

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 10.03.2015

CRWP No.665 of 2014

Pardeep Kumar

....Petitioner

Vs.

Narcotic Control Bureau, Chandigarh

.....Respondent

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MRS. JUSTICE LISA GILL**

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?

Present: Mr. Sukant Gupta, Addl. P.P., for the UT, Chandigarh.

Ms. Manjri Nehru Kaul, Addl. AG, Punjab.

Mr. Vivek Saini, AAG, Haryana.

HEMANT GUPTA, J.

During the annual inspection of District Jail, Rupnagar, convict Pardeep Kumar son of Bahadur Singh resident of Village Kasol, undergoing sentence for an offence punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985, submitted a representation before the Administrative Judge complaining against the denial of parole to him. Such representation was ordered to be treated as a Criminal Writ Petition.

Initially, this Court issued notice to the Union Territory, Chandigarh as well as the Narcotic Control Bureau, Chandigarh. However, later notice was ordered to be issued to the State of Punjab. On 04.07.2014, it was found that a humble *beeri* is the reason for denial of parole to convict

Pardeep Kumar, but the Bench is unable to discern any provision in the Punjab Jail Manual that a *beer* is a prohibited article.

Thereafter, on 11.07.2014, an affidavit has been filed on behalf of the Superintendent, District Jail, Rupnagar, wherein it has been pointed out that as per para No.540(2) of the Punjab Jail Manual, tobacco and all other substances except cigarettes and biddies are prohibited articles. It has been also pointed out that during visit of the District & Sessions Judge, Rupnagar on 27.07.2009, it was found that biddies and cigarettes were being sold in jail canteen prior to 13.07.2009. Such fact was also counter checked from the stock register maintained in the canteen. It was found that despite the order of the Hon'ble Supreme Court, the biddies and cigarettes were being sold in the jail premises, therefore, the Jail Superintendent stopped the sale of biddies and cigarettes in jail canteen. However, the petitioner was caught possessing bundles of biddies & tobacco during a search inside jail premises on 08.10.2013. Thus, the Superintendent, Jail, ordered the punishment of 30 days separate confinement to the petitioner, as tobacco i.e. bundles of biddies is prohibited article in jail premises. Such order was placed for appraisal before the District & Sessions Judge, Rupnagar on 26.10.2013. It has been also pointed out that as per Punjab Good Conduct Prisoners (Temporary Release) Act, 1962, a convict can only be granted parole leave if he/she maintains good conduct inside the jail on continuous basis. Since the petitioner has broken the code of good conduct by keeping the prohibited articles i.e. bundles of *beers* and tobacco in his possession, he would be eligible for release on parole after the expiry of one year from the date of commission of offence, as no parole/furlough leave could be granted to any such prisoner within this period.

However, after considering such affidavit, this Court found that in the absence of any prohibition regarding possession or consumption of cigarettes and biddies, as discernible from Clause 540 of Chapter XVII of the Punjab Jail Manual, punishment imposed upon the applicant, may be a nullity. The State of Punjab was called upon to consider; whether Clause 540 of Chapter XVII requires amendment to prohibit consumption of cigarettes and biddies etc. in jail. On 11.08.2014, it was found that Para 547 of Chapter XVIII of the Jail Manual provides that a prisoner, who has committed any of the offences enumerated in the preceding paragraph, shall be put up before the Deputy Superintendent by the Executive Officer In-Charge of the prisoner alongwith his history ticket in which the offence committed is recorded. The Deputy Superintendent shall hold a preliminary enquiry, record his own observations and present the prisoner alongwith his history ticket, witnesses and other relevant record before the Superintendent, who shall hold an enquiry and punish for such offences. The Court noticed the judgment of learned Single Bench of this Court in Shishpal Singh Vs. Superintendent District Jail, 1994 (3) RCR 516, wherein it has been held that punishment can be awarded only after examining the witnesses and giving an opportunity to the delinquent prisoner to cross-examine the witnesses alongwith an opportunity to lead evidence in defence. It has also been held that judicial appraisal of punishment cannot cure inherent defect of failure to grant requisite opportunity to the delinquent prisoner.

Subsequently, this Court noticed that the procedure prescribed and adopted for imposing punishments for offences in prisons, is violative of the rights of a convict, as it does not disclose a fair and transparent procedure. The States of Punjab, Haryana and UT, Chandigarh were directed to file their respective response.

The Chandigarh Administration in its reply pointed out that the Punjab Jail Manual has been amended from time to time by the Legislature, as and when the need so arose after the Constitution of India came into force. It was also stated that the Chandigarh Administration, after careful debate and deliberation and taking a holistic view of the Punjab Jail Manual and its cognate Acts and provisions, has come to the view that the provisions of the Punjab Jail Manual read with the Prisons Act, 1894 (for short 'the Act'), do not prima facie require any changes or amendments, as the same are very well serving the objective of proper and effective jail administration including the maintenance and discipline, law and order in the jail(s) under its jurisdiction.

