

Subodh Sarma and Anr.

Vs.

State Of Assam and Ors.

Gauhati High Court

26 September, 2000

Citation: Civil Rule No. 3984/96

Author: D Biswas

Bench: B Kumar D, Biswas

JUDGMENT

D. Biswas, J.

1. This Public interest Litigation has been registered at the instance of the petitioners, namely Shri Soubodh Sarma - a Consulting Engineer by profession and Smt. Sabita Goswami - a Journalist. The miserable plight of a women namely Smti Jahanbi Goswami Sharma, wife of and AIDS patient have prompted them to file this petition to espouse the cause of those who are infected or suspected to have been infected by HIV or AIDS, and the members of their family.

2. Before we advert to the problems raised in the writ petition, it would be of great assistance to know before hand what is HIV, how it is spread, how to detect it and the treatment to be given. All humans, fortunately, have a natural defence system against diseases caused by foreign organisms, i.e. the immune system, consisting inter alia of the white cells, including T-helper cells, (also know as the CD 4 cells) in the blood as well as the lymphatic systems. The immune system recognises the foreign organisms, technically

described as the antigen, and in order to defend the body against it manufactures what are known as antibodies, which attack and destroy the antigen. In the case of HIV disease, a virus known as a Human Immuno Deficiency Virus (in short HIV) enters the human body and destroys the very immune system itself.

3. The vast majority of persons contracting HIV gets AIDS (Acquired Immuno Deficiency Syndrome) which is the terminal stage of HIV infection. About 15% of the patients develop Acute Seroconversion illness. At the initial stage, the symptoms are like flu and hence mostly ignored. Later, the person goes into a long asymptomatic period which can last from 3 to 18 years. It is difficult to predict initially by clinical, biochemical or immunological methods as to who will develop AIDS. This uncertainty has a psychological stress which lowers CD 4, cell count, thereby reducing the persons' immune response. The HIV damages the immune system and secondary infections like pneumonia, diarrhea etc. set in. The human body is unable to combat such infections and the person infected with HIV ultimately dies on account of secondary infections.

4. HIV is transmitted to another only by the four known methods :-

(i) Bodily fluids and Blood transfusion - where HIV positive blood is transfused ;

(ii) Unprotected sexual intercourse with an HIV positive person :

(iii) Perinatal transmission, from a mother who is HIV positive to child during pregnancy ;

(iv) Breast feeding of child by an HIV positive mother.

It may be mentioned herein that HIV is not transmitted by casual contact like sharing toilets, washing clothes, sharing utensils and food etc.

5. HIV can be detected directly by culture and isolation of the virus in the body fluids such as blood, semen, saliva etc. This is, however, a very expensive process. The alternate process is to test the anti-bodies which develop after the entry of the HIV into the human system. The anti-bodies can be detected only after three to six months of the entry of the HIV. It is difficult to test and detect anti-bodies during this interim period which is otherwise known as "window period". The ordinary tests available today for HIV antibody testing are the ELISA (Enzyme Linked Immuno Assay) and the Western Blot tests. The ELISA test is, however, prone to giving false positives. The Western Blot test is more accurate and is used as a confirmatory test in case a positive ELISA test is reported. However, now a double ELISA is also considered to be specific and sensitive for confirmation. It is evident that a person who is found negative may be so found because of the "window period". A person would have to be tested every three to six months in order to determine his or her sero-positivity.

6. It is well established that people with HIV/AIDS require consistent and quality medical care. It includes - (i) regular immune system monitoring, preferably every 3 - 4 months ; (ii) availability and administration of appropriate drugs, and (iii) medical supervision with psychosocial support.

7. The scenerio in Assam is indeed grim. The first HIV positive case was detected in 1990 in Assam. Assam is surrounded by Mainpur, Tripura, Nagaland, Meghalaya and Arunachal Pradesh and is the abode to a large number of floating population. Therefore, special attention for HIV/AIDS intervention programme is necessary to spread awareness and impart information about the disease apart from effective steps in providing medical care.

