

Jammu & Kashmir High Court - Srinagar Bench
J&K High Court Bar Association vs Unknown on 11 March, 2020

Page | 1
WP (C) (PIL) no. 14/2016

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

WP(C) (PIL) no.14/2016

Reserved on 10.02.2020
Pronounced on 11.03.2020

J&K High Court Bar Association

...Petitioner

Through:
Mr. G. N. Shaheen, Advocate.
v.

Union of India & ors.

...Respondent(s)

Through:
Mr. B. A. Dar, Sr. AAG, for UT respondents;
Mr. Tahir Shamsi, ASGI;
Mr. Nazir Ahmad Bhat, CGC

Coram:
Hon'ble Mr. Justice Ali Mohammad Magrey, Judge
Hon'ble Mr. Justice Dhiraj Singh Thakur, Judge

Whether approved for reporting: Yes
JUDGMENT

DATE OF DECISION: 11.03.2020 (Magrey-J)

1. This petition has been filed by the Jammu and Kashmir High Court Bar Association, Srinagar, through its Executive Member, Mr. Muhammad Ashraf Bhat, way back in July, 2016, with the following prayers:

"a) That the respondents, their agents and servants be prohibited by a writ of prohibition from using or caused to be used 12-Bore Pellet Gun and or of any other Bore and Cartridges containing pellets as a means of crowd control against any group of people, including protestors in the State of Jammu and Kashmir. The use of pellet gun be totally banned as a means of crowd control.

b) That all the officers, who took the decision of using the pellet gun at the protestors and non-protestors after 8th July, 2016 and those who actually fired the pellet guns

be prosecuted. Cases be directed to be registered against them Page |2 WP (C) (PIL) no. 14/2016 for causing unlawful bodily injury, deprivation of eye sight etc.

c) That the respondents, their agents and servants be directed to compensate all those persons whose names are mentioned in the petition as well as those whose particulars will come to the notice of this Hon'ble Court during the hearing of this petition and the compensation be determined in the context of violation of Article 21 of the Constitution as made applicable to the State of Jammu and Kashmir, as these persons have either been deprived of their eye sight and or have suffered bodily injury, trauma, agony, mental pain etc.;

d) That the Director, SKIMS, Soura, Srinagar, Principal, SKIMS, Medical College, Bemina; Director, Health Services, Kashmir, and the Medical Superintendent, SMHS Hospital be directed to furnish to this Hon'ble Court details of all those persons who reported in the SKIMS, Hospitals, District Hospitals, Sub District Hospitals, Primary Health Centres for treatment on account of pellet injury and the treatment provided to them.

e) That the State of Jammu and Kashmir through Chief Secretary be directed to furnish report to this Hon'ble Court as to the circumstances and the time decision to refer pellet injury patients outside the State was taken. The respondents be also directed to bring competent and well trained surgeons from outside the State so as to provide treatment to those who are not willing to go outside for treatment or have no means for meeting the expenses of such treatment inside or outside the State. The Court may also determine negligence, if any, caused by any authority of the State in dealing with pellet injury patients.

d) Any other appropriate writ direction or order as the Hon'ble Court may deem fit in the facts and circumstances of the case be also passed in favour of the petitioner and against the respondents. "

2. We have heard learned counsel for the parties and considered the matter.

3. As per the averments made in the petition, the immediate cause for filing of this writ petition has been the unpleasant events which had occurred from 08.07.2016 wherein, according to the petitioner association, people, including teenagers, watching clashes between protestors and security forces, had received pellet injuries in their Page |3 WP (C) (PIL) no. 14/2016 eyes, skulls and throats. It is alleged that about 4000 persons were injured and about 100 persons were blinded. The petitioner in para 7(f) of the petition has given particulars of 46 persons whose eyes, according to him, were damaged by pellet injuries. Alleging excessive use of force against protestors, the petitioner in the petition has referred to various provisions of the Code of Criminal Procedure and other procedures to be adopted for dealing with and dispersal of assemblies. The petitioner association, professedly, espousing a public interest, has filed this petition with the above prayers.

4. When this petition first came up for consideration on 02.08.2016, the learned Advocate General and the learned ASGI took notices in the open Court. After the respondents filed their respective responses, the Division Bench of this Court, of which one of us (Magrey J) was a member, passed a detailed order on 21.09.2016. We think it advantageous to extract hereunder paras 17 to 30 of the said order. The same read as under:

"17. We have considered the respective submissions and gone through the pleadings.

18. Though maintainability of the writ petition is raised as a preliminary issue, since the merits of the issues raised with respect to said prayers have been argued, we are of the view that the decision can be rendered on merits.