In a separate reply filed by Mr. Jagjit Singh, Inspector General of Prisons, Haryana on behalf of the State of Haryana, it is pointed out that all cases of punishment by the Jail Superintendent are submitted before the concerned District & Sessions Judge during his jail visit and the District & Sessions Judge after examining the record and giving the opportunity to hear the convict in person in the jail, passes the order for judicial appraisal. Such procedure is said to be followed in letter & spirit in all the jails in Haryana. It is further stated that where convict is aggrieved by the orders of the Superintendent, Jail, the judicial appraisal may be made mandatory. It is pointed out that other alternative could be that if a convict is aggrieved against the punishment imposed upon him by the Superintendent, Jail, he may file an appeal before the Director General of Prisons, Haryana in writing and the Director General of Prisons, Haryana or any other officer authorized by him or by State Government, not below the rank of Additional Inspector General of Prisons, Haryana, may pass such orders only after taking into consideration of all facts and may also hearing the convict

personally at the time of his visit in the Jail and may pass such orders in appeal, as he may deem proper.

In the reply filed by the Inspector General of Prisons, Punjab on behalf of the State of Punjab, it is pointed out that the Department of Home (Jails), Government of Punjab has issued mandatory instructions dated 01.10.2014 to all the Superintendents of Jails to follow the same while awarding punishment for jail offence committed by the prisoner. It is also averred that the request had been made to the Principal Secretary (Jails), Government of Punjab for making necessary amendments by giving fair opportunity to the prisoner, who has committed jail offence in Para 547 of the Punjab Jail Manual, which deals with judicial appraisal of jail offence committed by the prisoner. It is also mentioned that a Committee has been constituted to suggest amendments in the Punjab Jail Manual on 01.10.2014.

We have heard learned counsel representing the States as well as the Union Territory, Chandigarh. The rights of the prisoners, facilities and privileges have been subject matter of consideration of this Court and of Hon'ble Supreme Court. Some of the judgments relevant are mentioned hereunder.

In CWP No.15041 of 2007 titled 'Court on its own motion Vs. State of Punjab', this Court has taken *suo moto* notice on a complaint made by the prisoners of Central Jail, Ludhiana. In the said case, vide order dated 30.05.2009, while observing that Jail Manual is a good guide for jail administration, the Bench feel that it needs a re-look, keeping in view the provisions made in Model Prison Manual. The Division Bench observed as under:

“No doubt the Jail Manual is a good guide for jail administration, however, we feel that it needs a re-look, keeping in

view the provisions made in Model Prison Manual. In view of order passed by us on 31.7.2006, in CWP No.10791 of 2002, all the three States are under an obligation to implement recommendations made by the National Human Rights Commission regarding mentally ill prisoners/ under trials. As on date, we can reasonably expect that the States are bound to adhere to and comply with the parameters for Jail Administration as laid down in Jail Manuals (till its modification), which is a very exhaustive document which deal with every aspect of Jail Administration. The fact all the same remains that the reports submitted before us indicate in no uncertain terms that there is complete violation of the provisions of the Jail Manual so far as administration and conditions in the jails in both the States are concerned.

As to how the situation can be improved, the rights of the inmates protected and a reformative approach implemented is the next question. That aspect can be taken care of by appointing a Committee each for the two States comprising three eminent citizens, having expertise in their own fields, to look into the problems as indicated by us in earlier part of this order. The Committee for the State of Punjab shall consist of:

- (a) Shri Justice (Retd.) Amar Dutt
- (b) Shri Md.Izhar Alam, IPS (Retd.)
House No.1476, Sector 42 Chandigarh
- (c) Shri G.P.S.Shahi, IAS (Retd.)
House No.700, Sector 11-B, Chandigarh

The Committee for the State of Haryana shall consist of:

- (a) Shri Justice (Retd.) Jai Singh Sekhon
- (b) Shri V.K.Kapoor, IPS (Retd.)
House No.836, Sector 16, Chandigarh
- (c) Shri R.R.Banswal, IAS (Retd.)
House No.303, Sector 7, Panchkula

The Committees shall also examine as to what extent the recommendations made by the National Human Rights Commission regarding mentally ill prisoners have been implemented by both the States. Suggestions be also made as to how recommendations made in Model Prison Manual can be incorporated in the Punjab Jail Manual 1996. The Committees are requested to suggest amendments in that regard to make the Punjab Jail Manual 1996 an effective tool, to run the Jail Administration. The Committees are also requested to prepare and submit specific reports with regard to the ten(10) major problems indicated by us in the earlier part of this order and to

suggest measures to improve the conditions in the Jails. The Committee shall, by reference to the provisions of Jail Manual, indicate the deficiencies in the jail administration and in what manner those deficiencies can be removed. The Committee is further expected to look into the problems of availability of proper accommodation for inmates, over crowding in jails and how to remove it. Issues regarding neglect of health and hygiene, food and clothing and availability of medical facilities, especially for mental ill prisoners, shall also be examined by the Committees.

