HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP No.5429 of 2010 (O&M)
Date of Decision: 29.05.2014

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Jasvir Singh & Anr. . . . Petitioners

vs.

State of Punjab & Ors. .... Respondents

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Coram : Hon'ble Mr.Justice Surya Kant

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1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

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Present: Mr. Anupam Gupta, Sr. Advocate - *Amicus Curiae* with
Messrs Gautam Pathania, Divay Swarup &
Bhavnik Mehra, Advocates

Ms. GK Mann, Advocate for the petitioners

Mr. Arjun Sheoran, Advocate for the complainant

Mr. PS Bajwa, Addl. AG Punjab

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Surya Kant J.

(1) The petitioners are husband and wife, respectively. They were tried for an offence under Section 302/364-A/201/120-B IPC for kidnapping and brutally murdering a 16 year old minor for ransom. The trial court awarded them death sentence which was confirmed by this Court. The Hon'ble Supreme Court dismissed their Criminal Appeal No.1396 of 2007 vide order dated January 25, 2010 but commuted the death sentence awarded to petitioner No.2 (wife) into life imprisonment.

(2) The petitioners now seek enforcement of their perceived right to have conjugal life and procreate within the jail premises.

The issues raised by them are indeed of paramount public importance. Equally significant are the related issues hovering around the concept of 'reasonable restrictions' or 'the extent of suspension of some of the fundamental rights during incarceration', 'radical jail reforms', 'the status of prisoners as protected citizen' within the Constitutional framework as well as the 'international perspective on the right to conjugal life in the precincts of jail', which too call for discussion.

(3) The petitioners are currently lodged in the Central Jail at Patiala in separate cells. They seek a command to the Jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. The first petitioner is statedly the only son of his parents and 8 months into their marriage they got caught in the criminal case. The petitioners claim that their demand is not for personal sexual gratification. The petitioners are also open to 'artificial insemination'.

(4) The petitioners' main plank is Article 21 of the Constitution. The 'right to life', they insist, has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part. The decision in ***State of Andhra Pradesh v. Chalaram Krishna Reddy (2000) 5 SCC 712***, is relied upon to urge that a prisoner whether convict, under-trial or a detenue, continues to enjoy the Fundamental Rights

including 'right to life' which is one of the basic Human Rights. The petitioners also refer to the well regulated concept of 'conjugal visitations' successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc.

(5) The State of Punjab has opposed the petitioners' prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit 'conjugal visitation'; its Section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual lays down the method for separation of male and female prisoners.

(6) Even 'artificial insemination' as a viable and alternative solution suggested by the petitioners, is not acceptable to the State of Punjab as according to its affidavit dated 20th November, 2010 "*there is no such provision in the Prisons Act, 1894 and Punjab Jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts…*".

(7) The father of the minor-victim (murdered for ransom by the petitioners) has also joined these proceedings to oppose the petitioners' prayer. His learned counsel has very ably assisted this Court, putting forth his point of view on an emotional pitch. His insight to the global case law has helped a lot in view formation.

(8) Owing to the ramifications, impact and implications of several vital issues of public importance, Sh. Anupam Gupta, Ld.Senior Advocate was requested to assist this Court as an *amicus*

curiae. He has with his usual outstanding legal acumen, portrayed the points in issue on a bigger canvass and reached to all possible decisions, books, articles and research papers across the world which have some bearing on the issues in debate and simplified their meaning and import to render once again unparalleled and impartial assistance of great quality.

(9) The following, amongst others, are the issues which have emerged for determination:-

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

iv. If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

(10) The jail inmates in India fall broadly in two categories: (i) the convicts – who no longer carry presumption of innocence; and (ii) the under-trials – who are presumed innocent until found guilty

by the court. The Legislature and the Judiciary both have been largely influenced by such classification while guaranteeing or curtailing fundamental, human or civil rights of the jail inmates. The convicts who are proven guilty, of course, are not entitled to each and every fundamental right guaranteed to a citizen or a person under our Constitution.

HISTORICAL PERSPECTIVE

(11) 'Jail' is the most ancient and oldest penal institution which was initially set up for detaining prisoners awaiting trial and execution of sentences. 'Imprisonment' came to be introduced somewhere in the 16th century as a form of punishment. Jails or prisons have since centuries been synonymous with the infliction of torture and terror on their inmates. The nineteenth century saw the concept of institutional correction and made a little progress towards individualized measures of offenders. The advanced nations in the twentieth century started concentrating on ways and means that would help the offenders in reducing the chance of repeating their criminal activity – an approach towards reformation of the convicts for the better.

PRISONS IN INDIA

(12) The prisons in India during the regime of East India Company were in terrible condition. The first ever Jail Committee to improve the conditions of jails was constituted in the year 1836 followed by the second in 1864 and the third in 1877. The second

Committee recommended some measures for improvement, such as minimum space for each prisoner, better clothing and food and regular medical check-up. There were Jail Committees in the year 1889 and 1892 also, culminating into the passing of Prison Act, 1894.

PRISON ACT, 1894

(13) This Act is the first declared policy on jail reforms in India. It commands the State Governments to provide accommodation in prisons, keeping in view separation of prisoners (Sec.4) and temporary accommodation if the number of prisoners is greater than the number that can be kept safely therein; the outbreak of an epidemic disease within prison mandates temporary shelter and safe custody of prisoners (Sec.7). With more reformatory amendments in 1937, the Act required a Medical Officer in jail to maintain the health record of every prisoner; to examine every prisoner on admission into prison. No prisoner can be removed to any other prison unless examined by the Medical Officer (Sec.26). The Officer is under duty to maintain discipline of prisoners. Chapter-VI of the Act entitles civil or un-convicted prisoners to arrange food, clothing and bedding from private sources. Chapter-VII contemplates employment of prisoners which is very essential for the upliftment of their moral, mental and vocational faculties. Offences in relation to prisons are defined in Chapters X and XI along with the punishment(s). The Act mandates that prisoners are

not to be confined in irons except under necessity. Section 59 of the Act empowers State Governments to make Rules consistent with the Act.

SUBSEQUENT JAIL COMMITTEES' REPORTS

(14) The Jail Committee's Report, 1919 indeed manifested the true reform-oriented approach on prison administration. This report was a clear deviation from the previous policy on deterrent and it advocated reformation. The report acknowledged that Indian Prison Administration was lagging behind in reforms or on the approach of the prisoner as an individual. It recommended productive laboring and education for prisoners besides the after-care programmes for their rehabilitation on release.

POST-INDEPENDENCE ERA

(15) The Government of India in 1951 invited Dr. WC Reckless from the United Nations Organisation, to recommend reforms in the prisons in India and pursuant to those recommendations, a Committee was appointed in 1957 to prepare the All-India Jail Manual. All-India Conference of Inspectors General of Prisons was also convened where they resolved that (i) correctional services should be integrated; (ii) probation system should be used more to avoid too much pressure on prisons; (iii) a Central Bureau of Correctional Services be created; (iv) after-care organization be established; (v) solitary confinement as a mode of punishment be abolished; (vii) there should be need-based

classification of prisoners; and (viii) Jail Manuals be periodically revised in the States.