19. It is not in dispute that from 08.07.2016 many parts of the valley are facing law and order problems for one reason or the other. Almost every day, on the guise of protests, the Security Personnel, their Camps and Police Stations are targeted by unruly crowds. The State Government has passed orders u/s 144 Cr. PC restricting the movement of public and vehicles. The Educational Institutions are closed for about ten weeks which is affecting the future of students. There is shut down due to various reasons and the situation has not improved as on date. It is true that so many persons were injured due to use of Pellet Guns or by use of force, some of them seriously. It is also true that because of use of Pellet Guns even though more protests become violent the loss of life is less, as stated in the reply filed by respondent nos. 1, 3 and 4. The petitioner is claiming that there is Human Rights violation. If the protest is not peaceful and the Page |4 WP (C) (PIL) no. 14/2016 Security persons are attacked by a huge and violent mob they have to necessarily use force as their self defence and for protecting public property. For dispersal of mob and maintenance of law and order detailed instructions are issued to the law enforcing agencies in the name of Standard Operation Procedure (SOP). The same was issued in terms of Section 127 to 132 Cr. P. C. as well as under Section 24, 32 and 33 of the J&K Police Act.

20. Whether in a particular situation or place the use of force is excessive or not can be ascertained only after investigation and finding rendered by some authority/Court factually.

21. Hon'ble the Supreme Court in the decision reported in 2016 (7) SCALE 725 (Anita Thakur and ors v.

Government of J&K and ors) (judgment dated 12.08.2016) pointed out the present situation in Kashmir in the following manner in para 12, which reads thus:

'12... Recent happenings show an unfortunate trend where such demonstrations and protests are on increase.

... In Kashmir itself there have been numerous instances where separatist groups have provoked violence. In this scenario, task of the police and law enforcing agencies becomes more difficult and delicate. In curbing such violence or dispersing unlawful assemblies, police has to accomplish its task with utmost care, deftness and

precision.'

22. Thus, it is manifest that so long as there is violence by unruly mobs, use of force is inevitable. What kind of force has to be used at the relevant point of time or in a given situation/place, has to be decided by the persons in charge of the place where the attack is happening. This Court in the writ jurisdiction without any finding rendered by the competent forum / authority cannot decide whether the use of force in particular incident is excessive or not. Having regard to the ground situation prevailing as of now and the fact that Government of India, Ministry of Home Affairs has already constituted a Committee of Experts through its Memorandum dated 26.07.2016 for exploring other alternative to Pellet Guns, before filing the report by the Expert Committee and a decision taken at the Government level, we are not inclined to prohibit the use of Pellet Guns in rare and extreme situations.

23. With regard to the contention about non-adherence of SOP, it has to be noticed that the Director General of Police issued the SOP which was circulated amongst the lower formations with direction to adhere to the guidelines in letter and spirit. The said SOP was framed under Section 127 to 132 Cr. P. C. read with Section 24, 32 and 33 of the J&K Police Act. Clauses A to T of the SOP read thus:

...

...

...

24. In the concluding part of the SOP the right to private defence is also given to the Police officials / Security personnel which reads thus:

...

...

...

25. The contention of the petitioner that SOP has not been followed while handling the dispersal of mob and maintenance of law and order, cannot be decided in the writ petition as the Director General of Police in his reply has specifically stated that the guidelines stated in the SOP are being strictly followed. Thus there is dispute regarding following or non-following of guidelines issued in the SOP. Whether at a particular place the guidelines issued in the SOP are being followed or not, can be individually decided and as in general no one can be in a position to give a finding. Thus the submission made by the learned Advocate General as well as the statement made by the Director General of Police in the objections filed, stating that guidelines issued in the SOP are being followed, is recorded.

26. In such circumstances we are not inclined to grant the relief sought in the writ petition with regard to prayers

(a) and the said prayer is rejected.

27. Insofar as prayer (b) is concerned, the same cannot be considered in the writ petition as no findings of use of excessive force, violating the guidelines issued in the SOP, have been recorded by any fact finding authority, as stated supra. Hence the persons alleging use of excessive force, due to which death or injury has occurred, can very well approach the appropriate forum to establish the same and seek redressal.

28. It is, however, made clear that the pendency of the writ petition with regard to other prayers will not be a bar for the State Government for paying compensation to the deserving family members of the deceased persons or to the injured persons as it may deem fit and proper.

Page |6 WP (C) (PIL) no. 14/2016

29. The concerned respondents are directed to ensure that all injured persons are extended adequate medical treatment for whatever injury they sustain and provide all possible required medical treatment to the injured by specialists and if specialists are not available in the State, appropriate arrangement has to be made to treat the patients by inviting specialists in the State or to shift the patients to hospitals outside the State wherever specialists are available.