The Committees shall also look into the possibility of providing various Schemes to encourage the inmates so that they may acquire technical knowledge or proficiency in different trades to sustain themselves when they come out from jails. The work/ labour which the inmates do in jails and wages to be paid to them shall also be examined. The Committee(s) shall also recommend to the Government to release funds for early implementation of various improvement Schemes, including construction of new jails. In the first instance, the Committee(s) shall visit all the District/ Central Jails situated in both the States and submit its report within a period of five months from the date of receipt of a copy of this order.

Both the States of Punjab and Haryana are directed to ensure all help and assistance to the members of the Committee. Requisite record be produced before them. Their visits to the Jails in both the States be organized. The Committee shall be provided with transport facility as per status of the members. The Committee(s) shall be provided two Cars (good condition) each, sufficient staff to assist the Committee(s), one officer not below the rank of Assistant Inspector General of Police (Prison) shall be deputed with both the Committees to assist its members. The members of the Committee(s) shall be entitled to get an honorarium of Rs.30,000/- each, per month. For their visits, they shall be entitled to get Daily Allowance, on the same pattern and scale, which they were getting when they were in service. The State shall make arrangement, free of cost, in State Circuit/ Guest Houses for stay of the members of the Committee(s) and its staff.”

In another writ petition i.e. CWP No.4188 of 2008 titled ‘Bittu

Vs. State of Punjab & others’ filed in public interest directing the States to

ensure a tobacco smoke free environment in various jails, this Court passed the following order on 07.08.2009:

“This petition has been filed in public interest. It prays for a mandamus directing the respondents to ensure a tobacco smoke free environment in various jails in the States of Punjab, Haryana and U.T.Chandigarh.

At the hearing before us today Mr. Navkiran Singh, drew our attention to the orders passed by this Court on May 30, 2009 in CWP No.15041 of 2007 by which this Court has appointed a Committee each for the States of Punjab and Haryana to examine and make recommendations among others on the following specific points concerning management of the Jails in the two states.

1. Old and dilapidated buildings;
2. Over crowding;
3. Delay in trial;
4. Neglect of health and hygiene;
5. Insufficient food and clothing;
6. Insufficient medical facilities etc.;
7. Lack of facilities to treat and rehabilitate mentally ill prisoners/under trials;
8. Implementation of recommendations made by National Human Rights Commission regarding care and treatment of mentally challenged prisoners who are unable to face trials on account of their incapacity;
9. How to deal with the mentally ill prisoners who have undergone period of sentence minimum prescribed/most part of it, for an offence with which they were charged; and
10. Need to re-look into the provisions of Punjab Jail Manual taking note of recommendations made in Model Prison Manual.

Mr. Singh submits that neglect of health and hygiene appearing at item No.4 above is wide enough to include examination of the issues that have been raised by the petitioner in this petition. He urged that non-smokers confined to the jails are becoming passive victims of smoking which needs

examination whether smoking should at all be permitted and if it can be permitted, the jail authorities ought to consider for non-smoking zone where the non-smokers can spend their time without any hazard.

Mr. Khosla, learned counsel appearing for the respondents submits that since the Committees constituted by this Court are examining various issues concerning reforms in to the management in the jails. The issue whether smoking should be forbidden and so far whether nonsmoking zones can be created within the jails can also be examined by the Committee for a suitable recommendation to be made to this Court.

In the circumstances, therefore, we are not called upon to examine on merits the issue raised for our determination in this petition. With the consent of the parties, we direct that the questions raised in this writ petition shall also stand referred to the Committee for an appropriate recommendation whether in the nature of amendments in the Jail Manual or other steps considered appropriate to save non-smokers from the hazards of smoking. A copy of the writ petition together with a copy of this order shall be forwarded by the Registry to both the Committees for appropriate action at their ends. With the above observation, the writ petition is disposed off.”