8. The grievances of the writ petitioners are that funds released for the project are deposited in the revenue deposit and is not utilised for the purpose it is allotted. The state

is yet to constitute AIDS Control Society under the Societies Registration Act with representation from NGOs. Petitioners' case is that apart from constitution of the Society, there must be a system to check as to whether funds used in the project has been utilised properly for both Phase-I and Phase-II of the project. The further contentions of the writ petitioners, as highlighted by Shri Goel, Learned Senior Counsel is that the monitoring committee to be constituted for this purpose should have substantial representation from the NGOs. According to him, there should not be delay in release of the funds and the funds so released should not be diverted to other Heads of Account. There is no proper documentation and the funds received from the Central Government has not been properly accounted for. Appointment of IAS Officers in the State AIDS Control Society has been indicted as a major set-back in the implementation of the project. According to the Learned Counsel, the person in management should have adequate experience in the field of health care and control of diseases. It is further pointed out that of the three Zonal Blood Testing Centres at Gauhati, Dibrugarh and Silchar, only one is operational and that in rural areas there is no proper facilities for HIV testing. The suggestions advanced on behalf of the writ petitioners may be summarised as follows :-

- (a) Data collection has to be systemized ;
- (b) General awareness among the member of the public is to be created to prevent the spread of HIV ;
- (c) Treatment of HIV positive persons without discrimination should be made available ;
- (d) Blood banks should not be permitted to operate without licence and control;
- (e) Counselling centres to be set up on a priority basis.
- (f) The funds allotted for the purpose shall not be diverted to any other account and should

be utilised for the project envisaged ;

(g) The funds received from the Central Government have not been properly accounted for and utilised for the purpose it was allotted ;

(h) There should be proper documentation ; and

(i) NGOs should be involved for intervention programme according to guidelines inforce in this behalf. Appropriate steps should be taken to spread awareness and impart information regarding HIV.

9. It is further suggested that certain protocols are to be followed while treating HIV positive patients, namely :-

"(1) No HIV test unless clinically indicated and not if it is not accompanied with treatment.

(ii) No HIV positive person to be denied treatment.

(iii) Maintenance of voluntary consent confidentiality and non-discrimination (Protocols).

(iv) Universal precautions and PEP (To be made available)

(v) Protocols for those who refuse to treat ; Counselling and disciplinary action.

(vi) Advocacy programmes to sensitize doctors and HCW."

10. Besides above, it has also been suggested that there is no necessity of isolation of HIV positive patients. In order to regulate the functions of the Blood banks, a State Transfusion Council have to be set up and the Blood Banks shall not be allowed to

operate without licence. Mr. Goel, Learned Counsel further argued that emphasis has to be given in setting up counselling centres on priority basis.

11. The Learned Counsel for the petitioners also raised grievances on the ground that the State AIDS Cell under the control of the Director of Health Services, Assam are not functioning satisfactorily for lack of sense of urgency. Nothing has been done in mobilising/the psychological, social and material resources to people with HIV infections and AIDS and of their close associates. AIDS patients are denied their legitimate right to avail treatment with dignity in the State run Hospitals. There is no arrangement even in Gauhati Medical College for effective treatment of the disease and no steps have been taken by the authorities to improve the situation. The World Health Assembly Resolution dated 13th May, 1988, the London Declaration etc. have been violated by the State authorities. The AIDS Counselling Centre opened at the Mahendra Mohan Choudhury Hospital at Gauhati is not functioning properly and the authorities at infectious Diseases Hospital at Kalapahar, Guwahati where the patients are normally transferred are also not extending proper medical facilities, even it is not allowing the missionaries and NGOs to enter the Hospital premises on flimsy grounds. Citing a number of instances of denial of effective treatment, Mr. Goel, Learned Counsel for the petitioner submitted that directions are necessary from this court to compel the State authorities to rise to the occasion and to fight back the impending menace in a proper and appropriate manner in compliance with the guidelines and strategies of the National AIDS Control Organisation, Ministry of Health and Family Welfare, Government of India. The Learned Counsel for the petitioners also urged that the State Government be directed to mobilise its resources to make the Second Phases of the Programme (1999-2004) a success in letter and spirit as elaborated in their additional affidavit.