(16) All-India Jail Reforms Committee headed by Justice A. Mulla recommended in 1983 to have a National Policy on Prisons and it suggested several radical reformations in the prison structure and administration. Nonetheless, the conditions in jails continued unchanged as was noticed by the National Expert Committee on Women Prisoners headed by Justice Krishna Iyer who gave its report in the year 1987.

(17) Some piece-meal, *ad hoc*, short-sighted and need-based reforms varying from State to State and depending upon factors like the budget allocation, have been taking place without any national policy in sight. [Ref. *Indian Prison Laws and Correction of Prisoners* by Nitai Roy Chowdhury]

ROLE OF JUDICIARY

(18) A prison in civil society is the place for enforceability of law. All governmental systems provide incarceration through a judicial order only. The prison or the protectees living there are thus instruments and subjects of justice delivery system. The Judiciary as the principal executor and promoter of the rule of law has to have major stakes in respect of the conditions prevailing in the prisons. The duty of the Courts towards jail reforms has become heavier than before after the enforcement of our

Constitution as Article 21 guarantees dignified life to one and all including the prison-inmates.

(19) The Hon'ble Supreme Court in ***D. Bhuvan Mohan Patnaik & Ors. vs. State of Andhra Pradesh & Ors., (1975) 3 SCC 185*** declared that convicts cannot be denied the protection of fundamental rights which they otherwise possess, merely because of their conviction. A convict whom the law bids to live in confinement though stands denuded of some of the fundamental rights, like the right to move freely or the right to practice a profession, nonetheless, such convict shall continue to enjoy other constitutional guarantees including the precious right guaranteed by Article 21 of the Constitution.

(20) The denial of the facilities like a packet of powder for a rickety carom board, the radio network or musical instruments like harmonium to the Naxalite prisoners in ***Dr. Bhuvan Mohan*** (supra) was, however, not interfered with by the Apex Court, for the reason that those were "…*matters of reform and though they ought to receive priority in our Constitutional scheme, their denial may not necessarily constitute an encroachment on the right guaranteed by Article 21 of the Constitution...".*

(21) In his one of the many salutary and historical decision [***Sunil Batra vs. Delhi Administration & Ors.,*** *(****1978) 4 SCC 494*** (popularly known as ***Sunil Batra-I***)], Krishna Iyer, J considered the core issue, whether a prison *ipso facto* outlaw the

rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement or the prison total eclipses judicial justice for those incarcerated under the orders of a judicial Court? The *dictum* very emphatically espoused the cause of jail-inmates holding that "*Prisons are built with stones of Law' (sang William Blake) and so, when human rights are hashed behind bars, constitutional justice impeaches such law. In this sense, courts which sign citizens into prisons have an onerous duty to ensure that, during detention and subject to the Constitution, freedom from torture belongs to the detenu.*".

(22) ***Sunil Batra-I***, amongst other things, ruled that the condemned prisoner (like Batra) shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. Such like convicts shall be entitled to amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic and other, and normal clothing and bedding. It was further held that condemned prisoners cannot be denied their right to eat, sleep, work or live together except on specific grounds warranting such a course etc. etc.

(23) ***Sunil Batra-I*** marched far ahead of its times in emphasising re-humanisation of the prisoners. It stated that "positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals,

sramdan and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored."

(24) The reforms in prison administration also caught attention in ***Sunil Batra-I*** which not only emphasized the need of legislative intervention for replacement of obsolete prison laws but also for the re-orientation and re-visitation of prison house and practices, for "*no longer can the Constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity.*" Thus, in the context of Section 30(2) of the Prison Act it was held that such prisoner is not to be completely segregated except in extreme cases of necessity which must be specifically made out.

(25) ***Sunil Batra vs. Delhi Administration, (1980) 3 SCC 488*** (known as ***Sunil Batra-II***), phenomenally liberated the jail inmates from the atrocities inflicted through mental torture, psychic or physical pressure and it brought a catenation of radical changes in prison conditions like (i) Separation of under-trials from convicts in jails; (ii) Their right to invoke Article 21 of the Constitution; (iii) Separation of young inmates from adults; (iv) Liberal visits by family and friends of prisoners; (v) Ban on confinement in irons; (vi) The duties and obligations of the Courts

with respect to rights of prisoners; and (vii) Re-defining the duties of District Magistrate etc.

(26) ***Sunil Batra-II*** delved deeper into the petrifying effects of loneliness of jail-inmates as is evident from the following passage:-

> ***"Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Art. 19 and its sweep."***

(27) It further noticed that even as per the 1973 report of National Advisory Commission "*prisoners should have a 'right' to visitation*" and that "*correctional officials should not merely tolerate visiting but should encourage it, particularly by families…' '…it also urged that corrections officials should not eavesdrop on conversations or otherwise interfere with the participants' privacy*". ***Sunil Batra-II*** very forcefully ruled that "*we see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close*

friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected."

(28) Several maladies within the jail precincts including the victimization of young inmates at the hands of adults drew attention in ***Sunil Batra-II***, prompting the Court to say that:-

> ***"In the package of benign changes needed in our prisons with a view to reduce tensions and raise the pace of rehabilitation, we have referred to acclimatization of the community life and elimination of sex vice vis a vis prisoner we have also referred to the unscientific mixing up in practice of under-trials, young offenders and long-term convicts. This point deserves serious attention."***

(29) The research conducted by a British author on the pitiable jail conditions in developed nations, depicting psycho stress and pressure on the prisoners sentenced for long terms, over-crowding in an area of limited size, unisexual agglomeration, the clash of personalities and the conflict of interests, physical violence for settlement of dispute in common and the impact of such conditions on the young inmates, was noticed with approval by the Hon'ble Supreme Court in ***Mithu vs. State of Punjab, (1983) 2 SCC 277.***

(30) It would be equally apt at this stage to reproduce Section 27(2) & (3) of the Prisons Act:-

> ***"27. Separation of Prisoners***.- *The requisitions of this Act with respect to the separation of prisoners are as follow:-*
>
> *(1) xxx xxx xxx*
>
> *(2) in a prison where male prisoners under the age of twenty-one are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not;*
>
> *(3) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners…"*

(31) That the aforesaid provision was never put in practice and merely adorned the Statute Book was critically acknowledged by the Hon'ble Supreme Court in ***Sunil Batra-II*** when it said that "***the materials we have referred to earlier indicate slurring over this rule and its violation must be visited with judicial correction and punishment of the jail staff. Sex excesses and exploitative labour are the vices adolescents are subjected to by adults. The young inmates must be separated and freed from exploitation by adults. If Kuldip Nayar is right this rule is in cold storage. It is inhuman and unreasonable to throw young boys to the sex-starved adult prisoners or to run***

menial jobs for the affluent or tough prisoners. Article 19 then intervenes and shields.”