It was, thereafter, writ petition i.e. CWP No.15041 of 2007 constituting a Jail Reforms Committee was disposed of on 21.03.2012 in the light of the order of the same date passed in CWP No.11478 of 2009 titled ‘Court on its own motion Vs. State of Punjab etc.’. The said writ petition was initiated on the basis of complaint alleging existence of serious anomalies and malpractices prevailing in the Bhatinda Jail. The Court observed as under:

“The Jail Reforms Committees constituted by the Court vide order dated 30.05.2009 in respect of both the States of Punjab and Haryana have submitted their respective reports. The said reports which are fairly exhaustive deal with three principal issues, namely, over-crowding in jails, lack of medical and other facilities in the jails

and availability of drugs and other intoxicants and other facilities in the jails on payment. The orders passed by this Court from time to time indicate that both the States of Punjab and Haryana have accepted the reports of the Jail Reforms Committees and the two States are committed to the implementation of the recommendations of the Committees. By orders passed this Court had permitted the two States to continue with the implementation of the recommendations of the Committees in all such of the jails of the two States where such implementation is required.

The implementation of the reports of the Committees by the two States would be a continuous process, particularly in so far as the long term measures are concerned, for example setting up of new jails; provision for additional facilities; improvement of existing facilities and taking of steps to counter the menace of various illegalities that are prevalent in the jails. Short term measures, if any, would, however, require implementation on immediate basis.

As the subject matter of the two writ petitions has been gone into by the Jails Reforms Committees appointed by the Court and recommendations have been made suggesting ways and means to improve the conditions of the jails in different spheres, we are of the view that both these writ petitions will not call for any order of the Court except that the process of implementation of the recommendations of the Jails Reforms Committees be undertaken in the right earnest. The short term measures be taken immediately and the long term measures, which involve a continuous process of implementation be continued in the right earnest. In so far as the results of the steps taken by the two States are concerned, it will be manifest itself in the conditions of the jails which may be observed from time to time by various authorities including periodic visits by the Hon'ble Judges of this Court as well as visits during the time of annual inspections. It is made clear that if any adverse report with regard to any matter pertaining to any jail is received by this Court, the same, in the absence of any cogent explanation, will be considered to be a violation of the present order and the several orders passed by this Court from time to time."

The above said orders relate to reforms in the jails, but the question in respect of the punishments to the inmates has not been examined.

Firstly, we shall examine the provisions dealing with the jail punishments

contained in the Punjab Jail Manual. The Punjab Jail Manual was applicable in the States of Punjab and Haryana as well as in the Union Territory of Chandigarh. In the State of Punjab, Jail Manual has been revised, but the basic provisions are same except change in paragraph numbers. For the facility of reference, the provisions as are applicable in the State of Punjab are enumerated. Chapter 18 of the Punjab Jail Manual deals with offences and punishment. Para 543 is, in fact, reproduction of Section 45 of the Act. Clause (12) of Section 45 of the Act deals with receiving, possessing or transferring any prohibited article. In terms of Section 59 of the said Act, Rules have been framed, which includes secreting any article whatever (Clause ii). It is para 547, which deals with punishments to be imposed by the Deputy Superintendent. Section 46 of the Act, as also reproduced in Para 547 of Punjab Jail Manual, reads as under:

Prisons Act, 1894

“46. **Punishment of such offences** - The Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence by-

(1) a formal warning:

Explanation— A formal warning shall mean a warning personally addressed to a prisoner by the Superintendent and recorded in the punishment book and on the prisoner’s history-ticket;

(2) change of labour to some more irksome or severe form for such period as may be prescribed by rules made by the State Government;

(3) hard labour for a period not exceeding seven days in the case of convicted criminal prisoners not sentenced to rigorous imprisonment;

(4) such loss of privileges admissible under the remission system for the time being in force as may be prescribed by rules made by the State Government;

¹(4) (a) *temporary forfeiture of class, grade or prison privileges,*

(b) *temporary or permanent reduction from a higher to a lower class or grade,*

(c) *such loss of privileges admissible under the remission system for the time being in force as may be prescribed by rules made by the State Government.*

(5) the substitution of gunny or other coarse fabric for clothing of other material, not being woollen, for a period which shall not exceed three months;

(6) imposition of handcuffs of such pattern and weight, in such manner and for such period, as may be prescribed by rules made by the State Government;

(7) imposition of fetters of such pattern and weight, in such manner and for such period, as may be prescribed by rules made by the State Government;

(8) separate confinement for any period not exceeding three months;

Explanation— Separate confinement means such confinement with or without labour as secludes a prisoner from communication with, but not from sight of, other prisoners, and allows him not less than one hour's exercise per diem and to have his meals in association with one or more other prisoners;

(9) penal diet, that is, restriction of diet in such manner and subject to such conditions regarding labour as may be prescribed by the State Government:

Provided that such restriction of diet shall in no case be applied to a prisoner for more than ninety-six consecutive hours, and shall not be repeated except for a fresh offence nor until after an interval of one week;

(10) cellular confinement for any period not exceeding fourteen days:

Provided that after each period of cellular confinement an interval of not less duration than such period must elapse

before the prisoner is again sentenced to cellular or solitary confinement:

Explanation— Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with, but not from sight of, other prisoners;

(11) penal diet as defined in clause (9) combined with cellular confinement;

(12) whipping, provided that the number of stripes shall not exceed thirty:

Provided that nothing in this section shall render any female or civil prisoner liable to the imposition of any form of handcuffs or fetters, or to whipping.”

