

**M. Vijaya**

**v.**

**Chairman and Managing Director, Singareni Collieries Co. Ltd., Hyd.  
and Ors.**

High Court of Andhra Pradesh

29 August 2001

WP No. 5104 of 2001

Citation: I(2002)ACC32, 2002ACJ32, AIR2001AP502, 2001(5)ALD522, 2001(5)ALT154,  
2001(2)APLJ450

Judges: S.B. Sinha, C.J., B. Subhashan Reddy, Motilal B. Naik, Bilal Nazki and V.V.S.  
Rao, JJ.

ORDER

S.B. Sinha, C.J.

1. This is a writ petition taken up on the basis of a letter written by one Smt. Masaraboina Vijaya wife of Ailalah, a resident of Indiranagar, Regional Hospital Area, Godavarikhani, Karimnagar District, addressed to the Hon'ble Chief Justice of this Court alleging that she was infected with the dreadful disease of AIDS (Acquired Immune Deficiency Syndrome) on account of the negligence on the part of the authorities of Maternity and Family Welfare Hospital, Godavarikhani, a hospital under the control of Singareni Collieries Company Ltd., (SCCL), in conducting relevant precautionary blood tests before transfusion of blood of her brother (donor) into her body when she was operated for hysterectomy (Chronic Cervicitis) on 30-1-1998 at the hospital. She prays for an enquiry into the matter and to take action against those responsible for causing the infectious disease and for a direction to SCCL to provide sufficient financial assistance.

2. The matter has been referred to a Larger Bench having regard to the importance and magnitude of the problem that the inhabitants of the State had been facing. When the matter came up for admission on 11-7-2001, we directed the Registry to issue a public notice in various national and regional newspapers inviting intervention of the Non-Governmental Organisations and the public-spirited persons. The respondents were also directed to file counters as regards the precautionary measures taken by them, amenities available in the hospitals and blood banks, regulatory measures taken by the State in relation to running of such hospitals and blood banks, treatment, including the mode and manner of treatment, rehabilitation of the patients, as also spreading of awareness amongst the general people.

3. In response to the said notice, one Sri S. Jeevan Kumar, Convenor, Human Rights Forum, Hyderabad, Dr. P.V.R. Bhaskara Rao, Chairman, "People for Economical and Effective Medicare", Hyderabad and Ms. Jyotirmayee, Secretary, Srikakulam Mandal Mahila Viniyogadarula Sangham, Srikakulam have filed separate petitions to permit them to participate in the proceedings as interveners. The husband of the petitioner also filed a petition to implead him as 2nd petitioner, Sri K.G. Kannabhiran, learned Senior Counsel also appeared as intervener.

4. The factual matrix leading to the invocation of the jurisdiction of this Court to intervene in the matter is as follows : The husband of the petitioner was working as Pump Operator in SCCL since 17 years and they had three children. She underwent a family planning operation in Singareni Maternity Hospital on 10-9-1989 whereafter she started suffering from abdomen pain. After investigation and scanning, it was diagnosed as Chronic Cervicitis and she was advised to undergo an operation for removal of her uterus. She was admitted in the Maternity Hospital of SCCL on 23-1-1998. For conducting the hysterectomy operation, one unit of blood was immediately required. Her brother Pettam Lakshmirajam donated his blood for the operation. She was discharged from the hospital on 7-2-1998. Fifteen days thereafter she started suffering from fever and she again approached the hospital on 20-2-1998, but as fever has not receded, she got herself admitted in a private hospital on 6-3-1998 wherefrom she was discharged on 23-3-1998 after treatment. She at the said hospital, had incurred an expenditure of Rs.23,500/-. As she did not recover from fever, she went to another private hospital where she was treated for about two months

wherefor she incurred an expenditure of Rs.5000/-. She again visited another private hospital on 26-9-1998 where after conducting certain tests she was declared to be a HIV +ve patient. She was, therefore, advised to go to Hyderabad for better tests. The test conducted to her husband resulted in HIV negative.

5. She again went to Singareni Area Hospital on 29-9-1998 and although the doctor therein confirmed the disease, he did not refer her to Hyderabad for better tests and once again conducted the tests. She being vexed with the conduct of the medical officers and the staff of the SCCL hospital, came to the Nizams Institute of Medical Sciences (NIMS), Hyderabad where after conducting certain tests she was informed to be a HIV+ve patient. She went to Madras General Hospital wherein again the disease was confirmed. On 17-10-1998 she went to Fair Pharmacy Hospital in Ernakulam, Kerala State for ayurvedic treatment.

6. When HIV tests were conducted both to her husband and to her elder brother, the donor of the blood, it was revealed that her brother was a HIV+ve patient. It is alleged that before transfusion of the blood of her brother, no care was taken to conduct the relevant and necessary blood tests and because of the negligence on the part of the hospital authorities, she was infected with the disease. She issued a notice to SCCL through a consumer welfare council to which it was replied that the Medical and Health staff of the hospital were neither responsible nor negligent in conducting any blood tests.

7. A lengthy counter-affidavit has been filed by the Medical Superintendent of SCCL, wherein the allegations made in the petition were denied. But, it is admitted that her blood was not tested for HIV status but the blood of the donor was tested and was found to be negative. The counter-affidavit narrates the events from the day the petitioner approached the hospital for treatment on 23-1-1998 onwards, purported care being taken by the company for the health of its employees as well as their dependants, the history of the hospital, and details regarding the spreading of AIDS etc. It was stated that the brother of the petitioner conducted a blood test ten months after donating the blood and it is not known whether he had been infected with HIV+ve at the time he had donated the blood.

8. The counter also states the background of chronic cervicitis disease the petitioner was suffering from and states that the case of the petitioner is a well-established case of chronic cervicitis. A surgery was carried out after all established conservative methods had failed to alleviate the patient's complaint of pain in the abdomen. There was no element of inadvertent surgery on the part of the doctors. The presence of chronic cervicitis can be evaluated by a simple bedside procedure such as Bimanual examination which was carried out by 3rd respondent Dr. Gangadhar Rao. He investigated the patient with due care so as to avoid intra-operative and post-operative complications and had prescribed all the routine investigations to avoid unforeseen complications during the surgery. Only upon finding all the elements in normal limits, the blood transfusion was contemplated by Dr. Dayanand, the Company Anaesthetist. The petitioner was informed to arrange for blood donors for two units of O+ve blood on 29-1-1998, but she could not arrange two donors as advised. On 30-1-1998, her brother Lakshmi Rajaiah donated one unit of compatible O+ve blood. Before taking his blood, blood sample was obtained from him for conducting HB estimation and it was found to be adequate. It was stated that subsequently, other tests required to rule out diseases such as Syphilis, Serum hepatitis, Malaria and AIDS in the blood donor were conducted. The tests were conducted with the help of antigen kits with adequate shelf life from reputed firms. It was further stated that as per the blood sample examination carried out on 30-1-1998, it was found HIV negative. The details of the tests are :

Name of the test	Batch No.	Exp. Date	Manufacturer	Date of receipt at Medical store
VDRL to rule out Syphilis	7906140	6/99	J. Mithra & Co.	11-10-97
HBS AG to	58	12/98	M/s. Tulip	4-11-97

Rule out

Serum

Hepatitis

HIV to Rule out AIDS      71481810    11/98      Merind      8-7-97

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9. It is only after carrying out the above tests and confirming that the blood donor is free from the diseases, blood was sent to operation theatre for transfusion. It was also stated that while the name of the donor was recorded as Mr. Lakshmi Rajaiah in the hospital records, the petitioner mentions the name of the donor as Pettam Laxmi Rajam. In spite of the fact that the SCCL area hospital is having specialists to treat all problems, the patient decided to persist with the treatment at private hospital.