(32) ***Francis Coralie Mulin vs. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608*** expanded the expression “personal liberty” embedded in Article 21 of the Constitution in the context of the rights of a detenue and it held that the prisoner or detenue has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. The Court held, in no uncertain terms, that no law which authorizes and no procedure which leads to cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness and thus would plainly be void and violative of Articles 14 & 21.

(33) Several other landmarks giving wider connotation to prisoner’s rights within the four walls of a jail including (i) ***State of Maharashtra v. Prabhakar Pandurant Sanzgiri AIR 1966 SC 424***; (ii) ***Sheela Barse vs. State of Maharashtra (1983) 2 SCC 96***; and (iii) ***Ramamurthy vs. State of Karnataka, (1997) 2 SCC 642,*** are not being elaborated here to avoid multiplicity.

(34) Though these decisions are truly milestones in the recognition and enforcement of prisoner’s rights and prison reforms yet they are peripheral to the core issues directly canvassed before me. ***Sunil Batra-II*** does notice the prevalence of homosexuality or sexual abuse of underage inmates by their adult counter-parts but

the question of 'conjugal visits' or 'right to procreation' to be the 'right to life' or 'personal liberty' of a jail inmate was not raised there. *Albeit*, the book "*Rape In Prison*" by *Anthony M. Scacco, Jr.* referred to in that decision does acknowledge that "***sex is unquestionably the most pertinent issue to the inmate's life behind bar... There is a great need to utilize the furlough system in corrections. Men with record showing good behavior should be released for weekends at home with their families and relatives***".

(35) The Andhra Pradesh High Court in ***PIL No.251 of 2012*** decided on 16th July, 2012 ***(Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) vs. State of Andhra Pradesh)*** dealt with an identical issue as therein a direction was sought to take immediate steps and allow conjugal visits to spouses of prisoners in jails across the State of Andhra Pradesh. The Court rejected the claim observing that if conjugal visits are to be allowed keeping in view good behavior of the prisoners, "*chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit...*" and that "*the issue raised in the writ petition being a policy decision is within the domain of the State...*". The Court further viewed that Chapter-IV of Andhra Pradesh Prison Rules, 1979 provide for the release of prisoners on furlough/leave and parole/emergency leave therefore "*it is not that*

there is no provision in the Rules to release the prisoners to enable them to lead family life with their spouses when they are granted furlough/leave of course for a limited period.".

(36) The vital issue of the 'best interests of unborn child of the petitioners' has been effectively raised by learned counsel for the complainant, citing ***R.D.Upadhyay v State of Andhra Pradesh & Ors. (2007) 15 SCC 337*** which deals with the welfare of women prisoners and the negative effects of prison environment on them. The Hon'ble Supreme Court in that case took notice of the report prepared by the Tata Institute of Social Science on the situation of children of prisoners which suggested the following five reasons for providing facilities to minors accompanying their mothers in the prison:-

> *"a)* The prison environment is not conducive to the normal growth and development of children;
>
> b) Many children are born in prison and have never experienced a normal family life, sometimes till the age permitted to stay inside (four to five years);
>
> c) Socialization pattern get severely affected due to their stay in prison. Their only image of male authority figures is that of police and prison officials. They are unaware of the concept of a home, as we know it. Boys may sometimes be found talking in the female gender, having grown up only among women confined in the female ward. Unusual sights,

like animals on the road (seen on the way to Court with the mother) are frightening.

d) Children get transferred with their mothers from one prison to another, frequently (due to overcrowding), thus unsettling them; and

e) Such children sometimes display violent and aggressive, or alternatively, withdrawn behavior in prison."

(37) A Division Bench of this Court also, in ***Viresh Shandilya v. Union of India and Others, PLR (2005) 139 P&H 357,*** adjudicated various issues dealing with the rights of prisoners including the issue of cable TV facilities to prisoners in the Model Jail, Burail, Chandigarh. Notwithstanding the fact that the facilities of television, cable network, mobile phones and pagers, etc., were found to have been blatantly and abrasionaly misused by a group of hard-core terrorists including a life convict, this Court declined to accept a blanket ban on these facilities as it would have deprived not only the majority of inmates who were mere "under-trials" from the amenity of viewing TV, it could cause adverse effects upon the reformatory methods required to be adopted in the model jails even in relation to the 'convicts'. It was also observed that in modern era, television has become the fastest source of information and is a component of the right to read and write which has since been recognised as a right under Article 21 of the Constitution even for the "prisoners". This Court further held that:-

> *"In our view, the "under-trials" as well as the "prisoners" lodged in the Model Jail Burail too have a right to information and the television can play a crucial role in that regard and to bring them in the mainstream of the civilized society, it will be too hard and anti-thesis of international conventions if a complete ban on viewing of TV is imposed."*

INTERNATIONAL PERSPECTIVE

(38) The woeful conditions like overcrowding, lack of bedding, toilets, inadequate health facilities, unnatural and premature deaths due to chronic disease, unhealthy and mal-nutritious food, lack of vocational training, denial of social orientation, torture, physical assaults by jail staff or co-prisoners, violent protests, drug abuse, non-consensual sex or sodomy and persistent denial of basic human rights with a closed-mindset towards the re-socialisation of the jail inmates – is not the saga of Indian prisons only. They concern all the prisons, new or old, all over the world. The deprivation of the universally-accepted basic human rights within the four walls of jails is thus a serious challenge to the Global justice delivery system and civic society as a whole.

(39) The United Nations' Basic Principles for the Treatment of Prisoners, 1990 states that ***"except for those limitations that are demonstrably necessitated by the fact of incarceration,***

all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights*, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants."*

(40) ***Raymond K Procunier vs. Robert Martinez[1]. [416 US 397, 40 L Ed 2d 224]*** pertained to the validity of certain Regulations promulgated by the Director of California, Department of Corrections imposing censorship on prisoner's mail and the ban on law students and legal professionals to conduct Attorney-Client interviews with inmates. The US Supreme Court found the Regulations authorizing mail censorship without adequate justification and viewed that prisoners had a right to use the mails as a medium of free expression, which right cannot be infringed by prison authorities in reading the inmate's mail as a matter of course. It was ruled that "a prisoner does not shed such basic First Amendment Rights at the prison gate. Rather he retains all the rights of an ordinary citizen except those, expressly or by necessary implication, taken from". The Court very aptly observed that the mails provide one of the few ties that inmates retain with their communities and families – ties essential to the success of their

[1] Decided on April 29, 1974

later return to the outside world and that inmate's freedom to correspond with outsiders advances rather than retards the goal of rehabilitation.

(41) ***Griffin B Bell vs. Louis Wolfish[2] [441 US 520]*** was a case of class action by inmates of a federally-operated, Short-Term Custodial Facility designed primarily to house pre-trial detainees in the Southern District of New York. They challenged numerous conditions of confinement and practices at the Facility including (i) their double-bunking as the rooms were originally intended for single occupancy; (ii) prohibition against inmates receiving hard cover books unless they were mailed directly from publishers or book stores etc.; (iii) prohibition against receipt of packages containing items of food or personal property from outside the Facility; (iv) searches of the inmate rooms during which they were not allowed to be present; and (v) strip searches of inmates conducted after every contact visit with a person from outside the institution, including exposure of the inmates' body cavities for visual inspection.

