

**A.F.R.**

**HIGH COURT OF ORISSA: CUTTACK**

**W.P.(C) No. 13441 of 2009**

In the matter of an application under Articles 226 and 227 of the Constitution of India.

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Sri Pratap Kumar Nayak,  
Vill: Badabarsingha,  
P.S.- Badamba,  
Dist: Cuttack

... Petitioner

-Versus-

State of Orissa & Others

... Opp. Parties

For Petitioner : Mrs. Sujata Jena, Mr.G.B. Jena &  
Miss. S. Mohanty.

For Opp. Parties : Government Advocate  
(For O.P. 1)  
M/s. Manas Mohapatra  
L.N. Sahoo, S.K.Routray,  
S. Mohanty, R.P. Kar & A.N. Ray  
(For O.P. 2)  
Mr. D. Sarangi (For O.P.4)

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P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA  
AND**

**THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

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Heard and disposed of : 28.07. 2011

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**B.N. Mahapatra, J.** This writ petition has been filed with a prayer to direct opposite party No.1-State of Orissa, represented by the Secretary to Government of Orissa, Department of Health and opposite party No.2-Director of Red Cross Blood Bank, Municipal Hospital, Bhubaneswar to pay a compensation of Rs.20,00,000/- to the petitioner. Further prayer is for a direction to opposite party No.4-Managing Director, Neelachal

Hospital Pvt. Ltd, Bhubaneswar to pay all the expenses which were spent by the petitioner for treatment of the petitioner's son.

2. Petitioner's case in a nutshell is that his son Adarsh was born on 21.10.2007 in Kalapathara Public Health Centre in the district of Nayagarh by a normal delivery. One day after the delivery, it was found that the baby has no anal canal. For proper treatment, the mother of the baby went to the nearest Public Health Centre where she was advised to move to Khurda Hospital as there was no paediatric specialist in the said P.H.C. In Khurda Hospital being advised by Dr. Jayaram Patra she contacted Dr. Subrat Mohanty, who was a Paediatric Surgery Specialist and as per the advice of Dr. Mohanty, she went to Neelachal Hospital, Bhubaneswar. The petitioner's son was admitted in Neelachal Hospital on 24.10.2007 and was operated on 25.10.2007. The operation was successful and the baby stayed there for about 10 days. At the time of discharge, Dr. Mohanty advised for check up of the baby every month and next surgery was suggested to be taken up after the weight of the baby is reached 9 K.G. Before the 1<sup>st</sup> surgery was taken up one bottle of blood was given to the baby which was collected from Red-Cross Blood Bank, Municipal Hospital, Bhubaneswar by depositing a sum of Rs.450/. The baby was again admitted to the Neelachal Hospital on 18.8.2008 for second surgery. The baby being found under weight, the Doctor advised for transfusion of a bottle of blood. Accordingly, a bottle of blood was brought from the Red Cross Blood Bank, Municipal Hospital, Bhubaneswar on 19.8.2008 by paying a sum of Rs.330/- and the baby was operated on that day. The second operation was also

successful like the earlier occasion and the baby was discharged after ten days of the operation. As advised by the Doctor, the baby was again admitted in Neelachal Hospital on 25.2.2009 for final surgery. As usual, before operation the blood of the baby was tested and on seeing the report Dr. Mohanty cancelled the surgery and advised the petitioner and his wife for another blood test to be done at Bangalore and collected the blood sample for the purpose. The baby was discharged immediately. While collecting the blood report which was sent to Metropolis Laboratory for testing, the petitioner was told that the baby was infected with HIV +ve. The doctor advised him and his wife to go to ICTC Centre for testing of their blood on 2.3.2009. On testing their blood it was found to be negative and the blood of the child was found to be HIV +ve. Thereafter the baby was taken to S.C.B. Medical College & Hospital, Cuttack for collection of blood sample and the same was sent to M.K.C.G. Medical College, Berhampur for testing and also for CD 4 counting and the count was 1139 cells per M.M. on 17.3.2009. On 26.8.2009 Mr. Mohanty refused to operate the baby on the ground that there is no facility in Neelachal Hospital for operation of HIV +ve patient.