10. It was further contended that the private Surya hospital where the petitioner had approached for treatment referred her to a private medical practitioner. Dr. Ramesh Kumar who subjected her to outpatient operative procedure called Upper Gastro Intestinal endoscopy procedure on 14-3-1998 and it was found that she was having esophageal candidiasis which would be sustained by a person whose immunity is depressed. She was treated with a drug against candidiasis called candid-v by the private doctor but she did not respond to it. This esophageal candidiasis is one of the cardinal signs of AIDS and it occurs in a patient of AIDS after few years of entry of HIV virus into the patient's body. It was further stated:

It is also submitted that Dr. Ramesh Kumar has taken a biopsy from esophagus of patient. The specimen obtained through endoscopy was subjected to histopathological examination at a private laboratory located at Hyderabad called Deepti diagnostic centre. The report given by this doctor has certain information, which discloses the real nature of petitioner's disease. In this petition the petitioner is contending that the virus has entered into her body because of blood transfusion performed one and a half months back i.e., on 30-1-1998. The finding of Dr. Ramesh Kumar goes against the petitioner's basic contention, which incidentally is one of the basic

premises of this case. The copy of report of Dr. Ramesh Kumar enclosed to her earlier representations made through Praja Shakthi Consumers Welfare Council, clearly shows that the HIV virus may have been introduced into patient's body several years ago. This report also establishes that the patient was suffering with the AIDS by the time she was transfused blood donated by Mr. Laxmi Rajaiah.

11. The petitioner approached the area hospital on 29-9-1998 and she was tested at the hospital according to the recommendations that were in force on 29-9-1998. The General Duty Medical Officer who perused the investigations had referred the petitioner on the same day to a specialist physician for thorough clinical evaluation of the condition. On 4-10-1998 the physician referred her to biochemist for issuing the reports but she did not go back to physician after that date and approached NIMS though she was not advised to do so. She underwent Weston Blot Test at NIMS though it was not necessary in her case as the same is required to be carried out only in cases where HIV test is weekly positive. Though at the NIMS she was advised to undergo CD 4 T lymphocyte count test she had not undergone the same which would have helped in forecasting several complications that are likely to occur in the course of the disease. Instead, she went to Madras where again she was advised to undergo HIV test. There was inconsistency with respect to the name of the blood donor. The donor who gave blood on 30-1-1998 cannot be a source of acquiring AIDS as he was found to be HIV negative. The blood donor was not available to the hospital to carry out thorough clinical and laboratory evaluation as per the established norms. The possibility of asking a HIV+ ve person to impersonate as Mr. P. Lakshmi Rajaiah at city clinical laboratory cannot be ruled out for the purpose of extracting compensation from the company.

12. The SCCL hospitals have well established processes for screening of blood donors for HIV and have been testing the blood of donors since 1994. The counter also mentions about the phenomenon called window period, which is encountered in AIDS. This period is the period during which virus is circulating in the body of the individual but is not detected by serological tests which period lasts for six to twelve weeks. It is possible that Mr. Lakshmi Rajaiah might be in the window period and would have tested sero-negative. The window period is described as follows:

The period between the acquisition of infection and seroconversion i.e., appearance of antibodies positive Elisa test, and Western Blot test is called the window period which is usually 6-12 weeks. Therefore a person during this stage is not aware (even after testing) that he is harbouring the infection but he is capable of transmitting the disease to others.

13. It was further contended that the petitioner was suffering from esophageal candidiasis, which was diagnosed on 14-3-1998. According to the company, it is not possible to get the disease within one and half months after acquiring the infection as it takes few years which clearly shows that she was having an opportunistic infection, which occurs in 3rd or 4th stage after infection. Normally the patients who underwent operation are not tested for HIV status and it is only the donor who is tested.

14. The Chairman and Managing Director of SCCL filed a counter-affidavit wherein it has been pointed out that out of the workforce of 1,05,000, upon a survey conducted, it was found that more than 1000 workmen are affected with HIV and when all the family members are taken into account, the number of infected persons would be more than 3000. The company runs six hospitals employing 236 doctors with total bed strength of 1,130. But, in the event any patient is not cured, they are referred to Hyderabad to get themselves treated in the multi-speciality hospitals like Osmania, NIMS etc. and the expenditure thereof is borne by the company and that facility was given to the petitioner. It is stated that the company having regard to the magnitude of the problem, had taken steps for bringing awareness of the disease of AIDS in the workforce as well as the society around them by making a vigorous and continuous campaigning by all available methods like pamphlets, tele-plays, stage-plays, public speeches etc. It has been pointed out that on 23-12-2000 in terms of National Coal Wage Agreement -VI, special leave of six months is being granted to employees suffering from AIDS with 50% of basic pay. A further leave at 50% of basic pay will be granted if there is a relapse or continuance of the ailment. The company also started a voluntary organisation known as ASHA - AIDS Sufferers Helpage Association with the aim to create awareness among the workmen of SCCL and general public about AIDS. In the counter-affidavit, however, it has not been stated that since when the magnitude of the problem had been detected and awareness programme had been started.

15. A detailed counter-affidavit has also been filed by the Addl. Project Director, A.P. State Aids Control Society, Hyderabad on behalf of the respondents 7, 9 and 10. The counter has spoken to various measures taken by the Government having regard to the magnitude of the problem. The counter in has dealt with the aspects of HIV infection in the State of Andhra Pradesh, precautionary measures taken by the State, amenities available in the Hospitals and blood banks, HIV testing techniques and blood banking technology, regulatory measures taken by the State in relation to running of hospitals and blood banks, treatment including the mode and manner of treatment, rehabilitation of the patients and also spreading of awareness among general public and involvement of NGOs.