(42) The District Courts and the Court of Appeals held that the impositions were illegal and unreasonable in the case of pre-trial detainees. On an appeal, the U.S. Supreme Court, by majority, reversed the decisions of District and Appellate Court and held that the double-bunking of inmates did not amount to punishment and

[2] Decided on May 14, 1979

did not violate the detainee's rights under the Due Process clause of the Fifth Amendment; (ii) the 'publisher-only rule' was a rational response by prison officials to security problem that of smuggling contraband to the institution; (iii) the restriction on receiving packages did not deprive inmates of the facility of their property without due process of law and the restriction was justifiable to prevent smuggling of contraband; (iv) the room search rule did not render searches unreasonable within the meaning of the Fourth Amendment; (v) the visual body cavity searches were not unreasonable and did not violate the Fourth Amendment, and could be conducted on less than probable cause, hence it did not amount to 'punishment', for there was no suggestion that the restrictions and practices were employed by officials with an intent to punish the pre-trial detainees housed in the Facility.

(43) The dissenting view expressed by Powell and Marshal, JJ in ***Bell*** is equally noteworthy. They held that the body-cavity searches of inmates represent one of the most grievous offences against personal dignity and common decency and that the procedure of the body-cavity searches was a totally humiliating spectacle frequently conducted in the presence of other inmates. They strongly condemned this practice and held that ***"such unthinking deference to administrative convenience cannot be justified where the interests at stake are those of***

presumptively innocent individuals, many of whose only proven offence is the inability to afford bail".

(44) In ***Sherman Block vs. Dennis Rutherford***[3]***, [468 US 576]*** pre-trial detainees challenged the jail's policy of denying contact visits with their spouses, relatives, children and friends and also challenged the practice of conducting irregularly-scheduled shake-down searches of individual cells in the absence of cell occupants. The District Court of California sustained both the challenges and the Court of Appeals upheld it. The United States Supreme Court however, disagreed and by majority held that a blanket prohibition on contact visits with pre-trial detainees at a jail is a reasonable non-punitive response to the legitimate security concern and does not violate the Fourteenth Amendment. The Court held that the Constitution does not require that detainees be allowed contact visits when responsible, experienced Administrators have determined in their sound discretion that such visits will jeopardize the security of Facility. The Court reiterated that pre-trial detainees do not have a constitutional right to observe shake-down searches of their cells by prison officials.

(45) Justices Marshall, Brennan and Stevens in their dissenting view nonetheless recognized the value of what the pretrial detainees asserted and observed that ***"the ability of a man to embrace his wife and his children from time to time***

[3] Decided on July 3, 1984

during weeks or months while he is awaiting trial, is a matter of great importance to him".

(46) The recent decision of US Supreme Court in ***Edmund G. Brown, Governor of California vs. Marciano Plata***[4]***, [563 US (2011)]*** is worth quotable. That was a case complaining serious violations in California's prison system. The District Court found that prisoners with serious mental illness do not receive minimal adequate care; the mental healthcare was deteriorating due to overcrowding; there were as many as 1,56,000 detainees, nearly double the number that California's prisons were designed to hold; there were poor toilet facilities; high vacancy rates for medical and mental health staff; related issues of unsanitary and unsafe conditions and the State was not willing to allocate adequate budget to redress the issues. The District Court in one of its extraordinary order of far-reaching consequences directed the California prison authorities to de-crowd the prison population to 137.5% of designed capacity within two years. Finding that the prison population would have to be reduced if capacity could not be increased through new construction, the Court also ordered the State to formulate a compliance plan and submit it for approval. The effect of the order was the premature release of approximately 46000 jail inmates.

[4] Decided on May 23, 2011

(47) The US Supreme Court by majority upheld in principle the view of the District Court and ruled that "***as a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the Law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment***". It further said "***to incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates 'may actually produce physical torture or a lingering death'***.". The Court deviated from its previous views in some of the cited cases and very emphatically ruled that "***a prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society…"*** and that ***"…Courts may not allow Constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration***".

(48) The Supreme Court of Canada in ***Richard Sauve v. The Attorney General of Canada, 2002 (3) Canada Supreme Court Reports 519***, considered the constitutionality of Section

51(e) of the Canada Elections Act which denied the right to vote to every person who is imprisoned in a correctional institution serving a sentence of two years or more. The question raised before the Court was whether the aforesaid provision infringed the guarantee of the right of all citizens to vote under Section 3 of the Charter and whether it also violated the equality guarantee of Section 15(1) of the Charter? The Supreme Court by majority struck down the offending provision and very emphatically ruled that denying the right to vote does not comply with the requirements for legitimate punishment which must not be arbitrary and must serve a valid criminal law purpose. It was viewed that *"**the idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete".*** The Court said that ***"denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter"***.

(49) The Canadian Supreme Court in ***Sauve*** was conscious of the fact that the prisoners sentenced to two years or more may, besides the right to franchise, assert their participation in other political activities thus it put a caveat on its verdict observing that the question of other political activities like standing for office *"could be justifiably denied to prisoners under Section 1. It may be*

that practical problems might serve to justify some limitations on the exercise of derivative democratic rights".

FOREIGN COURTS' VIEW ON CONJUGAL VISITS IN PRISONS AND ARTIFICIAL INSEMINATION

American Viewpoint

(50) Close to the facts of the case in hand, the United States Court of Appeal, Ninth Circuit, in ***William Gerber vs. Rodney Hickmen, 291 F.3d 617 (2002)*****,** considered the claim of an inmate in the California State prison alleging that Mule Creek State Prison is violating his Constitutional right by not allowing him to provide his wife with a sperm specimen that she may use to be artificially inseminated. The convict was 41-years old and was serving sentence to a hundred years to life plus 11 years. His wife was 44 years' old and they wanted to have a baby as no parole date was set for the convict due to the length of his sentence, he wished to inseminate his wife artificially. The question that arose for consideration was whether right to procreate is fundamentally inconsistent with incarceration? The Court of Appeals, with a majority of 6-5, relied upon two previous decisions to hold that **(i)** ***"many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement"*****; (ii)** ***"prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits",*** and that keeping in view the nature and goals of a prison system, it

would be a wholly unprecedented reading of the Constitution to "***command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right***". The Court of Appeals did not accept the oral argument on the effect of technological advancement on the issue and said that "***Our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish***".