In Haryana, there is ‘The Haryana Good Conduct Prisoners (Temporary Release) Act, 1988’. The said Act has been amended vide Haryana Act No.21 of 2013 to read as ‘The Haryana Good Conduct Prisoners (Temporary Release) Amendment Act, 2013’ (for short ‘the Haryana Amendment Act’). Clause 2(aa) inserted by virtue of the said Haryana Amendment Act includes a person, who has been detected of using cell phone or in possession of cell phone/SIM card inside the jail premises (*clause (iv)*).

In Murli S. Deora Vs. Union of India & others (2001) 8 SCC 765, the Hon’ble Supreme Court observed as under:

“2. Fundamental right guaranteed under Article 21 of Constitution of India, inter alia, provides that none shall be deprived of his life without due process of law. Then - why a non-smoker should be afflicted by various diseases including lung cancer or of heart, only because he is required to go to public places? Is it not indirectly depriving of his life without any process of law? The answer is obviously - ‘yes’. Undisputedly, smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. In any case, there is no reason to compel non-smokers to be helpless victims of air pollution.

6. In the petition, it is pointed out that tobacco smoking contains harmful contents including nicotine, tar, potential carcinogens, carbon monoxide, irritants, asphyxiates and smoke particles which are the cause of many diseases including the cancer. It is alleged that three million people die every year as a result of illness related to the use of tobacco products of which one million people belong to developing countries like India. The World Health Organisation is stated to have estimated that tobacco related deaths can rise to a whopping seven million per year. According to this organisation, in the last half century in the developing countries alone smoking has killed more than sixty million people. Tobacco smoking also adds to the air pollution. Besides cancer, tobacco smoking is responsible for various other fatal diseases to the mankind.

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8. Learned Attorney General for India submits and all the counsel appearing for the other parties agree that considering the adverse effect of smoking in public places, it would be in the interests of the citizens to prohibit the smoking in public places till the statutory provision is made and implemented by the legislative enactment. The persons not indulging in smoking cannot be compelled to or subjected to passive smoking on account of acts of the smokers.”

The Hon’ble Supreme Court, thus, prohibited smoking in public places such as Auditoriums, Hospital Buildings, Health Institutions, Educational Institutions, Libraries, Court buildings, Public offices and Public conveyance, including railways. It is, thereafter, to prohibit consumption of cigarettes and other tobacco products, which are injurious to health, with a view to achieving improvement of public health in general, as enshrined in Article 47 of the Constitution, ‘The Cigarettes and other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003’ (for short ‘the Tobacco Act’) was enacted in pursuance of 39th and 43rd World Health Assemblies in which the World Health Organization (WHO) urged its member States including India to consider in their tobacco control strategies, plans for legislation and other effective measures for protecting their citizens

with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions.

The 'cigarette' as defined in Section 3(b) of the Tobacco Act means any roll of tobacco wrapped in paper or in any other substance not containing tobacco. Similarly, *beeri* is a thin cigarette filled with unprocessed tobacco flakes and wrapped in tendu leaf tied with a string at one end. In terms of Section 3 (n) of the said Act, 'smoking' means smoking of tobacco in any form whether in the form of cigarette, cigar, beedis or otherwise with the aid of a pipe, wrapper or any other instruments. The smoking in public place is prohibited in terms of Section 4 of the Tobacco Act. The 'public place' is defined in Section 3 (l) of the said Act to mean any place to which the public have access, whether as of right or not, and includes auditorium, hospital buildings, railways waiting room, amusement centres, restaurants, public offices, court buildings, educational institutions, libraries, public conveyances and the like which are visited by general public, but does not include any open space.

The primary issue, which is required to be examined in the present petition, is whether; Jail is a public place in which smoking of a cigarette including *beeri* is prohibited by virtue of the Tobacco Act. We find that the resolution of the World Health Organization is to ensure effective protection to the non-smokers from involuntary exposure to tobacco smoke. Still further, the definition in Section 3 is to have the meaning unless the context otherwise requires. The 'public place' as defined in Section 3(l) of the said Act is inclusive definition to mean any place, where the public have access, whether as of right or not, but does not include open space. The Jail though is out of bound for a free citizen to walk in, but it is a place where large numbers of inmates are confined for awaiting their trial or after

conviction apart from posting of equally large number of security personnel. The inmates can have both smokers and non-smokers. Smoking in jail would lead to involuntary exposure of smoking to the non-smokers. Since large numbers of inmates are confined in the four walls of a building, it is a public place though the confinement is meant for the persons under the authority of law. It is not an open space, which alone is excluded from the definition of a public place. Therefore, for the purposes of the Tobacco Act, the public place would include a jail, where smoking is prohibited. Thus, in terms of Section 4 of the Tobacco Act, the smoking is deemed to be prohibited in jail.