16. We have heard the learned Counsel appearing for the parties including Counsel appearing for the interveners.

17. The learned Advocate-General appearing on behalf of the State has placed voluminous material before the Court to contend that having recognised the magnitude of the problem, the State has taken several steps to control and prevent the spreading of AIDS/HIV infection and also necessary steps for giving primary treatment to AIDS patients. As there is no recognised cure for the disease, the State Government is directing its efforts to bring awareness among the people. According to him, amongst the rural masses, the awareness is about 44% and in the case of urban masses it is 66%. It is stated that the State has recorded 8517 HIV cases out of which 193 AIDS deaths were reported which accounts to rise of 1% in positive cases of AIDS.

18. The learned Advocate-General would submit that having regard to the magnitude of the problem, the Government has taken up numerous programmes to tackle the same. The Government of India has also initiated series of measures like generation of public awareness through effective communication, introduction of blood screening for transfusion purposes and conducting surveillance activities in the epicentre of the epidemic. A National AIDS Control Organisation (NACO) was established with the objectives of ensuring a high level awareness of HIV/AIDS and its prevention in the population, to promote the use of condom for safe sex in high risk population i.e., Migrant labour, truckers, Prison Inmates, sex workers, to ensure safety of blood, to develop the services



required for providing support to HIV infected persons and AIDS patients.

19. The learned Advocate-General would further submit that the possibility of non-detection of AIDS for a period of six months cannot be ruled out. As per the guidelines of NACO, AIDS Control Society was constituted for the State of A.P. in 1998. Awareness generation in general public is stressed on Information, Education and Communication (IEC) activities. The State AIDS Control Society is concentrating on IEC to achieve a target level of 90% awareness throughout. All the blood banks are instructed to conduct all the mandatory tests i.e., HIV, HCV, HbsAg by Elisa method only in addition to the VDRL and malaria. The learned Advocate-General would contend that having regard to the steps undertaken by the State, the percentage of HIV positive cases has come down to 2.3%.

20. Mr. K.G. Kannabhiran, learned Counsel would submit that many blood banks are not registered, doctors themselves are not educated, some slogans are objectionable and the family faces a social ostracism whenever a family is found to be HIV+ve. He would further contend that no provision has been made for rehabilitation of the AIDS patients. No separate arrangement also has been made for treatment of AIDS patients.

21. Sri Ravishankar Jandhyala, learned Counsel appearing on behalf of one of the interveners would submit that having regard to Articles 21, 39 and 47 of the Constitution of India, the problem should be considered in the light of the expanded horizons of life and liberty as adumbrated under Article 21 of the Constitution of India. The State cannot deny the right of the citizen to health and the hospitals should be provided with all the equipments for conducting the requisite tests when blood transfusion takes place. The learned Counsel would submit that in India the number of AIDS patients is between 3.5 and 4 million whereas in the entire world only ten million people are suffering from the disease. According to the learned Counsel, the disease is more prevalent in women, prisoners and children. It was suggested that a comprehensive Act as has been introduced by the State of Maharashtra should also be introduced in the State of A.P.

22. Mr. A. Satya Prasad, learned Counsel appearing for one of the interveners, Dr. P.V.R Bhaskar Rao, submitted that the slogan of use of condoms is also not in the right direction

as there was 12% failure. AIDS is a group of 31 independent known diseases amenable for treatment independently and such diseases can be caused by starvation, mal-nutrition, mal-absorption, environment and drug addition. No one should be condemned to be an AIDS patient just because he is HIV positive. There should not be any separate wards in hospitals for HIV patients and slogans, which would promote indiscriminate sex, should be prohibited. There should be an unbiased scientific study as to how many individuals in the country are suffering from disease of AIDS group and how many of them are really having HIV infection. Various diseases in the group of AIDS must be treated independently without using the toxic anti viral drugs, which are not only highly toxic but also harmful to the health of people.

23. Mr. K. Sudhakar Reddy, learned Counsel appearing for the husband of the petitioner would submit that his client has since spent more than Rs.50,000/- for her treatment and she has to go Kerala every month for treatment.

24. This Court is not only to consider the legal issues involved but also having regard to the arguments advanced by the learned Counsel appearing for the parties, is required to issue appropriate directions for the effective implementation of the various AIDS control programmes taken up by the Government and the NGOs.

History of HIV- AIDS:

25. Diseases due to infections are the commonest causes of illness throughout the world. The present day world is concerned with diseases caused by the virus that causes the HIV infection or the AIDS disease. The situation is so pathetic that 1st December of every year is being observed as World AIDS day by WHO to educate mankind all over the world about the dreadful and incurable nature of the disease.

26. In the summer of 1981 the Centre for Disease Control (CDC) in the United States recognised that a specific condition -Acquired Immune Deficiency Syndrome (AIDS) - was spreading rapidly in some parts of US among young previously healthy homosexuals. In 1983 the etiological agent of the disease was identified as Human immunodeficiency Virus (HIV). In 1986, a variant of this virus causing same disease was reported from Sub-Sahara

West Africa and was labelled as HIV II. Human Immunodeficiency Virus (HIV I and HIV II) belong to the family of retroviruses and the infection with either, leads to progressive dysfunction of the immune system making it incapable of fighting bacteria and other pathogens.

27. As is evident by its name, AIDS is not a single disease but is of a syndrome - a set of diseases, which result from the destruction of the body's defences by the human immunodeficiency virus, HIV. In healthy individuals, infections and cancers are kept at bay by virtue of an array of defenders in the body, which constitute its immune system. Unknown to us, these defenders- the white blood cells (WBC) are at work every day, recognising foreign invaders in the body and fighting them both by recruiting an army of cells which attack infection directly and by producing specific chemicals called antibodies which neutralise the invaders. The detection of these antibodies in blood samples is used to determine past or present infection.

28. How exactly HIV knocks down the immune system is still a matter of active research. According to the most widely accepted theory, HIV lymphocytes (WBC), which play a vital role in orchestrating the defences of the immune system. The strange thing about HIV is the long time it takes to do its damage. After entering the human body, HIV may lie 'hidden' for several years before triggering its rapid multiplication and destruction of the cells. This way it escapes being attacked by antibodies, which are circulating in the blood to seek out and destroy it. Ultimately, HIV destroys WBCs and the body falls prey to opportunistic infections and cancers described as the hallmark of AIDS.

29. The major routes of HIV transmission are (1) sexual, (2) parenteral inoculation of blood and (3) perinatal transmission. The details are:

Sexual:

Homosexual from men to men. Heterosexual from men to women and to a lesser extent from women to men

Parenteral Inoculation of blood;

By transfusion

Needle sharing among injecting drug users

Needle stick injury

Exposure to open wounds or mucous membrane

Organ transplant

Perinatal

Intrauterine

Peripartum (before, during and after delivery).

30. Contact such as kissing or household contact including sharing of food or utensils has not been shown to transmit the virus. It is transmitted through unprotected sexual intercourse with an infected partner whether heterosexual or homosexual; through infected blood or blood products; infected syringes and needles, blades, knives and other skin piercing instruments and from an infected pregnant mother to the child during pregnancy and at the time of delivery.