(51) At the same time, learned *Amicus Curiae* referred to the dissenting opinion of five Judges in ***William Gerber*** (supra), wherein TASHIMA, KOZINSKI, HAWKINS, PAEZ and BERZON, Circuit Judges were of the view that a prison is meant to deny inmates certain rights enjoyed by free people and loss of those rights is the punishment. They held that Gerber's status as an inmate won't permit him vacation in Paris or spend the weekend at home, because the very point of incarceration is to deny prisoners freedom of movement and the comforts of home. They, however, further viewed that:-

> *"…This would be a different case if the legislature of California had ordained that prisoners must lose the right to procreate as punishment for their crimes, in addition to loss of physical liberty… But the legislature did no such thing… Nevertheless, could it be that, by ordering*

> *imprisonment, the legislature also implicitly cut off a prisoner's right to procreate? Even under the best of circumstances, this would be a difficult argument for the state to make, because the term "imprisonment" carries no plausible implication as to any rights other than those necessarily abridged by physical incarceration.*
>
> (emphasis applied)

(52) Previously, in ***Steven J. Goodwin vs. CA Turner[5], [908 F.2d 1395] (1990)***, the U.S. Court of Appeals, Eighth Circuit, considered the claim of a federal prisoner incarcerated in Missouri, to whom permission to give sperm to artificially inseminate his wife, was declined by the District Court. The Court of Appeals rejected Goodwin's argument that the prison regulation has a direct impact on his wife's right to procreate and viewed that *"by its very nature, incarceration necessarily affects the prisoner's family"*. The other reasons assigned by the Court of Appeals while refusing Goodwin's prayer included that such a permission will have a significant impact on other inmates and the female inmates would have to be granted expanded medical services *"thereby taking resources away from security and other legitimate penological interests"*.

[5] Decided on July 17, 1990

European Viewpoint

(53) ***Dickson vs. The United Kingdom {Application No.44362/04}*** – a decision dated 4th December, 2007 rendered by the Grand Chamber of the European Court of Human Rights has been cited with great force. That was a case where two British nationals sought permission for access to artificial insemination facilities. The first applicant was a murder convict and sentenced to life imprisonment. He had no children. He met the second applicant while she was also imprisoned. She had since been released. The applicants got married in 2001. As they wished to have a child, the first applicant applied for facilities for artificial insemination to which the second applicant also joined. They relied on the length of their relationship; first applicant's earliest expected date of release and the age of second applicant to urge that it was unlikely for them to have a child together without the use of artificial insemination facilities. The Secretary of State refused their application. Their challenge to that decision was turned down by the High Court as well.

(54) ***Dickson(s)*** alleged violation of Articles 8 & 12 of the European Convention on Human Rights which, *inter alia,* provides that (i) everyone has a right to his private and family life and (ii) that men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of that right.

(55) The Grand Chamber of ECHR held that Article 8 was applicable to the Applicants' complaint as the refusal of artificial insemination facilities concerned with private and family lives which notions incorporate the right to respect for their decision to become genetic parents. Before inferring the violation of Article 8 of the Convention, the fact "*that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination",* was duly noticed. The Court further expressed *"…its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits (see Aliev, cited above, § 188). Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."*

(56) The Court then awarded monetary compensation to the applicants on the strength of Article 41 of the Convention which enables it to afford just satisfaction to the injured party.

SUBMISSIONS OF THE LD. *AMICUS CURIAE*

(57) Learned *Amicus Curiae*, very eloquently explained that the fundamental rights were incorporated in our Constitution after

an intense study of various Constitutions as well as the human right principles then available. He urged that such fundamental rights and principles are of widest amplitude as the framers of the Indian Constitution intended to leave the scope of their outer limit open-ended so that the courts are not shackled by the limited interpretation of a particular time period.

(58) It was urged that the State has denied the right to procreate to the petitioners only because such a right does not find any mention in the Rulebooks or Statutes. In the absence of such a right having been spelt out in a codified-law, it cannot be assumed that the petitioners' prayer contravenes any law. The denial of the right to procreate thus is alleged to be unreasonable, arbitrary as such a right not being violative of any rule or law, its denial amounts to be a monstrous violation of Article 21 of the Constitution.

(59) Ld. *Amicus Curiae* further submitted that this Court in exercise of its discretionary writ jurisdiction possesses ample powers to enforce the subject fundamental right and direct the Prison Authorities to allow conjugal visits for the sole purpose of procreation, as best as the circumstances permit, and if they find any difficulty and explain it with reasons then the petitioners may be allowed, at their expense, the option of artificial insemination. On the question of the "**best interest principle of the child**", it was explained that the parents of petitioner No.1 have committed

to bear all expenses and bring up the child in the absence of the petitioners.

(60) Ld. *Amicus Curiae* canvassed that the right to life includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. The law under which petitioners are sentenced and tried does not extinguish their rights under Article 21, till in a legal manner and as far the procedure established by law, the life of 1st petitioner is extinguished. His right to procreate cannot be taken away only because he has been sentenced and punished for some offence. There is no provision, explicit or implied, in any penal law and/or the Constitution that takes away the petitioners' right to decent life under the set circumstances, which squarely falls within the expanded scope of Article 21. The petitioners seeking to exercise their fundamental right to 'life and procreate' thus ought not to be denied. Petitioner No.1 has been awarded death sentence and is undergoing punishment but his 'right to life' cannot be taken away till his execution. Until then the right to life includes all rights except the freedom to move which has been taken away by way of punishment of law.

(61) Relying upon various binding and persuasive judicial precedents cited above, Ms. GK Mann, learned counsel for the petitioners very brilliantly took up their cause and tried hard to get

this Court completely detached from the facts and circumstances which led to the petitioners' condemnation or incarceration in the criminal case. She remarkably built-up her case within the periphery of fundamental/human rights still guaranteed or available to the petitioners.

THE OTHER VIEWPOINT

(62) Learned counsel for the Complainant, contrarily, relied upon the dissenting opinion of Judges Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer, in ***Dickson*** opining that no one can be heard to say *"…that there is no right to conjugal visits in prisons, but that there is instead a right for the provision of artificial insemination facilities in prisons (this interpretation results implicitly from paragraphs 67-68, 74, 81 and 91). Not only is this contradictory…"* The Minority further held that *"the margin of appreciation of Member States is wider where there is no consensus within the States and where no core guarantees are restricted. States have direct knowledge of their society and its needs, which the Court does not have. Where they provide for an adequate legal basis, where the legal restrictions serve a legitimate aim and where there is room to balance different interests, the margin of appreciation of States should be recognized…"* The learned Judges were also of the view that "*…the Court might have wished to discuss the very low chances of a positive outcome of in vitro fertilization of women aged 45 (see Bradley J. Van Voorhis, "In Vitro Fertilization", New England*

Journal of Medicine 2007 356: 4 pp. 379-386). The Court also fails to address the question whether all sorts of couples (for example, a man in prison and the woman outside, a woman in prison and the man outside, a homosexual couple with one of the partners in prison and the other outside) may request artificial insemination facilities for prisoners. We are of the opinion that in this respect too States should enjoy an important margin of appreciation..."