12. The respondent No. 8 in their affidavit-in-opposition submitted that AIDS is a matter

of serious concern for everybody and the State of Assam with a view to combat the disease had established State AIDS Cell in 1992 headed by the Respondent No. 8, the Additional Director of Health Services, Assam. According to them, all possible steps prescribed by medical science for the purpose of prevention of the disease are being undertaken by the Cell mentioned above. According to them, there are reports of a few stray incidences of isolation of the HIV positive patients, but the Cell having no administrative control could not make any direct intervention in the matter. The incidence of isolation have been reported to the Health and Family Welfare Department. According to the deponent no medical cure of the disease have been discovered by the medical science and, as such, maximum effort is being devoted to prevention and control of the disease. The State AIDS Cell is functioning as per guidelines and programmes set out by the National AIDS Control Organisation of India, in short NACO. All the programmes chalked out by the NACO have been successfully undertaken by the State Cell. The funds which is released by the Government of India on the approval of the NACO is not received by the Sate in time. The funds released although at a belated stage have been properly audited by the Accountant General, Assam and proper utilisation certificate in this respect of every expenditure have been issued. It is only after production of such utilisation certificate issued by the Accountant General, the fund for the subsequent year is released by the Government of India.

13. It is further submitted by the respondents that all possible programmes within the limited means and resources to combat the meance in the State of Assam have been undertaken. A five bedded Indoor Unit of Psychiatry with Outdoor Patient Department (OPD) facility have been opened at Mahendra Mohan Chodhury Hospital at Guwahati and this unit is looked after by a Doctor successfully trained to counsel and extend psychiatry support to the HIV patients. The AIDS Counselling Centre at Mahendra Mohan Choudhury Hospital is also fully operational.

14. Regarding allocation of funds and the allegations thereto, Annexure-A to the affidavit-in-opposition indicates that the State Government have not released the total amount received from the Government of India in the financial years between 1992-1993 to 1996-1997. There is no specific denial to the allegations made by the writ petitioners that the funds allocated by the Government are not being released and even if released are not being properly utilised. Infact, the answering respondent have not disputed the general assertion made by the writ petitioners about the necessity for augemting the process to fight against the AIDS. It is also indicated in paragraph-13 of the affidavit that effective steps have been taken to implement the directions given by the Supreme Court of India with regard to Blood Banks. Directions have been issued by the State Drug Control Authority that no Blood Banks would be allowed to operate without licence. Presently, there are only two licenced Blood Banks operating in the State of Assam, namely, Gauhati Medical College Blood Bank and Ganga Blood Bank at Ambari, Gauhati - 3 (as is available in the affidavit). Mandatory tests for HIV, Hepatities B Vires, Malaria Paraside and VDRL are carried out as per the Drugs and Cosmetic Rules, 1945. It is further asserted that the State AIDS Cell is supplying necessary kits to Government Hospitals and Medical College Hospitals and Blood Banks as well as Zonal Blood Testing Centres run by the Government. The heavy equipments necessary for this purpose are also been supplied by the NACO. Regarding counselling, it has been stated in the affidavit that persons have been duly selected and deputed for training on counselling programmes to be conducted by the NACO.