Size of the problem in the world -International efforts to contain AIDS:

31. There are estimated 26.8 million cases of adult HIV infection and AIDS as in mid 1997 and over 2.5 million children have also been infected with the virus. According to WHO, 8 million people in the world have already developed AIDS and vast majority of them have died. It is estimated by WHO that by the year 2000 there will be at least 30 to 40 million people infected with HIV worldwide. In Asian countries like Thailand, India, Korea, Bhutan, Myanmar etc., there are many cases of HIV positive. It is also estimated by WHO that by the year 2000, between 8 and 10 million, men, women and children in Asia will have been infected with HIV. It is not possible to say with any degree of certainty how long an HIV infected person will live; 5-12% may develop AIDS in about five years; 25-45%

may reach the final stage after ten years and the rest may take about 12 to 15 years. However, a person with full-blown AIDS can survive for a maximum period of 6-12 months.

32. The world community through the United Nations Organisation and one of its specialised agencies - the World Health Organisation - has taken up the challenge to contain this deadly disease. The studies initiated and the solutions suggested provide guidelines for the individual member-States to effect necessary changes in their legal systems. Nonetheless uniform standards throughout the world cannot be adopted in this regard. Social, economic and cultural factors play a large part in shaping the legal policies.

33. The United Nations General Assembly held a special session on HIV-AIDS at the highest political level on 25th and 26th June, 2001 in New York. It focused on steps to intensify international action and to mobilise resources to fight the epidemic. In connection with that session, Mr. Kofi A. Annan, the Secretary-General of the United Nations, released a message, which was published in the columns of 'The Hindu' dated 26-6-2001. In the said opinion titled as 'How the world can win its battle against AIDS', the author while saying that despair about global threat of HIV-AIDS is unjustified, opined that any underestimation or indifference about the scourge would be irresponsible. He reiterated the five objectives laid out by him at African summit in Abuja, Nigera which are as under:

1. We have to prevent the disease spreading further, above all by teaching young people how to avoid it;
2. We must stop the cruellest infections of all- those from mother to child;
3. We must bring care and treatment within the reach of all those infected; this is not an alternative to prevention, but an essential complement to it, since people are more willing to take HIV tests when they know there is hope of treatment;
4. We must step up scientific search, both for a vaccine and for a cure; and
5. We must protect those whom AIDS has left most vulnerable starting with the

orphans.

34. The Secretary-General of United Nations also exhorted Governments, foundations, and commercial companies, private individuals to come forward to join the global effort in the battle against the AIDS.

35. The President of the United States of America on 19-8-2000 signed a Law called - Global AIDS and Tuberculosis Relief Act. On that occasion, President Clinton noted as under, American Journal of International Law, Vol.95-January, 2001 pp155-156:

The Unites States.....cannot and should not battle AIDS alone. This crisis will require the active engagement of all segments of all societies working together. Every bilateral donor, every multilateral lending agency, the corporate community, the foundation community, the religious community, and every host Government of a developing nation must do its part to provide the leadership and resources necessary to turn this tide, it can and must be done.

There is currently no vaccine or cure for HIV/AIDS, and we are at the beginning of a global pandemic, not the end. What we see in Africa today is just the tip of iceberg. There must be a sense of urgency to work together with our partners in Africa and around the world, to learn from both our failures and our successes, and to share this experience with those countries that now stand on the brink of disaster. Millions of lives- perhaps hundreds of millions- hang in the balance. That is why this legislation is so important.

36. All the international organisations, regional organisations etc., are seized of the problem. They are finding ways and means to combat AIDS. In this international scenario, the sub-continent, and given the social structure of the citizenry, the problem in India is also reaching an acute stage.

Size of the problem in India:

37. The first case of HIV (arguably) was detected in India in the year 1986 and since then

HIV prevalence has been reported in all the States and Union Territories. It is estimated that the number of HIV infected adults in India, in mid 1998 was 3.5 million. In recent years, it has spread from urban to rural areas and from individual having high-risk behaviour to the general population. It was found that extra marital sex was the primary mode of infection to the extent of 80% of AIDS cases. Blood transfusion and blood product transfusion like plasma is estimated to contribute over 5%.

38. In rural areas, illiterate people, those belonging economically weaker sections and victims of several social disabilities, even now continue to live in segregated areas with no minimum civic amenities. Abject poverty has contributed to high rate of illiteracy among these classes. Living together in clustered groups without any awareness as to health, care and necessary precautions to be taken, tend to increase the spread of HIV. One serious problem concerning HIV infected persons is that they do not display any outward symptoms and until the infection reaches a fairly advanced stage, no physical impairment or depletion of strength is noticed. Therefore, public awareness is very vital in the control of AIDS.

39. In a recent article published in Sunday Express dated 5-8-2001 written by Dr. Ravi Vadrevu titled as Scare v. Care, it has been stated :

Is HIV-AIDS a reality in India? The answer is a resounding yes. According to NACO estimates, there are 3.75 million HIV positive cases in India. As per the estimates of responsible national and international voluntary organisations, it may be close to 10 million (refer the latest issue of AIDS Asia published by the Peoples Health Organisation from Mumbai). In this day and age, India does not have to repeat the blunder of the various African Nations in denying the existence of HIV positive people. They did it in the 80s and have reaped the consequences in the 90s. The political rhetoric of some African leaders ( like President Mbeke), coupled with misguided scientific elements, compelled the knowledgeable HIV medical scientific community across the globe to issue the historic Durban Declaration at the World AIDS Conference, Durban, South Africa (July 2000).

Social reaction:

40. Social reaction HIV-AIDS is almost hysterical. When it is known that a person is infected with HIV, not only he, but the family members attending on him also become targets of social ostracism. A feeling of curse and a sense of shame descend on the victim's family. Apart from social boycott, the family suffers economic repercussions. If the victim is the sole bread-earner, he will lose his employment. The prospects of marriages of the children recede. The psychological depression that engulfs the family acutely affects the educational career prospects of the other members. The attitude of the public towards HIV infected persons depends upon the degree of awareness in that community about HIV-AIDS and its repercussions.

41. Taking serious note of the problem, the Government of India initiated a series of measures to tackle the disease. As noticed supra, National AIDS Control Organisation (NACO) was established to ensure a high level of awareness of HIV/AIDS and its prevention, to promote the use of condoms for safe sex in high risk population i.e., Migrant labour, truckers, prison inmates etc.