3. Mrs. Sujata Jena, learned counsel appearing on behalf of the petitioner submits that a person suffering from HIV +ve has a legal right to be provided with the treatment. Therefore, by denying the petitioner not to treat his son in the Hospital the opposite party- Neelachal Hospital committed illegality. As it reveals from the reports, the petitioner's son was not infected with HIV+ve from his birth. It seems that he was infected with it soon after the transfusion of blood on

19.8.2008 which was collected from the Red Cross Blood Bank, Municipal Hospital-opposite party no.2. The receipt granted by opposite party no.2 shows that the blood units are tested against Malaria, VDRL, Jaundice ( MB & Ag AIDS (HIV +2) and HCV before use. Mrs. Jena further submitted that medical science so far has identified four causes for infection of HIV i.e. (i) through unsafe sex, (ii) a child born from HIV infected parents; (iii) through needles and (iv) through transfusion of HIV infected blood. Considering age of the baby the source of infection through unsafe sex is ruled out. The petitioner and his wife are not infected by HIV as could be seen from the blood reports under Annexures-9 & 10. The scope of infection through needle is remote since disposable needle was used in transfusion of blood by opposite party no.4. Therefore, the source of infection is the blood which was brought from opposite party no.2. The petitioner is a labourer in Sazan India, a Chemical Factory at Gujarat and earning a paltry sum of Rs.4,000/- per month. He has already spent Rs.88,000/- at the Neelachal Hospital towards medicines and hospital charges by taking hand loans from his friends and relatives and selling a plot of 10 Gunths of fertile land. Due to the lower middle class status of the petitioner, it is impossible for him to take additional burden of treatment of a HIV patient. The constitutional mandate is to provide all medical facilities to the citizens of the country. Therefore, opposite party no.1-State is responsible under law to provide all health facilities to the people. It is because of the negligent action of opposite party nos. 1 & 2, the son of the petitioner has been infected with incurable disease. In this case the blood which

was collected for transfusion was contaminated thereby putting the people of the entire State into peril. The action of opposite party nos. 1 & 2 are also contrary to the rulings of the Hon'ble apex Court in the case of *Common Cause vs. Union of India and others*, AIR 1996 SC 929. As per study of the medical science, the length of time following the infection of an individual to develop detectable antibodies is about three months after the infection. This is called the "Window Period". The petitioner's son is detected with the disease after about 5 months of blood transfusion. Therefore, the blood brought from the Blood Bank on 19.8.2008 was infected with HIV +ve. According to the Supreme Court, right to live includes right to health. The apex Court in *Common Cause (supra)*, has directed the National Council and State Council for proper storage, transport and quality control of the blood apart from other pecuniary measures. There is no provision in the State to identify virus during the Window Period. Unless special test known as Antigen Test is conducted through Polymer Chain Reaction (PCR) method, the virus cannot be identified during the Window Period i.e. during three months of infection. Therefore, the receipt given by the blood bank stating therein that the blood units are tested against HIV seems to be a myth. The petitioner is entitled to compensation under the public law remedy. Concluding her argument Mrs. Jena prayed to grant compensation of Rs.20,00,000/- for the laches of opposite parties Nos. 1 & 2.