15. The affidavit-in-opposition submitted by the Respondent Nos. 2 and 6 in the same tune admits of the necessity of combating the meance of AIDS at a war footing. According to the Respondent Nos. 2 and 6, it is a global phenomenon and has been declared as a epidemic. Highlighting the steps taken by the NACO, it is submitted that a number of steps have been taken in the country including the State of Assam to prevent

this deadly disease. It is further maintained that steps have been taken to improve the treatment and supervisory facilities of the AIDS Cell with the money received from the Government of India. Initial problems faced in providing treatment have been taken care of as per guidelines provided by the NACO. Effective steps have also been taken to control and regulate the functions of the Blood Banks with facilities for tests for HIV, Hepatitis B etc.

16. The Commissioner and Secretary, Government of Assam, Finance Department in his affidavit explained the position with regard to finance specially with reference to the order dated 3.10.1996 passed by this Court. It would appear that the amount sanctioned for the project was kept in revenue deposit on various occasions. It is submitted that the amount was ordered to be kept in revenue deposit and could not be spent for the purpose for which it was meant. The deponent explained that deposits made in the revenue deposit (public account) could be withdrawn and spent without further authorisation of the State Legislature. Sometime delayed release of the funds by the Government of India on the closing days of the financial year also necessitates deposit of the amount in the revenue deposit to avoid lapse of fund and to ensure quick pace of developmental activities in the over-all-interest of the State.

17. The Union of India in their affidavit-in-opposition submitted that NACO is a wing of the Ministry of Health and Family Welfare created and established to implement the National AIDS Control Programme through the States and Union Territories, It is a 100% centrally sponsored Scheme and with consistent persuasion and administrative control the programme has been picking up well. After scrutiny of the Action Plan submitted by the State, funds were released and in the process Rs. 240.32 lakhs have been released as financial assistance for implementation of the programme to the Government of Assam during the period 1992-03 to 1996-97. It is also made clear that due care has been taken

to ensure that the unspent balance lying with the States and Union Territories were utilised. NACO is monitoring the implementation/utilisation of the funds. It is further submitted that guidelines have been circulated to all States and Union Territories for implementation of the programme and orientation training for medical and para-medical staffs have also been organised at the instance of the NACO after identifying physicians responsible for AIDS Management Programme in all States and Union Territories including Assam. It is further submitted that all steps have been taken by the answering respondents for implementation of the programme and the Government of India being the signatory to the London Declaration and strategy formulated by the World Health Organisation is totally dedicated to the implementation of the various programmes involving the health status of the communities in India.

18. The pleadings reproduced above in details indicate that the respondents are aware of the urgent necessity to deal with the problem by way of prevention and control of the disease since there is no cure for the same as yet. However, a close scrutiny of the pleadings would show that the State of Assam have not been able to gear up its machineries to the extent necessary. The awareness programmes the way it is being carried out does not seem to have any deterrent effect. This is evident from the submission of Mr. Goel, Learned Counsel that even the physicians are scared to treat the AIDS patients out of fear of infection. A few cases of HIV positive have not been dealt with properly and appropriate treatment does not seem to have been given. The patients have been isolated and a few of them have been transferred to Infectious Disease Hospital at Kalapahar where the NGOs and missionaries were not allotted entry. This is indicative of lack of transparency in the matter.

19. It is apparent from the affidavit filed by the respondents that there are only two licensed Blood Banks in the State. Steps taken to regulate and control the functioning of

the Blood Banks have not been spelt out. There is also no indication that unlicensed Blood Banks have been closed although orders have been issued to this effect. Sri B.C. Das, Learned Counsel, however, submitted that there are 50 Blood Banks in the State and all necessary equipments are supplied by the NACO and door to door control is being carried on. But this is not enough. It is apparent that there is no arrangement for HIV testing in rural areas and the State Transfusion Council, as has been contemplated, does not appear to have been established. The State has not yet constituted AIDS Control Society under the Societies Registration Act with adequate and sufficient number of representatives from the NGOs. The Second Phase of the programme does not appear to have received proper attention of the State authorities. The facilities for treatment indicate that only five bedded Indoor Unit has been established at Mahendra Mohan Choudhury Hospital at Gauhati and no steps have been taken for treatment of HIV positive persons as Indoor patients in any other hospital. That apart, counselling centres do not appear to be sufficient in number with experienced and dedicated physicians. Steps taken by the State in this direction appear to be inadequate.