42. The 1st case of HIV infection was reported in Andhra Pradesh in 1986. Year-wise incidence percentage of serology tested HIV positive cases is as follows:

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Year	Percentage
1990	0.16
1996	0.9
1997	1.1
1998	1.1
1999	0.9
2000	1.0



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itive cases is estimated to be 0.16 in 1990 to 0.94 in 1996 and it has risen to

ate of Andhra Pradesh Directorate of AIDS Control Programme was  
1992 in close coordination and collaboration with other Government  
Public, Private and Non-Governmental Organisations. The Directorate was  
r development and implementation of AIDS control plan as approved by  
r the guidelines of National AIDS Control Organisation an AIDS Control  
nstituted for the Andhra Pradesh State in 1998 to take long term and short-  
s. The term objectives are (a) Prevent spread of HIV infection, (b) Reduce  
and mortality associated with HIV infection, (c) Establishment of effective  
anagement at all levels, (d) Provision of technical and operational support,  
bilise community support to restrict transmission by conventional methods.  
jectives are (a) Strengthen Sexually Transmitted Disease (STD) Clinics to  
/AIDS, (b) Modernise Blood Banks to facilitate HIV testing, (c)  
of HIV/AIDS Surveillance and Prevention activities, (d) Human Resource  
to manage HIV infected and AIDS patients, (e) To create awareness about  
ion and its control, (f) Promote Safety of blood and blood products and (g)  
l support to HIV/AIDS patients.

te there are 142 licensed blood banks of which 44 are from Government  
al Government, 2 autonomous, 11 Quasi-Government, voluntary, 33 Hospital  
8 are private commercial blood banks. NACO has upgraded the Zonal Blood  
e District level blood banks by supplying equipment like blood bank  
entrifuges, water baths, etc., HIV and Hepatitis-C Elisa and Raid test kits are  
d by NACO. All the Medical Officers, Staff Nurses and Laboratory  
orking in Government Blood Banks are allegedly trained in HIV testing  
l Blood Banking Technology. Further, a State Blood Transfusion Council

(STBC) was formed in 1998 the main objective being to create awareness on voluntary blood donation. Blood donation camps are being arranged by the Government and Charitable blood banks involving NGOs. Workshops are being held involving members of Indian Medical Association and Nursing Home Associations on blood safety programmes and rational use of blood and also to all Blood Bank Medical Officers and Laboratory Technicians on preventive maintenance of Elisa systems. STBC also resolved that no private blood bank shall be given fresh licences and only corporate hospitals and philanthropic organisations/ NGOs like rotary can be considered after careful scrutiny: The Director, Drug Control Department has also been directed to raid blood banks and the medical shops for unauthorised supply blood bags. All the blood banks are instructed to do all the mandatory tests HIV, HCV, HbsAg by Elisa method in addition to the VDRL and Malaria. From 1st of June, 2000 as per NACO guidelines, voluntary Counselling and Testing Centres have been established in all the District Headquarters Hospitals and in Microbiology Departments of the Medical Colleges. Surveillance centres known as Blood Testing Centres have also been established at various Medical Colleges to monitor the trends of the disease.

45. It is stated that Family Health Awareness Campaigns are being held at the Sub-centre level for 15 days covering the entire rural and urban slum population in the State. A centre is established at the State headquarters on every Wednesday to give counselling to all HIV affected and their relatives about future course of action in prolonging their lives by suggesting appropriate methods for use of condoms, proper nutritious diet, treating their psychological dispersion and suggesting methods how to live happily.

46. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. By reason of numerous judgments of the Apex Court the horizons of Article 21 of the Constitution have been expanded recognising various rights of the citizens i.e., right to live in pollution free environment-*Indian Council for Enviro Legal Action v. UOI* [1999 AIR SCW 1069(b)], *Veerendrnda Gaur v. State of Haryana* [(1995) 2 SCC 537], right to water- *Subhash Kumar v. S.O. Bihar*, [[1991]1SCR5], *State of Kant v. State of A.P.*, [(2000) 10 SCC 664], *Narmada Bacho Andolan v. UOI*, [AIR 2000 SC 3751] , right to health- *Parmanand*

*Kataria v. UOI*, [1990 CriLJ 671] . Articles 38, 39(e) and (f) and 47 enshrined in Part IV of the Constitution reads thus:

38. State to secure a social order for the promotion of welfare of the People :--

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas engaged in different vocations.

39. Certain principles of policy to be followed by the State .---The State shall, in particular, direct its policy towards securing:

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age or strength.

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health .---The State shall regard the raising of the level of nutrition and the standard of living of its people and improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drink and of drugs which are injurious to health.

47. It is no gainsaying that though Directive Principles of State Policy in Part IV of the

Constitution are not enforceable in a Court of law, they are nevertheless fundamental in the governance of the State. By reason of expansive interpretation of "life" in Article 21 of the Constitution of India in various Supreme Court judgments, which is now the law of the land, right to life includes the right to all reasonable health facilities.

48. It is well accepted that the disease spreads through homosexuals and/or hetero sexual intercourse, by blood transfusion and use of contaminated needles for the purpose of injections and through antenatal transfusion from mother to the child. The person infected with HIV due to various reasons may not be aware and by reason of such innocence he or she spreads the disease. Do we have any law to deal with a situation?

49. Epidemic Diseases Act, 1897 (Act 3 of 1987) was enacted for the prevention of the spread of dangerous epidemic diseases in the country. HIV-AIDS, though not epidemic, is being more lethal than any other dangerous epidemic, in our opinion; the State is vested with the power to take special measures when ordinary provisions of law are insufficient for preventing the outbreak or spreading of the recent scourge. Section 52 of A.P. Public Health Act, 1939 defines certain diseases as infectious diseases and obliges the State to take all precautionary steps in accordance with the said Act. For obvious reasons, HIV-AIDS is not one of the identified diseases. Till today, the State did not think it fit to identify HIV-AIDS as one of the infectious diseases under the Public Health Act.

50. Apart from the Epidemic Diseases Act, 1897 and Public Health Act, there is no legislation in India regulating AIDS prevention. Likewise, decided cases dealing with the AIDS and AIDS patients and their rights with reference to fundamental rights under the Constitution are quite a few. In 1989, AIDS Prevention Bill was introduced in Indian Parliament. The central theme of the Bill was to segregate the AIDS patients, high-risk groups i.e., should condemn the patients rather than helping and protecting them. The Bill placed the entire burden on HIV+ve patients and it seeks to prosecute the blood donors if they irresponsibly and knowingly that they are HIV+ve donate blood. The bill did not touch the hospitals and blood banks, which are required to be better equipped. The bill also did not provide any safeguards and guarantees to AIDS patients. Though the bill did not propose to terminate employees and to send away students from the institutions; the bill

was not passed. The State of Karnataka and State of Maharashtra have introduced bills in their Legislative Assemblies in 1999. These bills aimed at promoting social security through prevention and control of the spread of HIV infection and to provide for specialised medical treatment and social care and rehabilitation. A HIV Prevention Board was sought to be created which was empowered to declare certain areas as high-risk HIV infection areas. However, the bills were not passed into enactments.

