.C. In terms of the order passed by the Supreme Court, such a UTP only gets a right to have his case considered by the UTRC which may, or may not, direct release of the UTP under Section 436A at that stage.

14. We, accordingly, dispose of these petitions in the aforesaid terms.

VIPIN SANGHI, J

JASMEET SINGH, J

MAY 19, 2021

B.S. Rohella