20. The position with regard to finance appears to be not at all satisfactory. The funds received by the State Government from the Central Government have been kept in revenue deposit on various occasions and have not been released in full. The statements made by the Respondent No. 8 and the Annexure-A attached with his affidavit shows that funds allotted by the Central Government have been withheld by the State in part and the explanation given by the Commissioner, Finance Department for withholding of the funds does not inspire confidence of this court. There cannot be any earthly reason for withholding the funds and keeping it in revenue deposit when it has been specifically meant for AIDS Programme. It is evident that in the year 1992-93 as against 34.825 lakh allotted by the Central Government, the State has released 27.86 lakhs. In 1993-94 as against 12.432 lakhs, the State released 11.995 lakhs. In 1995-96 against 30 lakhs allotted

by the Central Government, the State released 22 lakhs and a sum of Rs. 8 lakhs was deducted for payment of salaries. This is indeed not permissible and contrary to the guidelines. In 1995-96, the amount of Rs. 35 lakhs sanctioned by the Government of India has been kept in the revenue deposit. There is no indication that the funds has been released by the State. In 1996-97, there is no indication as to whether the State Government have released the amount of Rs. 50 lakhs received from the Government of India.

21. Although audit is being carried out by the Accountant General and NACO is suppose to monitor the expenditure incurred, it would be advisable to have documentation of funds so that inspection of the accounts could be effectively carried out by the appropriate authorities in order to rule out doubts regarding utilisation of funds for the purpose allotted.

22. In view of the draw backs pointed out above in implementation of the programme, it would not be uncalled for to issue suitable directions to the respondents to streamline the administration for adhering to the objective set by the NACO. We, therefore, propose to dispose of this writ petition with the following directions to the respondents :-

(i) The guidelines and strategies formulated by the National AIDS Control Organisation (NACO) shall be properly implemented in letter and spirit with due regard to the London Declaration of Aids Prevention dated 28th January, 1988 and the Global Strategy formulated by the World Health Organisation.

(ii) The funds released by the Government of India shall not be diverted to any other Heads of Account except for the purpose of implementation of the programme as per guidelines and strategies formulated by the NACO and the funds withheld so far shall be released for the Programme, if not already lapsed.

(iii) The State Government shall make enquiry by appropriate agencies as to the irregularities in funding affairs, as alleged, and take appropriate remedial measures, if necessary.

(iv) The State authorities shall close those Blood Banks which are operating in the State without valid licence and establish a State Transfusion Council to regulate the affairs of the Blood Banks in the State ensuring that all tests mandatorily required to be done as prescribed by the World Health Organisation before transfusion of blood are carried out.

(v) AIDS Counselling Centres should be opened at different State Hospitals through out the State, depending upon necessity and steps should be taken for effective functioning of the AIDS Counselling Centre opened at Mahendra Mohan Choudhury Hospital, and trained and qualified persons shall be appointed for AIDS Management Programme to prevent spread of AIDS in State.

(vi) Appropriate steps should be taken immediately to provide adequate equipments and other facilities in the three Medical Colleges in the State of Assam and trained persons should be posted to participate effectively in the AIDS Management Programme.

(vii) Effective monitoring system should be evolved to supervise the implementation of the programme including regular audit of accounts subject to the Guidelines framed by the NACO in this behalf in addition to regular audits by the Accountant General, Assam.

(viii) Appropriate orders/directives be issued to ensure that persons suspected to be suffering from AIDS or HIV positive shall not be refused treatment in the hospitals. On such matters coming to the notice, appropriate action should be taken against the erring doctors or the members of the staff.

23. The respondents are directed to take effective steps without loss of time to comply with the directions above. The writ petition accordingly stands disposed of.