30. Insofar as the other reliefs sought for in the writ petition are concerned, for considering the said reliefs the writ petition is admitted to hearing and respondent nos. 3 and 15 to 23 are directed to file detailed counter affidavits by the end of November, 2016. The petitioner may file rejoinder by the end of December, 2016."

5. Looking at the prayer clause of the writ petition, as quoted in the very first paragraph of this order, it becomes axiomatic that the petitioner Association sought the following reliefs in the petition:

- i) that the Court prohibit use of use of 12-Bore Pellet Guns for crowd control in J&K;
- ii) that Security Force officers and personnel, who had used Pellet Guns on protestors and non-protestors with effect from 08.07.2016 may be directed to be prosecuted for having caused injuries to people;
- iii) that the respondents be directed to compensate the injured persons whose names are mentioned in the petition or whose particulars may come on record;
- iv) that the authorities of the various Hospitals etc. may be asked to furnish details of the persons who had reported at their respective Hospitals for treatment on account of pellet injuries and the treatment provided to them;

v) that the respondents be directed to bring competent surgeons from outside the State for providing treatment to the persons who had received injuries in their eyes by Pellet Guns.

6. So far as the first and the second prayers made in the petition are concerned, the Court has already recorded a finding in its order dated 21.09.2016, particularly in paras 22 to 27 thereof, quoted hereinabove.

7. As regards the fourth and the fifth prayers made in the petition, the concerned Hospital authorities have filed their respective Page |7 WP (C) (PIL) no. 14/2016 responses to the petition, detailing out the number and the particulars of the injured persons who had reported at their respective Hospitals during the period in question, the nature of injuries received by them, the treatment provided to them and the procedures, wherever necessary, conducted on them. So far as the prayer for bringing Specialists from outside the State for treatment of persons who were not in a position to go outside for treatment of their eye injuries, para 4 of the reply affidavit filed on behalf of respondents 26 and 28, i.e., the Medical Superintendents, SMHS Hospital and Bone & Joint Hospital, Barzulla, Srinagar, is quoted hereunder:

"4. That the services of Dr. S. Natrajan, Director, Aditya Jyoti Hospital, Mumbai and his team were taken. They operated the patients from 26th to 30th of July, 2016. The services of Dr. Mahesh Shanmugam, Director, Retina Services, Shankara Eye Hospital, Bangaluru were utilised from 6th to 8th of August 2016. Dr. Natrajan is Retinal Surgeon of International repute. He is expert in managing such trauma cases. He has operated thousands of ocular trauma and retinal cases both in the country and outside country. His masterly talent is known worldwide. Dr. Natrajan has to visit the Hospital again from 22nd to 25th of August 2016 and will assess the already operated patients and operate other patients, if required. The allegation made in the writ petition that the outside doctors have no knowledge about the pellet injury is baseless and without any merit."

8. It may also be mentioned here that in response to order dated 11.05.2018 passed by the Court, the Director, Health Services, Kashmir, in his affidavit gave the district-wise list of the persons who had received pellet injuries. According to the statistics stated in the affidavit, 510 patients had been referred to other Hospitals in the country. It is stated that treatment was provided to all the patients free of any charge.

9. In light of the above facts, we are of the view that since medical treatment has duly been extended to all the injured persons, some of whom have been referred to other Hospitals in the country as well, and Special Doctors have also been called from outside the State for Page |8 WP (C) (PIL) no. 14/2016 treatment and conduct of surgeries of some other patients, nothing more needs to be done as regards prayers (iv) and (v) made in the petition.

10. Coming to prayer no.(iii) made in the petition for grant of compensation to the injured persons, respondent no.2, i.e., Secretary to Government, Home Department, in his reply affidavit stated that

there is no specific policy or rule in vogue relating to compensation to the alleged victims of pellet guns. It is, however, averred that vide Government order no.61-Home of 2017 dated 27.01.2017 a Committee comprising of IGP, Kashmir Zone; Principal, Government Medical College, Srinagar; Director, Health Services, Kashmir, a representative of SKIMS, Srinagar, not below the rank of Assistant Professor, and of CID Organization, J&K, not below the rank of SSP, headed by the Divisional Commissioner, Kashmir, was constituted to identify the persons who were permanently / partially disabled during the law and order disturbances in Kashmir Valley from 08.07.2016 to 02.11.2016. It is stated that pursuant to the above, the Divisional Commissioner, Kashmir, in terms of communication dated 23.10.2017 read with communication dated 25.01.2018, submitted a list of persons who had been injured during the period in question, and that in pursuance of the recommendations of the Divisional Commission, the Government in the Home Department, vide Government orders dated 05.01.2018 and 26.02.2018, accorded sanction to the payment of Rs.0.75 lakh to 54 persons who had suffered permanent disablement and Rs.0.50 lakh in favour of 10 persons who had suffered partial disablement. As regards the 46 persons named in para 7(f) of the writ petition, it is stated that matter relating to payment of compensation in their favour was examined and taken up with the Divisional Commissioner, Kashmir, vide communication dated 28.05.2018 for placing the same before the Committee constituted vide the aforesaid Government order dated Page |9 WP (C) (PIL) no. 14/2016 27.01.2017 for examination / considerations strictly in terms of its mandate.