51. The old adage "Prevention is better than cure" holds good in the case of HIV more than any other disease. The Governmental and non-Governmental Organisations, therefore, should focus on information, Education and Counselling (IEC). The overall countrywide incidence of anti-natal HIV positivity is between 1-2 per cent. Mother to child transmission (MTCT) control programme should be the top priority in treatment.

52. We may notice that in *Common Cause v. Union of India*, [[1996]1SCR89] , the Apex Court dealing with a public interest litigation case filed highlighting the serious deficiencies and shortcomings in the matter of collection of, storage and supply of blood through the various blood centres operating in the country particularly in the context of enormous increase of HIV infected cases inter alia directed the Government to establish a National Council of Blood Transfusion as a society registered under the Societies Registration Act. A direction was also issued to all the State Governments to establish State Councils of Blood Transfusion and also undertake to adopt strict licensing procedures for establishment of blood banks under the Drugs Control Act. As already noticed, one such State Council has been established in the State of Andhra Pradesh and it is dealing with various licensing aspects of blood banks.

53. Another important aspect of the matter is that many hospitals in the State including Government Hospitals are not disposing of bio-medical waste as per norms specified in the Bio-Medical Waste (Management and Handling) Rules, 1998. According to the schedule for bio-waste management, all hospitals and nursing homes in towns with a population of 30 lakhs or more must have obtained the authorisation certificate by June 30, 2000 from the Pollution Control Board. It appears that many hospitals have ignored the notification issued by the PCB to obtain authorisation certificates. According to a news item published in the

Times of India dated 8-8-2001, the hospitals including the Government ENT Hospital, Koti are not adhering to the above rules. There is no dispute that aforesaid rules are applicable to both the Government and Private Hospitals. The disposal of bio-medical waste has relevance in the prevention of the disease because such waste includes the used needles and syringes and there is the possibility of the used needles and syringes been reused in respect of any undetected HIV patients.

54. There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India.

55. It is well settled that right to life guaranteed under Article 21 is not mere animal existence. It is a right to enjoy all faculties of life. As a necessary corollary, right to life includes right to healthy life.

56. In *Vincent Parikurlangara v. Union of India*, Ranganadha Mishra, J., dealing with legal obligations of the State to prohibit sale and use of banned drugs observed that..... healthy body is the very foundation of all human activities and in a welfare state it is the obligation of the State to enforce creation and sustenance of conditions of good health. In *Pt. Paramananda Kataria v. UOI*, [1990 CriLJ 671], the Apex Court again reiterating the same observed that Article 21 of the Constitution casts an obligation on the State to preserve and protect life. In *State of Punjab v M.S. Chawla*, [AIR 1997 SC 1225], the Supreme Court held that right to healthy life is a fundamental right. The citizen's right to healthy life and the State's compelling constitutional obligation to protect other citizens from attacks of AIDS presents a situation where the right to privacy and public interest conflict each other. As mentioned above, right to marriage, right to privacy and right to employment etc., of HIV-AIDS patients come in conflict with the rights of other citizens as

well as the duty of the State under Article 47 of the Constitution of India to endeavour to improve the health of the citizens. Can the State segregate HIV-AIDS patients in hospitals from others? Can the State compel the high-risk groups like migrant workers, truck drivers, prison inmates and sex workers to undergo HIV-AIDS test and deny those persons normal life? Can the State deny the privileges and facilities to those persons who are tested HIV+ve (HIV-AIDS)? These are some of the paradoxical questions, which have come before the Courts all over the world. Of late, the Courts in India are also called upon to answer these questions.

57. In *Lucy S. D'Souza v. State of Goa*, [AIR 1990 Bom 355] , Section 53(1)(vii) of Goa, Daman and Diu Public Health Act, 1985 was challenged as unreasonable and violative of Articles 14, 19(1)(d) and 21 of the Constitution of India. The said provision authorised the Government to isolate and keep persons who are found to be positive for AIDS by serological tests in separate institutions or wards for such period as may be considered necessary. A Division Bench of the Bombay High Court held that the provision does not violate Articles 14, 19(1)(d) and 21 of the Constitution of India and observed thus:

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

58. In the event of conflict between the individual right and public right which more often occurs while dealing with the cases of HIV-AIDS, the Roman Law principle 'Salus Populi est Suprema' (regard for the public wealth is the highest law) -must apply. This maxim is based on the implied agreement of a member of the society that his own individual interest

and welfare shall in cases of necessity yield to that of the community and that his life and liberty under certain circumstances be placed in jeopardy or even sacrificed for the public good See Broom's Legal Maxims-10th Edn, 1989 - Sweet and Maxwell.

59. The decided cases so far seem to indicate that the above-mentioned legal maxim applies in Indian context also. In *Mohan Patnaik v. Government of A.P.*, [1997(1)ALT504 (FB)], it was held that in case of conflict between individual Fundamental rights and larger interest of the society, the latter right would prevail. In *P.N. Swamy v. SHO, Hyderabad*, [1998 (1) ALD 75] , a Division Bench of this Court was required to decide whether detaining sex workers in rescue homes on the ground that they are infected with HIV/AIDS is violative of their fundamental right under Article 21 of the Constitution of India. After referring to the judgment of the Supreme Court in *State of Uttar Pradesh v. Kaushaliya*, [[1964]4SCR1002] , the Division Bench judgment of the Bombay High Court in *Lucy D Souza 's* case (supra), this Court held that Section 17(4) of the Immoral Traffic (Prevention) Act, 1956 (hereinafter called as 'ITP Act') which empowers the Magistrate to send the rescued women to welfare homes cannot be said to violate Articles 14 and 21 of the Constitution of India. The Division Bench, therefore, directed that those sex workers who are found to be HIV+ ve be sent to welfare homes for a period of two years during which they may be provided adequate medical facilities and train them in vocational courses. We have no reason to differ from the ratio in *P.N. Swamy* case (supra).

60. In *MX of Bombay Indian Inhabitant v. M/s. Z.Y.*, [AIR 1997 Bom 406] , a Division Bench of the Bombay High Court was required to address a question as to whether it is permissible for the State under our Constitution to condemn a person infected with HIV to virtual economic death by denying him employment? The Court answered the question in the negative and held that:

“.....The rule providing that person must be medically fit before he is employed or to be continued while in employment is, obviously, with the object of ensuring that the person is capable of or continues to be capable of performing his normal job requirements and that he does not pose a threat or health hazard to the persons or property at the work place. The persons who are rendered incapable, due to the ailment, to perform their normal job functions or who pose a



risk to other persons at the work place, say like due to having infected with some contagious disease which can be transmitted through the normal activities at the workplace, can be reasonably and justifiably denied employment or discontinued from the employment inasmuch as such classification has an intelligible differentia which has clear nexus with the object of the achieved, viz., to ensure the capacity of such persons to perform normal job functions as also to safeguard the interests of other persons at the workplace. But the person who, though has some ailment, does not cease to be capable of performing the normal job functions and who does not pose any threat to the interests of other persons at the workplace during his normal activities cannot be included in the aforesaid class. Such inclusion in the said class merely on the ground of having an ailment is, obviously, arbitrary and unreasonable.. .... the impugned rule which denies employment to the HIV infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at the work place is clearly arbitrary and unreasonable and infringes the wholesome requirement of Article 14 as well as Article 21 of the Constitution of India.”