(63) In ***R vs. Secretary of State for Home Department, [2001] EWCA Civ 472***, the Supreme Court of Judicature (Civil Division), UK considered the claim of a convict-appellant who was serving life sentence for murder. He was aggrieved at the denial of access to facilities for artificial insemination of his wife. The Court considered the appellant's claim in the context of violation of Articles 8 & 12 of European Convention on Human Rights and after referring to the Strasbourg Jurisprudence and relevant decisions of the Commission, it summarized its conclusions as follows:-

> *"i) The qualifications on the right to respect for family life that are recognised by Article 8(2) apply equally to the Article 12 rights.*
>
> *ii) Imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference with the right to respect for family life under Article 8 and with the right to found a family under Article 12.*

iii) This restriction is ordinarily justifiable under the provisions of Article 8(2).

iv) In exceptional circumstances it may be necessary to relax the imposition of detention in order to avoid a disproportionate interference with a human right.

v) There is no case which indicates that a prisoner is entitled to assert the right to found a family by the provision of semen for the purpose of artificially inseminating his wife."

(64) The Court nonetheless put a cautious note that the above-reproduced conclusions need not be construed to justify preventing a prisoner from inseminating his wife artificially or naturally. The Court was of the view that interference with fundamental human rights must always involve an exercise in proportionality.

(65) The Court in the above-cited case thereafter referred to the policy of the Secretary of the State and culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination, namely, (i) it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children whilst serving their sentences, save when they are allowed to take temporary leave; (ii) there is likelihood of a serious and justified public concern if prisoners continue to have the

opportunity to conceive children while serving sentences; and (iii) there are disadvantages of single parent families. The Court thus held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the convention nor unlawful or irrational.

POLICIES FOR CONJUGAL/FAMILY VISITS ACROSS VARIOUS JURISDICTIONS

(66) Learned counsel for the complainant drew attention to policies for conjugal/family visits across various jurisdictions. In Canada, as per the Directive 770 dated 14/08/2008 issued by the Commissioner of the Correctional Service Canada, private family visit is allowed but these are subject to certain restrictions like:

> PRIVATE FAMILY VISITING
>
> "22. Eligible inmates shall be offered the opportunity to participate in private family visiting. Private family visiting is intended to support the development and delivery of family programs in the institution and to provide inmates with the opportunity to use separate facilities where they may meet privately with their family to renew or continue personal relationships.
>
> ELIGIBILITY – INMATES
>
> 23. All inmates are eligible for private family visiting except those who are:
>
> a. assessed as being currently at risk of becoming involved in family violence;

b. in receipt of unescorted temporary absences for family contact purposes; or

c. in a Special Handling Unit or are awaiting decision or have been approved for transfer to a Special Handling Unit.

ELIGIBILITY – VISITORS

24. Persons eligible to participate in private family visiting shall include spouse, common-law partner, children, parents, foster parents, siblings, grandparents, and persons with whom, in the opinion of the Institutional Head, the inmate has a close familial bond, provided they are not inmates. **Inmates are not eligible to participate in private family visits with other inmates."**

(67) The policy in Australia's Capital Territory, namely, "Corrections Management (Private Family Visits) Policy 2009" provides that "*prisoners are not eligible to participate in private family visits with other prisoners."*

ACADEMIC RESEARCH AND OPINION ON CONJUGAL VISITS

(68) Learned *Amicus Curiae* referred to various scholarly articles, books and research papers, throwing invaluable light on the issue of conjugal visits/marital relationship of prisoners/human rights of prisoners. The article **Marital Relationships of Prisoners in Twenty – Eight Countries** by Prof. Ruth Shonle

Cavan and Prof. Eugene S. Zemans,[6] gives insight of the policies and practices followed in as many as 28 countries in Europe, Asia, Africa and American continents. According to this article *"...in only a few countries are provisions for marital contacts extended equally to all categories of prisoners. The limitation may be because of the unreliability or dangerousness of the criminal; or marital contacts may have some connotation of a privilege to be granted only to cooperative and conforming prisoners. In either case, the practice of home leaves or of family residence in a penal colony is not carried out haphazardly but tends to be integrated into the total prison regime.. ..it is worth noting that in general the countries from which we received responses do not favour private or conjugal visits within the prison, with the exception of Mexico."*

(69) The other research paper authored way back in the year 1964 titled **Conjugal Visitations In Prisons - A Sociological Perspective**[7], is a study on the determination of changes of attitudes of prison administrators in USA towards the idea of conjugal visitations. The author concludes that *"Conjugal visitations tend to magnify and accentuate problems relating to rehabilitation. It would appear that prison administrators are not in favour of conjugal visitations, foreign precedents to the contrary notwithstanding. This stand by prison administrators, however, is*

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[6] Ruth Shonle Cavan, Eugene S. Zemans, *Marital Relationships of Prisoners in Twenty-Eight Countries*, 49 J. Crim. L. Criminology & Police Sci. 133 (1958-1959)

[7] Joseph K. Balogh, "Conjugal Visitations In Prisons - A Sociological Perspective", 28 Fed. Probation 35 1964.

not without some foundation the attitude of the American public is characterised by apathy, un-familiarity, and disinterestedness in the problem as a whole…".

(70) Yet another article **Attitudes toward Conjugal Visits for Prisoners**[8] is a research compilation on conjugal visiting practices including those prevailing in Latin American countries like Brazil, Bolivia, Colombia, Chile etc. The practices in Canada and the California (USA) where conjugal visits had been started also found a mention there. After interviewing the Prison Administrators in California, the author found *"deep cleavages and almost irreparable estrangement of wives and children toward the husband and father who is away in prison …..it is our contention that we do not protect society by contributing to the dissolution of the family unit. Family visiting is an attempt by California prison administrators to provide an opportunity for the inmate to visit his wife and children in a relaxed normal-like family setting".*

(71) Learned *Amicus Curiae* referred to Nelson Mandela's autobiography **Long Walk to Freedom** wherein one of the tallest leaders of the world has described that Prison not only robs of one**'s** freedom but it also attempts to take away one's identity as every inmate is asked to wear same uniform, eat the same food and follow the same schedule. The work of Sir Leon Radzinowicz and Joan King, titled **The Growth of Crime: The International**

[8] Norman S Hayner, ""Attitudes toward Conjugal Visits for Prisoners", 36 *Fed. Probation* 43 1972.

Experience especially the Chapter titled 'Prisons in the Pillory' has been usefully highlighted, where the authors while dealing with the issue of conjugal rights have strongly advocated the visits from wives and live-in relationship partners for long-term offenders as an effective solution to the problem of sexual tension and homosexual behavior amongst prisoners. The learned authors have backed with equal force that those prisoners who do not fall into the top security categories should be granted periodical home-leave as a better and more natural solution than conjugal visit in the unfamiliar and embarrassing atmosphere of a prison. In the case of maximum security prisoners, the authors have suggested a small scale experiment whereby selected prisoners with stable marriages could spend a day or weekend with their families in some kind of family hostel outside the prison walls as such a recourse will help maintain links and reduce tension.

(72) Learned *Amicus Curiae* also quoted an article by Professor Baroness Deech on **Human Rights and Welfare** (2009) which gives a meaningful insight of the case of Yigal Amir, who assassinated the Prime Minister of Israel in the year 1955. Under the Israeli law although the prisoners are allowed to marry and have children, the convict was denied such right due to the heinous nature of the crime. Having married by proxy, the couple petitioned for the right to consummate their marriage and the wife was allowed a conjugal visit in late 2006. The Courts held that the

prisoners have these human rights. The said case underlines the severity of the crime to not be a disqualification in granting rights of procreation/consummation as the same are "human rights".