Section 4 of the Tobacco Act has a proviso, which contemplates that in a hotel having thirty rooms or a restaurant having capacity of thirty persons or more, a separate provision for smoking area or space ‘may be’ made. For the facility of reference, Section 4 of the Tobacco Act reads as under:

“4. Prohibition of smoking in a public place – No person shall smoke in any public place;

Provided that in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in the airports, a separate provision for smoking area or space may be made.”

A perusal of Section 4 of the Tobacco Act would show that it is for the hotel or the restaurant to make a provision for smoking area. It is not mandatory. The mandate of law is that no person shall smoke in the public place. Therefore, on the basis of proviso, none of the inmates can claim any right to smoke in the jail.

A perusal of the affidavit dated 11.07.2014 shows that *beeris* and cigarettes were being sold in Jail prior to 13.07.2009, which is apparent from the stock register attached with the affidavit. The District & Sessions

Judge found that sale of *beeris* and cigarettes in jail contravenes the order of

the Hon'ble Supreme Court though by that time, the Cigarettes and other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 was enacted.

Therefore, in the light of the Hon'ble Supreme Court order in Murli S. Deora's case (supra) as well as keeping in view the object of the Tobacco Act, we find that sale of cigarette and *beeris* and smoking thereof in a public place i.e. Jail has rightly been prohibited, though, it is required to be regulated in such a manner, as is suggested earlier.

Now coming to the rights of the prisoners, the same have been examined by a Constitutional Bench in a judgment reported as Sunil Batra Vs. Delhi Administration & others (1978) 4 SCC 494 holding that the convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed. The Bench struck down the provisions to keep the prisoner's sentence to death in solitary confinement. The Court found that the power to confine in iron can be constitutionalised only if it is hemmed in with severe restrictions. The discretion vesting in the Superintendent to require a prisoner to wear fetters has to be exercised with extreme restraint. The discretion has to be based on an objective assessment of facts and the facts themselves must have close relevance to safe custody. Only in cases of extreme emergency, the same can be exercised only after giving notice and hearing in an unbiased manner. The Court held to the following effect:

“171. Such a power, except in cases of extreme urgency difficult to imagine in a grim prison setting where armed guards are obviously available at instant notice and watch towers vigilantly observe (save in case of sudden riot or mutiny extra-ordinarily), can be exercised only after giving notice and hearing and in an unbiased manner. May be that the hearing is summary, may be that the communication of the grounds is brief, maybe that oral examination does not always

take place; even so natural justice, in its essentials, must be adhered to for reasons we have explained in Gill and Maneka Gandhi.

172. I regard as essential that reasons must be assigned for such harsh action as is contemplated and such reasons must be recorded in the history ticket of the prisoner as well as in the journal. Since the reasons are intended to enable the Petitioner to challenge, if aggrieved, the record must be in the language of the petitioner or of the A region, and not in English as is being done now.

173. There must be special reasons of an extraordinary or urgent character when fetters are fastened on an unconvicted prisoner. Those substantial reasons must be recorded and its copy furnished to the prisoner. Rule 430 commands that this be done. Even otherwise, the procedural panacea of giving specific reasons (not routine chants) has a wholesome restraining effect. And the constitutional survival of Section 56 depends on the formula of reasonableness.

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177. Another remedy also may be visualised as feasible. The visitors of jails include senior executive officers of the Division, Sessions Judges and District Magistrates (see rule 47). This is ordinarily an All India pattern. The duties of official visitors include satisfying themselves that the provisions of the Prisons Act, rules, regulations, orders and directions are duly observed. Undoubtedly, the proper adherence to Section 56 and the related rules falls within the purview of 'rule' 49. 'Rule' S 3 states that all visitors shall have the opportunity of observing the state of jail, its management and every prisoner confined therein. The visitors, official and non-official, have power to call for and inspect jail records. 'Rule' 53 and 53B are pregnant provisions. We read humane amplitude into this group of 'rules' so as to constitutionalise the statutory prescriptions. They spell out a duty on the part of the visitors and the Inspector General of Prisons, to hear appeals or complaints from the prisoners regarding irons forced on them. The reasonableness of the restriction being the constitutional badge, the only way we can sustain Section 56 of the Act is to imply in the broad group of provisions external examinership, immediate review and cutting short of the iron regime to the briefest spell."