61. The case of *Mr. 'X' v. Hospital 'Z'*, [AIR 1999 SC 495], decided by Supreme Court deals with 'suspended right to marry'. In that case, a doctor's marriage could not take place as he was tested HIV+ve. He approached the National Consumer Disputes Redressal Commission for damages against the hospital, which revealed that he was infected with HIV. When the claim was rejected by the National Commission, he approached the Supreme Court, inter alia, contending that the right to marry is a fundamental right and, therefore, the hospital must be directed to pay compensation by way of damages. The Supreme Court held that right to marry cannot be claimed to be absolute and that a person suffering from HIV/AIDS cannot be said to have absolute right to marry though he deserves full sympathy and equal treatment in all walks of life. It is apposite to extract the following passage:

"AIDS' is the product of indisciplined sexual impulse. This impulse, being the notorious human failing if not disciplined, can afflict and overtake anyone how high so ever or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease 'AIDS' deserve full sympathy. They are entitled to all respects as human beings. Their society cannot, and should not be avoided, which otherwise, would have bad psychological impact upon them.

They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. (See: *School Board of Nassau County, Florida v. Airline* [(1987) 107 SCT 1123]; *Chalk v. USDC CD of Cal*, [(9th Circuit 1988) 840 2.F 2d 701]; *Shuttle-worth v. Broward City* [(SDA Fla 1986) 639 F Supp 654]; *Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne*,[(1989) 261 Cl R 197]). But, "sex" with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.

62. Yet another aspect of the matter is whether compelling a person to take HIV test amounts to denying the right to privacy? In *Kharak Singh v. State of UP.*, [1963CriLJ329] , *Govind v. State of M.P.* and other cases, the Supreme Court held that right to privacy is one of the penumbral rights of Article 21 of the Constitution. In all situations, a person can be asked to undergo HIV test with informed consent. If a person declines to take a test, is it permissible to compel such person to take the test? The question is whether right to privacy is violated if a person is subjected to such test by force without his consent? By the end of 1991, 36 Federal States in USA enacted legislations regarding informed consent for HIV test. These legislations intended to promote voluntary test and risk reduction counselling. In USA, law also applies for involuntary tests and disclosure of information about the people in prisons, mental hospitals, juvenile facilities and residential homes for mentally disabled persons. (See AIDS Law Today - Scott Burry and others published by Yale University-1993).

63. In India there is no general law as such compelling a person to undergo HIV-AIDS test. Indeed, Article 20 of the Constitution states that no person accused of any offence shall be compelled to be a witness against himself. Be that as it may, under Prison Laws, See Sections 24, 37, 38 and 39 of The Prisons Act, 1894 (Central Act 9 of 1894) Rules 583 to 653 (Chapter XXXV) and Rules 1007 to 1014 (Chapter LVII) of Andhra Pradesh Prisons Rules, 1979, as soon as a prisoner is admitted to prison, he is required to be examined medically and the record of prisoner's health is to be maintained in a register. Women prisoners can only be examined by the matron under the general or special powers of the Medical Officer. As per Section 37 of the Prisons Act, any prisoner wanting to be medically examined or appearing to be sick has to be reported before the Jailor who in turn is liable to

call the attention of the Medical Officer in that behalf and all the directions issued by the Medical Officer are to be recorded.

64. Under the ITP Act, the sex workers can also be compelled to undergo HIV/ AIDS test. When sex workers are detained in corrective institutions or welfare homes either under Section 10-A or under Section 17(4) or 19(2) of the Act, there are adequate provisions for medical examination. There are also provisions in segregating rescued women who are suffering from venereal diseases. We may also notice that Section 2 of Dissolution of Muslim Marriage Act, 1939, Section 32 of Parsi Marriage and Divorce Act, 1936, Section 10 of Indian Divorce Act, 1869, Section 13 of Hindu Marriage Act, 1956 and Section 27 of the Special Marriage Act, 1955 make incurable venereal diseases of either of spouses a ground for divorce. Further under Sections 269 and 270 of the Indian Penal Code, 1860, a person can be punished for negligent act of spreading infectious diseases.

65. In cases of divorce on the ground that the other spouse is suffering from HIV/ AIDS or in case under Sections 269 and 270 IPC, can the person be compelled to give blood specimen for HIV test. The immunity under Article 20 does not extend to compulsion of giving of blood specimens?

66. From the pleadings in the case, the following facts clearly emerge. There is lack of awareness in the common public and in particular the rural folk. Blood banks are although under the State control, evidently, regular monitoring process and strict measures are not taken for their effective functioning in the context of enormous increase in HIV positive cases. Even the State does not have the correct information as regards the correct number of HIV infected persons having regard to the psychological barriers that the persons infected would be subjected to social ostracism. The existing statutes available to the State would be of little or of no help in the legal framework or arresting the spread of HIV-AIDS. The State's responsibility, the duties of the medical profession, the role of voluntary agencies, the rights of the HIV infected persons, penal provisions should be incorporated in an integrated manner in a statute.

67. The very fact that even in one Public Sector Undertaking the possibility of 3,000

persons being infected with HIV among the one lakh workforce and their family members clearly go to show that the States does not have correct picture about the number of HIV patients. It is a matter of great concern that even the respondent-company having noticed the magnitude of the problem, did not carry on the requisite blood tests to the victim even after she approached the hospital nor she was referred to any other super specialty hospitals for tests and treatment. It has not been disclosed as to whether the doctors working in the said hospital are themselves aware of the problem and whether the pathologists working therein are technically competent to carry on the tests or whether both Elisa and/ or Weston Blot tests were conducted to the blood donor. The entire defence of the company is based on surmises and conjectures. Evidently, despite the knowledge that the petitioner had been suffering from AIDS, no financial or other help had been given so far.

68. The doctrine of sovereign immunity and good faith clause is used to ignore acts of malfeasance and misfeasance on the part of the public authorities. These acts of malfeasance and misfeasance even resulted in depriving the fundamental rights especially those of life and liberty. The poor citizens who suffer deprivation of life cannot be given relief by mere lip sympathy. Substantial justice could only be done by awarding monetary compensation treating the violation as a constitutional tort. This principle developed in common law jurisdictions in the last quarter of the last century has been expanded by the Supreme Court which is now even followed by British Courts. Starting from *Rudul Shah v. State of Bihar*, [1983CriLJ1644] , till *D.K. Basu v. State of W.B.*, [1997CriLJ743] , the Supreme Court emphatically laid down that when fundamental rights are violated a citizen has a public law remedy of seeking compensation and that this public law remedy is in addition to the private law remedy of suit for tortious damages. We may quote the following from the judgment of the Supreme Court in D.K. Basu's case:

.....it is now a well accepted proposition in most of the jurisdictions that monetary or pecuniary compensation is an appropriate and indeed an effective and some times perhaps the only suitable remedy for redressal of the established infringement of the public servants and the State is vicariously liable for their acts. The claim of the citizen which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of

compensation, the emphasis has to be on the compensatory and not on punitive element the objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them."