(73) Learned *Amicus Curiae* lastly referred to an academic paper written by Brenda V. Smith, **Analyzing Prison Sex: Reconciling Self- Expression with Safety**, Humans Rights Brief (2006) as it gives an overview of the issue 'Human Rights Norms and Prison Sex' across various jurisdictions. The article is extremely informative and states – *"Many other countries permit sexual expression in institutional settings, define these visit under the rubric of either intimate or conjugal visits, and permit prisoners to have intimate and other contact with spouses, partners and family. For example,* ***Brazil*** *has implemented a "conjugal visit," which allows prisoners to visit with family and friends without physical restriction, and an "intimate visit," which allows prisoners to receive visits from their partners or spouses in individual prison cells. In the* ***Czech Republic****, the Director of prison may allow married couples to visit in rooms specifically designated for intimate contact. It also allows prisoners to receive visits from four close relatives at a time. In* ***Spain****, inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours. Finally,* ***Denmark*** *has implemented a "prison leave" system for prisoners with sentences greater than five months. The leave can last from one day to an entire weekend. Denmark*

"see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and furthermore by keeping contact with relatives outside it is believed that fewer prisoners try to escape".

THE PUNJAB GOOD CONDUCT PRISONERS (TEMPORARY RELEASE) ACT, 1962 AND THE STATE POLICY, INSTRUCTIONS FOR THE RELEASE OF CONVICTS ON PAROLE, FURLOUGH ETC.

(74) Coming back to the Indian scenario, it is intriguing to note that it was as far back as in the year 1926 that the Punjab Good Conduct Prisoners' Probational Release Act, 1926 was enacted with the Object that those prisoners whose antecedents or conduct while under restraint give promise that they will justify privilege of conditional release, with opportunities of earning their own livelihood and "**of having their families with them**", could be released by the State Government, conditionally.

(75) The post-Independence era brought a new legislation known as the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962. The Act was legislated keeping in view the recommendations of Jail Reforms Committee, for the grant of 'leave' on 'furlough' to certain categories of long-term prisoners and also to release them on 'parole'. Section 3(1) of the Act enables the State Government to release the prisoners temporarily for a specified period, if it is satisfied that:-

> "(a) a member of the prisoner's family had died or is seriously ill; or

(b) the marriage of the prisoner's son or daughter is to be celebrated; or

(c) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence;

(d) it is desirable to do so for any other sufficient cause."

(76) In addition, Section 4 of the Act empowers the State Government to release prisoners temporarily, on 'furlough' subject to his good behavior and the quantum of sentence awarded or the nature of offence committed. Section 6 of the Act creates an embargo against the release of a prisoner, if it is likely to endanger the security of the State or the maintenance of public order. The Act also prescribes penal consequences if the prisoner fails to surrender on the expiry of release period. The neighbouring State of Haryana too has enacted the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 broadly with similar provisions. Both the States have formulated Statutory Rules and taken policy decisions to give effect to their respective Legislations on the temporary release of prisoners.

(77) It may be seen from the words, expressions and phrases used by the Legislature in Section 3 of the 1962 Act that the necessity to keep a prisoner in contact with his/her family; societal expectations of his/her presence on certain occasions and the augmentation of sources of livelihood of the prisoner's family have been manifestly acknowledged. Further, sub-clause (d) of Section 3(1) is of such a wide amplitude that it can encompass any reasonable cause as a sufficient ground for the temporary release of a prisoner.

(78) From the conjoint reading of the 1962 Act, Rules and the Punjab Government policy, it is seen that these benefits are extendable to all the prisoners, subject to their good behavior while in jail, except those involved in heinous offences or whose temporary release is likely to endanger State security or public peace and order.

(79) Undeniably, the existing Statutes, Rules or Policy do not contain any express or implied provision to facilitate conjugal life or the opportunity for procreation to a prisoner even if he/she has neither committed 'heinous offence' nor such convict endangers 'State security or public peace and order'. Even the Jail Reforms Committees constituted from time to time have failed to delineate on the issue. The landmarks like ***Sunil Batra-I & II*** or the later decisions could not opine whether such right(s), to be or not to be

read as a part of Article 21 of the Constitution, for no such issue was ever raised in those cases.

(80) The solitary purpose behind travelling into global case-law on the point in issue is to assimilate the broad consensus that has emerged on judicial platforms. It may be seen that from U.S. to Europe, the rights to conjugal visits, procreation or even artificial insemination facilities have been recognized only partially, being integrally embedded in Articles 8 & 12 of 'European Convention on Human Rights' or as the rights that are fundamental to the liberty and human dignity emanating from the Eighth Amendment, and further subject to the justifiable and proportionate restrictions.

(81) Reverting back to the question posed at the outset, there is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements.

(82) The right to conjugal visits or procreation or for that matter the right to secure artificial insemination as a supplement, are also, thus, subject to all those reasonable restrictions including public order, moral and ethical issues and budgetary constraints which ought to be read into the enjoyment of such like fundamental right within our Constitutional framework.

(83) Incarceration leads to suspension of some of the fundamental rights and is a legal impediment in giving effect to the right to conjugal visits or procreation. The said right inheres right to privacy, dignity, respect and free movements as well. Good behavior of the convict, unlikelihood of his/her endangering the State security, peace and harmony or the social and ethical order, financial and society security of the convict and his/her family etc. etc. are several other relevant factors to determine the extent and limitations for translating such a right into reality.

(84) An equally important and paramount issue is whether eligible convicts should have the facility of conjugal visits within the jail precincts or a provision like Section 3(1)(d) of the 1962 Act can be enlarged enough to serve as a regular measure for their temporary release on parole for such exclusive visits. The other question that needs simultaneous answer is as to whether these facilities be extended within or outside the precincts of jail to those hardened criminals also whose singular offence might have shaken the conscience of the society? The lack of unanimity in views even amongst the developed nations indeed keeps this riddle unsolved.

CONCLUSION

(85) India is a multi-linguistic, multi-cultural nation. Most importantly it has multitudinous religions, their sects and branches. India has its own traditions, customs, social values, inhibitions and taboos. Those who are well-equipped and abreast of

the facts and figures on the social, economic, educational, self-sustenance, gender free growth of the society or other related complexities, are the most suited to re-visit the legislative or executive policy regime and recommend the need-based changes keeping in view the futuristic priorities towards national cohesion. A society which is currently involved in academic and intellectual debates on 'gay-rights' or the recognition of 'third-gender', cannot shy away nor can it keep concealed under the carpet the pragmatic concept of conjugal visits of the jail inmates. To say it differently, time has come and before it is too late, the stake-holders must sit together and deliberate upon this crucial subject and take a holistic view.