The judgment ended with the following words:

"197B. (1) Section 56 must be tamed and trimmed by the rule of law and shall not turn dangerous by making the Prison 'brass' an

imperium in imperio. The Superintendent's power shall be pruned and his discretion bridled in the manner indicated.

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(6) The discretion to impose 'irons' is subject to quasi-judicial oversight, even if purportedly imposed for reasons of security.

(7) A previous hearing, minimal may be, shall be afforded to the victims. In exceptional cases, the hearing may be soon after. The rule in Gill's case and Maneka Gandhi v. Union of India (1978) 1 SCR 218 gives the guidelines.

(8) The grounds for 'fetters' shall be given to the victim. And when the decision to fether is made, the reasons shall be recorded in the journal and in the history ticket of the prisoner in the State language. If he is a stranger to that language it shall be communicated to him as far as possible, in his language. This applies to cases as much of prison punishment as of 'safety' fetters.

(9) Absent provision for independent review of preventive and punitive action, for discipline or security, such action shall be invalid as arbitrary and unfair and unreasonable. The prison officials will then be liable civilly and criminally for hurt to the person of the prisoner. The State will urgently set up or strengthen the necessary infrastructure and process in this behalf - it already exists in embryo in the Act.

(10) Legal aid shall be given to prisoners to seek justice from prison authorities, and, if need be, to challenge the decision in court - in cases where they are too poor to secure on their own. If lawyer's services. are not given, the decisional process becomes unfair and unreasonable, especially because the rule of law perishes for a disabled prisoner if counsel is unapproachable and beyond purchase. By and large, prisoners are poor, lacking legal literacy, under the trembling control of the jailor, at his mercy as it were, and unable to meet relations or friends to take legal action. Where a remedy is all, but dead the right lives; only in print. Article 39 A is relevant in the context. Article 19 will be violated in such a case as the process will be unreasonable. Article 21 will be infringed since the procedure is unfair and is arbitrary. In Maneka Gandhi the rule has been stated beyond mistake.

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(12) The prolonged continuance of 'irons', as a punitive or preventive step, shall be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who

shall briefly hear the victim and record reasons. They are ex-officio visitors of most central prisons.

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199. We find many objectionable survivals in the Prison Manual like whipping and allergy to 'Gandhi Cap'. Better classification for 'Europeans' is still in the book! I hope that Prison Reform will receive prompt attention as the higher political echelons in the country know the need and we may not be called upon to pronounce on the inalienable minima of human rights that our constitutional order holds dear. It is noteworthy that, as pointed out in *Furman v. Georgia* 33 L Ed 22d. 346 with reference to death sentence, by Justices Douglas and Marshall, the more painful prison cruelties are often imposed on the socioeconomic weak and the militant minorities. Our prisons, both in the matter of classification for treatment and in the matter of preventive or punitive imposts, face the same criticism. To thoughtful sociologists it seems evident that prison severities are visited mostly on agitators, dissenters, protesters, proletarians and weaker sections. Moreover, punitive 'vested interest' sometimes wears 'preventive' veils, when challenged and we cannot wish away discretionary injustice by burying our heads in the sands of incredible credulity. Courts must be astute enough to end these 'crimes' against criminals by correctional interpretation."

In Sunil Batra (II) Vs. Delhi Administration (1980) 3 SCC 488,

a three Judges' Bench again issued the following directions:

"79. What we have stated and directed constitute the mandatory part of the judgment and shall be complied with by the State. But implicit in the discussion and conclusions are certain directives for which we do not fix any specific time limit except to indicate the urgency of their implementation. We may spell out four such quasi-mandates.

1. The State shall take early steps to prepare in Hindi, a Prisoner's Handbook and circulate copies to bring legal awareness home to the inmates. Periodical jail bulletins stating how improvements and habilitative programmes are brought into the prison may create a fellowship which will ease tensions. A prisoners' wall paper, which will freely ventilate grievances will also reduce stress. All these are implementary of Section 61 of the Prisons Act.

2. The State shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity community contact and correctional strategies. In this latter aspect, the observations we have made of holistic development of personality shall be kept in view.
3. The Prisons Act needs rehabilitation and the Prison Manual total overhaul, even the Model Manual being out of focus with healing goals. A correctional-cum orientation course is necessitous for the prison staff inculcating the constitutional values, therapeutic approaches and tension free management.
4. The prisoners' rights shall be protected by the court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programmes shall be promoted by professional organizations recognized by the Court such as for e.g. Free Legal Aid (Supreme Court) Society. The District Bar shall, we re-commend, keep a cell for prisoner relief."