(See *Sebastian M. Hongray v. Union of India*, [AIR 1984 SC 1026], *Cere v. Union of India*, [(1995)IILLJ768SC] , *D.K. Basu v. State of West Bengal*, *Neelabati Bahera v. State of Orissa*, *Chairman, Rly Board v. Chandrima Das*, [2000CriLJ1473] .)

69. The doctrine of constitutional tort is enforceable in a case of this nature. In *Chairman, Railway Board v. Chandrima Das* (supra), the Apex Court held that in terms of the said doctrine, compensation can be awarded in favour of any person in the event his right to life, as adumbrated under Article 21 of the Constitution of India, is violated. In the instant case, prima facie, the victim has suffered owing to negligence on the part of the medical and para-medical staff of the hospital of the Company. The Company itself has disclosed that out of the work force of one lakh, about one thousand workers have been tested HIV+ve Keeping in view the fact that other family members might have been infected, the modest estimate, according to the Company, itself would be about three thousand. In a grave situation of this nature prevalent in the area, it was incumbent upon the medical and para-medical staff of the hospital of the company to carry on the requisite tests on the victim for detecting the AIDS at the time when the blood was transfused for hysterectomy operation. Futhermore, no tests were conducted on her at the subsequent stages also. It is really astonishing that if the hospital in Hyderabad could find out that the victim was suffering from AIDS, the hospital of the Company which is stated to be equipped with all modern

facilities including the equipment to test AIDS, could not do so.

70. Though we do not intend to issue a direction upon the respondent-Company for grant of special and general damages in tort in these proceedings, however, having regard to the peculiar facts and circumstances of the case, particularly, the negligence on the part of the medical and para-medical staff of the hospital of the company in conducting tests on the victim at the appropriate stages, we are of the view that the petitioner is entitled to some reasonable amount of compensation to meet the costs incurred by her towards medical expenses, in this Public Law Remedy.

71. All the learned Counsel who argued the matter put forward various suggestions and requested this Court to issue appropriate directions to the respondents for better management and control of AIDS in the State in the wake of various control programmes undertaken by the State through Governmental and Non-Governmental organisations.

72. Having examined the matter in detail with reference to various materials including statistics placed before us, we are inclined to make/issue the following suggestions/directions:

1. Sufficient AIDS/HIV+ve test kits/ equipment to all hospitals and institutions should be provided. The Government Blood Banks as well as licensed blood banks should be compelled to buy fool proof HIV+ve /AIDS test equipment.
2. All the Government hospitals should use only disposable needles in injections. Registered medical practitioners should be compelled to use only disposable syringes.
3. Bio-medical waste collected from hospitals and nursing homes should be properly destroyed or disposed of.
4. There should be more awareness programmes undertaken by the Government especially in rural areas, in slum areas so that people can take preventive measures.
5. Having regard to the cost of anti-AIDS drugs, efforts should be made to supply

anti-AIDS drugs free of cost like in anti-TB and anti-leprosy programmes and family welfare programmes.

6. Doctors should be encouraged to undergo special training programmes for diagnosis and treatment of AIDS patients.

7. There should be proper schemes for rehabilitation of patients who are diagnosed as HIV+/AIDS as there is 'social ostracising' is attached to HIV+/AIDS infected person.

8. There should be compensatory mechanism to deal with the AIDS in case of negligence on the part of the blood banks/hospitals by way of free facilities and free access to State funded health institutions,

9. Doctrine of constitutional tort should be recognised even for prevention and control of AIDS and State should be made liable for any negligence on the part of the health service system subject to laid down by Supreme Court in Indian Medical Association v. P. Shantha, .

10. There should be special treatment facilities in hospitals for those who suffer from HIV+/AIDS.

11. There should be strict vigilance on licensed Blood Banks with reference to pre-blood transfusion testing for HIV+ and there should be effective educational and training programmes for those who man the blood banks.

12. Government may consider to introduce sex education in schools at least from adolescence stage.

13. Identity of patients who come for treatment of HIV+/AIDS should not be disclosed so that other patients will also come forward for taking treatment.

14. There should be change in the method of AIDS propaganda and no slogans, which promote indiscriminate sex, should be used in the propaganda.

15. The infected HIV+ patient should be educated properly about the AIDS so that he may not inadvertently or innocently be responsible in spreading the disease.

16. The latest method of testing blood for HIV+/AIDS should be introduced in all the hospitals by giving subsidies so that tests can be conducted at reduced costs.

17. All the Hospitals and Nursing Homes should be directed to dispose of their bio-medical waste in terms of Bio-Medical Waste (Management and Handling) Rules, 1998 and they shall strictly comply with the norms specified therein. Such hospitals shall be directed to obtain the necessary authorisation for disposal of the waste from the PCB.

18. Like the Central Government, which has exempted from payment of Central excise duty in respect of medicines imported for the treatment of AIDs, the State Government should also consider the desirability of grant of sales tax exemption in relation thereto.

19. It is axiomatic that no mandamus would issue to the Legislature to enact legislation in the matter. But, having regard to the submissions made at the Bar as also taking notice of the fact that the States of Maharashtra and Karnataka have already introduced Bills in this behalf in the respective Legislatures, the Government of Andhra Pradesh may also consider the desirability of introducing a similar Bill before the State Legislature.

73. We direct that the company shall immediately take such measures by opening one or more blocks for rendering special treatment to the HIV+ patients with all the requisite infrastructure and the latest medicines. The Director of Medical and Health is directed to oversee the functions of the said hospitals and a special drive be launched in all the colonies under the control of the Company and/or any such area. The State shall also issue necessary circulars to such public sector undertakings and other private sector companies to see that the persons suffering from HIV-AIDS are identified and/or given proper treatment.

74. For the reasons indicated hereinbefore, leaving upon the parties to seek appropriate



remedies before the appropriate civil Court for damages, we direct the respondent-Company to pay a sum of Rupees one lakh to the victim within four weeks from today by way of compensation in this Public Law Remedy to meet the costs incurred by her towards medical expenses. We make it clear that this compensation is in addition to the special and general damages that may or may not be granted to the petitioner by the appropriate civil Court for the alleged tortious liability for negligence, in accordance with law.

75. The writ petition is disposed of accordingly.