(86) The criminologists have delineated the aim behind 'punishment' and have enlisted several achievable objects like retribution, prevention, protection of the public, reformation and rehabilitation of convicts. The growing trend is for reformation and rehabilitation, prevent recidivism and to encourage re-socialisation through the fostering of personal responsibility. The sentence period is thus divided in such a manner that in the early days of sentence, there is emphasis on punishment or retribution but the net-end goal to be achieved is re-socialisation. The revised concept of punishment has found universal acceptability amongst all civic societies who believe in governance by rule of law. The significance of provisions like 'parole', 'furlough' or 'temporary release' should,

therefore, be mirrored as the backbone of penal jurisprudence achievable through reformative concepts. If these age-old reprieving facilities are refurbished with the latest tools and designs, there can possibly be no reason as to why the authorities should shy away from releasing the convicts temporarily on 'parole', 'furlough' etc. for conjugal visitations/procreation.

(87) The legislative or executive, all policies, ought to remain vibrant and dynamic as the static or stale concepts cannot address all contemporary issues. Unfortunately, the in vogue executive policies on the rights of jail inmates are unevenly loaded with the pre-Independence mindset. The Punjab Jail Manual narrates the powers of jail staff and the obligations of convicts in such a tell-tale manner that the 'prisons' can be likened to the 'chambers of torture', as if Article 21 of the Constitution and dozens of human rights are still alien to prison-residents.

(88) Jail reforms have been the priorities of none. A little improvement in guaranteeing basic human rights, though still far from satisfactory, has happened with the tireless efforts of the Indian judiciary and a constant monitoring through jail inspections by the District and High Courts with due help from the public spirited organizations and individuals from the civil society. None of the serious issues like overcrowding, lack of clean and sufficient toilets, requisite and healthy food, medical facilities, tele-communication facilities or re-orientation have been addressed nor

there appears to be any commitment of the executive in this direction. There are no comprehensive plans for rehabilitation and re-settlement of the convicts on their release and many of them step out of a dark hole to fall into a darker ditch.

(89) There can be no quarrel and as rightly observed by AP High Court in ***Ms.G. Bhargava*** (supra) also that the issues like facilitation of conjugal visits of convicts for procreation essentially fall within the domain of policy makers and it has to be left to them to evolve an effective mechanism whether by way of legislation or through executive decision. However, what cannot be overlooked is that the convicts or other jail inmates are a class of persons who have been separated from society by the Courts in performance of their sovereign duties. Jails and other Correctional Centres are the extended limbs of justice delivery system as a measure for the enforcement of judicial verdicts. The management, conditions of living and future responsibilities of the inmates inside the jails etc., cannot be left to the sole desire or discretion of the executive. It is rather the responsibility of Courts to ensure that the rights of every resident of prison(s) or correctional home(s) are duly protected and irrespective of the financial constraints which is the oft-offered explanation by a State, the conditions of living, re-orientation or rehabilitation of the convicts is given effect under the direct supervision, command and control of the Courts.

(90) The directions for re-visiting the legislative or executive policy regime which are implicit in the observations made hereinabove are, however, subject to the caveat and conditions like -

(i) the gravity of the offence committed by a convict and its likely effect on the society in the event of temporary release;

(i) likelihood of absconding in the case of offenders of heinous crimes;

(ii) good behavior while in jail;

(iii) duration of the actual sentence already undergone;

(iv) the expected date of release on completion of a tenure sentence;

(v) pre-conviction conduct of the convict; etc. etc.

(91) Owing to the neglected and limited infrastructure, causing overcrowding, lack of specialized services and above all the prevailing social norms and the societal expectations, it may not be conducive to create space for conjugal visits within the existing prisons. It can nevertheless be introduced on trial basis in Model Jails or Open Air-Free Jails in such a manner that the independent family units of the 'convicts with good behavior' may live like in a small hamlet. For that purpose, as of now, a team comprising (i) District & Sessions Judge, (ii) Deputy Commissioner (iii) Superintendent of Jails can identify the places where such like practices can be introduced to begin with.

(92) Since multiple inputs from the social scientists, Criminologists, Jail Administration and Judiciary along with budget allocation for the requisite infrastructures, will have a direct bearing on the policy formulation, it is not expedient or desirable for this Court to direct the actual implementation of its directions or observation(s) in a time-bound manner. The State Government shall in consultation with the High Court constitute Jail Reforms Committee to deal with different aspects of jail reforms keeping in view the observations made in this order and on submission of report by such Committee within one year from the date of its constitution, the State shall admit to the High Court the time-frame within which those recommendations shall be given effect.

(93) It is directed that until the State of Punjab effectively addresses the issues either by way of appropriate legislation or through policy framework, the expression "any other sufficient cause" contained in Section 3(1)(d) of the 1962 Act shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient ground for the purpose of his/her temporary release on 'parole' or 'furlough' though subject to all those conditions as are prescribed under the Statute.

(94) Having held that, this Court cannot be oblivious of the fact that the cited decisions of various Courts across the globe voicing their opinion on the right of conjugal visits or artificial insemination of a convict may have some persuasive value in

general but the jurisprudential principles expounded therein do not advance the petitioners' claim being vividly distinguishable, for the reasons that (i) the society, its fabric and pragmatic approach to allow or disallow certain events to happen in the case in hand are laid on entirely different foundations and thus no common pyramid can be structured; (ii) the circumstances which led to the petitioners' incarceration are far grave in nature and different from those where one of the spouse was totally innocent and possessory of all human rights without any curtailment unlike the instant case where both of them are convicts and undergoing death sentence and life conviction, respectively; (iii) even the most liberal view taken by some of the European or American Courts would not justify the claim put forth by the petitioners; and (iv) the existing infrastructure and overall environment do not support emergent measures; I, therefore, decline to issue any direction with reference to the claim put-forth by the petitioners.

(95) For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-

i. **Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?**

Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the

ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

ii. **Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?**

The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict between the right to procreate and incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

iii. **Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?**

'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

iv. **If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?**

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State.

(96) In the light of the above discussion, the instant writ petition is disposed of with the following directions:-

i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. the Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law

and security, adverse social impact and multiple disadvantages to their child;

ix. the Jail Reforms Committee shall make its recommendations within *one year* after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

(97) Since the scope of this petition was enlarged in the larger public interest beyond the relief sought by the petitioners and the issues raised or answered are equally relevant keeping in view their *pari materia* Statute(s) or policies, it is directed that the directions issued hereinabove shall apply *mutatis mutandis* to the State of Haryana and Union Territory of Chandigarh as well.

(98) The petitioners – husband and wife, who are undergoing death sentence and life imprisonment, respectively, are not found entitled to any relief, as prayed for by them, for the reasons

assigned in paras 91, 92 and especially in para 94 of this order. Their prayer is accordingly declined.

(99) Before parting for the day, I appreciate the outstanding and dispassionate assistance to this Court rendered by learned *Amicus Curiae* Shri Anupam Gupta, Senior Advocate, to whom also the office is directed to send a copy of this order.

(100) A copy of this order be also sent to the Chief Secretary to Government of Haryana and Advisor to the Administrator, UT Chandigarh for their information and necessary action.

(101) ***Dasti***.

29.05.2014 **(Surya Kant)**
vishal shonkar **Judge**

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