In Kishore Singh Ravinder Dev & others Vs. State of Rajasthan (1981) 1 SCC 503, the petitioner was confined in cells with fetters. The Court considering the case of one convict Surjit Singh, who was given punishment of solitary confinement and cross-bar fetters for the reason that he was "loitering in the prison", behaving insolently and in an "uncivilised" manner tearing off his history ticket. The affidavit of the Superintendent was not found to be satisfactory though not lacking in bona fides. Considering the punishment under Section 46 of the Act, the Court held as under:

"10. We cannot agree that either the Section or the Rules can be read in the absolutist expansionism the prison authorities would like us to read. That would virtually mean that prisoners are non persons to be dealt with at the mercy of the prison echelons. This country has no totalitarian territory even within the walled world we call prison. Articles 14, 19 and 21 operate within the prisons in the manner

explained in Sunil Batra (I) (supra), by a Constitution Bench of this Court. It is significant that the two opinions given separately in that judgment agree in spirit and substance, in reasoning and conclusions. Batra in that case was stated to be in a separate confinement and not solitary cell. An identical plea has been put forward here too. For the reasons given in Sunil Batra's case we must overrule the extenuatory submission that a separate cell is different from solitary confinement. The petitioners will, therefore, be entitled to move within the confines of the prison like others undergoing rigorous imprisonment. If special restrictions of a punitive or harsh character have to be imposed for convincing security reasons, it is necessary to comply with natural justice as indicated in Sunil Batra case. Moreover, there must be an appeal not from Caesar to Caesar, but from a prison authority to a judicial organ when such treatment is meted out."

It is thereafter, the process of judicial appraisal came into being.

Though the Hon'ble Supreme Court directed way-back in the year 1979 to revisit the Prisons Act and the Prisoners Manual, but except some changes here and there, nothing much has changed. The provisions of imposition of fetters and whipping etc. are still part of the Jail Manual. Therefore, we find that the Prisons Act and the Jail Manual require complete overhaul and not cosmetic changes. Though it falls within the domain of Legislation, but we find that the observations of the Hon'ble Supreme Court in Sunil Batra's case (supra) have gone unheeded. Therefore, while reiterating the directions, we find that in respect of at least jail punishments and the judicial appraisal much is desired.

While exercising judicial appraisal, the Sessions Judge or the Chief Judicial Magistrates or other Judicial Magistrates are treating the function as that of administrative appraisal. We find that such judicial appraisal is a quasi judicial function assigned to the Judicial Officers and is required to be exercised after complying with the principles of natural justice and after going through the history sheet and the record of the convict.

At the time of imposition of jail punishment, the competent authority shall prepare a gist of allegations; the stand of the convict, oral or written and the conclusion thereof. The reasons may be brief, but it must be recorded. Thereafter, the Superintendent, Jail shall produce the record of the convict, who has been imposed punishment, to the Court of Chief Judicial Magistrate forthwith i.e. within 24 hours of the imposition of the punishment. The Court of Chief Judicial Magistrate or such other Judicial Magistrate entrusted keeping in view the severity and duration of the punishment, appraise the record either during the jail visit or by giving an opportunity to the convict through the legal aid counsel out of the list of Legal Aid Counsel maintained by the Chief Judicial Magistrate and/or by the Legal Services Authority. Such Judicial Magistrate shall record its reasons in support of its findings. Such decision shall be final subject to power of judicial review under Article 226 of the Constitution of India. Needless to say that power of judicial review is limited to examine the decision making process, as laid down by the Hon'ble Supreme Court in Tata Cellular Vs. Union of India (1994) 6 SCC 651 and cannot be interfered with only for the reason that a different view is possible.

Para 562 of the Punjab Jail Manual classifies the punishments imposable under 46 of the Act into minor and major punishments. On the other hand, para 630 of the Punjab Jail Manual, as applicable in the State of Haryana, classifies the punishments imposable under Section 46 of the Act into minor and major punishments. The consequences of jail punishments are contained in Rule 9 of the Haryana Good Conduct Prisoners (Temporary Release) Rules, 2007, which disentitles a convict awarded a minor jail punishment that his parole case shall be initiated after six months from the date of punishment, whereas in case of a convict, who has been awarded a major jail punishment, his parole case shall be initiated after one year from

the date of punishment. The extent and nature of punishment awarded by the Jail Superintendent is subject to judicial appraisal, in the manner enumerated above. However, we feel that the minor and major punishments require rationalization and it will be open to the State Government or to the State Legislature to rationalize the jail punishments in more scientific and reasonable method keeping in view the current requirements.

With the above observations, the present petition is disposed of.

(HEMANT GUPTA)
JUDGE

10.03.2015
Vimal

(LISA GILL)
JUDGE