11. It may be mentioned here that when this matter was heard on 10.02.2020 by this Court and order was reserved, the parties were given liberty to bring on record such further documents / information as they might feel helpful in just disposal of the case. In this context, on 19.02.2020, a communication bearing no.Div.Com/RA- BAR/46/2018/2020 of even date, written by Divisional Commissioner, Kashmir, to the Principal Secretary to Government, Home Department, J&K, Jammu, was brought on record. In this communication, it is stated that out of the 46 persons named in para 7(f) of this petition, four persons, namely, Jehangir Ahmad Rather S/o Gh. Hassan Rather R/o Lalpora, Lolab, Kupwara; Aijaz Ahmad Mir S/o Gh. Qadir Mir R/o Behrampora, Sopore; Dar Aalam S/o Abdul Saleem Dar R/o Narbal Budgam; and Tanveer Ahmad Ganai S/o Bashir Ahmad Ganai R/o Chand Baramulla, have been cleared by the Committee and provided ex-gratia relief vide Government order no.10-Home of 2018 dated 05.01.2018. It is further stated in the said communication that the remaining cases shall be decided in tune with the Government policy framed in this behalf in due course of time. The body of the communication is quoted hereunder:

"Subject: PIL No.14/2018 titled J&K High Court Bar Association V/S UOI and others.

Refer to your letter No.Home/OWP/57/2016 dated 28.05.2016 regarding the above captioned subject. In this context it is submitted that the details of 46 persons mentioned in the instant PIL were put before the committee, constituted for the purpose by the Govt. vide order No.61-Home of 2017 dated 27.01.2017, which met on 09.06.2018 for necessary consideration. It is apt to mention here that out of the 46 persons, 04 persons namely

(i) Jehangir Ahmad Rather S/o Gh. Hassan Rather R/o Lalpora Lolab, Kupwara (ii) Aijaz Ahmad Mir S/o Gh. Qadir Mir R/o Behrampora, Sopore (iii) Dar Aalam S/o Abdul Saleem Dar R/o Narbal Budgam and (iv) Tanveer Ahmad Ganai S/o Bashir Ahmad Ganai R/o Chand Baramulla had already been cleared by the committee and P a g e | 10 WP (C) (PIL) no. 14/2016 provided ex-gratia relief vide Govt. order No.10-Home of 2018 Dated 05.01.2018. The remaining cases shall be decided in tune with the Govt. policy framed in this behalf in due course of time."

12. Having considered the matter, in view of the above, we are of the opinion that so far as the constitutional tort is concerned, the State has fulfilled its obligation, inasmuch as they have made ex-gratia payments to most of the injured persons as mentioned above, and with respect to the remaining it is categorically stated that their cases shall be decided in tune with the Government policy in that behalf in due course of time. We think that in the event any individual person feels that he has not been adequately compensated commensurate with the injury he had suffered, nothing can come in his way to claim such compensation as he may wish from the State under the private law in an action based on tort through a suit instituted in a court of competent jurisdiction. This Court in this PIL, in its jurisdiction under Article 226 of the Constitution of India, can not grant a relief to the satisfaction of every such individual allegedly injured in police action, especially so when there is a finding recorded by the Court in its order dated 21.09.2016 that almost every day, in the guise of protests, the security personnel, their camps and Police Stations were targeted by unruly crowds, and that, if the protest is not peaceful and the security persons are attacked by huge and violent mobs, they have to necessarily use force in their self defence and for protecting public property. Therefore, strictly speaking, it is not a case where compensation is being sought or claimed for wrong doing of any security force personnel, or for violating any fundamental right of any citizen by them, but for discharge of public duty by such security force personnel who were being attacked by violent mobs during the relevant period. In any case, since the Government has discharged its obligation, nothing more needs to be done in this PIL.

P a g e | 11 WP (C) (PIL) no. 14/2016

13. For the above reasons, this PIL merits dismissal and is, therefore, dismissed.

(Dhiraj Singh Thakur)
Judge

(Ali Mohan
J

Srinagar,
11.03.2020
Syed Ayaz, Secretary.

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| i. | Whether the order is speaking: | Yes |
| ii. | Whether the order is reportable: | Yes |

SYED AYAZ HUSSAIN

2020.03.12 10:17

I attest to the accuracy and
integrity of this document