4. Learned Government Advocate appearing on behalf of opposite party No.1 submits that the allegation of the petitioner that his son has been infected with HIV +ve due to blood transfusion made at

Neelachal Hospital Pvt. Ltd., Bhubaneswar obtained from the Red Cross Blood Bank of Municipal Hospital, Bhubaneswar, is baseless and without any proof. Rather the drawal and storage of blood in Red Cross Blood Bank are done following the strict procedure and safety standard with little scope for any compromise with quality. The blood procured by the petitioner from Red Cross Blood Bank of Municipal Hospital, Bhubaneswar on the basis of requisition made by Neelachal Hospital Pvt. Ltd. has undergone mandatory tests like HIV, HBV, HCV, VDRL and Malaria before issue of blood for transfusion. In the case of the petitioner, all these mandatory tests have been conducted and more particularly, HIV test has been found to be negative before issue. As per the report of the Technical Committee dated 06.05.2011 both the blood units issued in favour of Sri Adarsh Nayak were tested for HIV infection and found negative before it was issued. Therefore, the allegation of the petitioner is not correct as the son of the petitioner was provided with sufficient and adequate treatment in the hospital and the A.R.T. Centre of SCB Medical College and Hospital, Cuttack in terms of the procedure prescribed. There is no conclusive proof that the bottles of blood obtained from opposite party no.2 and transfused by Neelachal Hospital Pvt. Ltd. was infected and resulted into HIV +ve for the patient. The State Government has not been shirking from its responsibility and there is a reasonable facility for treatment of HIV patients. The petitioner is not interested for treatment of his child rather more interested for getting compensation from the Government misrepresenting the facts before this Court.

5. In the counter affidavit filed by opposite party No.2, it is stated that there has been absolutely no negligent action on the part of opposite party No.2 towards the son of the petitioner as has been alleged. The record reveals that a bottle of blood was issued on requisition from Neelachal Hospital, Bhubaneswar on 25.10.2007 for the baby of the petitioner after due test on usual payment. It is further submitted that unless somebody's blood is tested for HIV +ve and found to be so, it cannot be said that he/she is infected. Therefore, the evidence adduced by the petitioner vide Annexures-1 to 6 to the writ petition are not enough to say whether the child suffered or not from HIV infection from its birth. Opposite party No.2 had conducted all the tests as mentioned in the test reports of the collected blood and found to be free from infections, stored it in tested freeze. There is no scope of issuing blood having infection to any person. Since the child was continuously being treated medically and had undergone two surgeries, in the process of treatment and surgery there is every chance of infections by use of various types of needles etc. The allegation that the blood collected from opposite party No.2 on 19.08.2008 is contaminated, is absolutely false and baseless.

It was further contended that the treatment of Adarsh Nayak is sufficient and A.R.T. Centre found the patient in a severe Immuno Suppression state and accordingly, the treating physicians advised medication so that the patient could be substantially fit immunologically for corrective surgery on the patient without any life threatening complication. Father of the patient has communicated to the

Superintendent of Sardar Vallabbai Patel Post Graduate Institute of Paediatrics (Sishu Bhawan), Cuttack that he is not ready to take the drugs advised by A.R.T. Centre of SCB Medical College and Hospital, Cuttack and if by taking medicines anything happens to him then doctors will be held fully responsible for the same and the patient is not taking medicine given by A.R.T. Centre, SCB Medical College and Hospital. There is no conclusive proof that transfusion of those two bottles of blood used by Neelachal Hospital has infected the patient with HIV +ve.

6. Opposite party No.4-Neelachal Hospital in its counter affidavit submitted that the type of operation needed for the patient was very serious in nature and may result in multiple complications for which specialized paediatric Intensive Care Unit is necessary which is not available in the opposite party-Neelachal hospital. Therefore, the treating doctor rightly refused for further treatment. Considering the financial status of the petitioner, concession has been given on two occasions when the child was operated and the same was done successfully.

7. On the rival contentions of the parties, the question that falls for consideration by this Court is as to whether due to negligence on the part of opposite party no.1-State and opposite party no.2-Director, Red Cross Blood Bank, petitioner's son was affected by HIV+ve for which they are liable to pay compensation to the petitioner.

8. The petitioner's case is that due to negligence on the part of opposite party No.2-Director, Red Cross Blood Bank, Municipal Hospital,



Bhubaneswar, his son was affected by HIV +<sup>ve</sup> through transfusion of the blood he bought from opposite party no.2. His further case is that due to lack of proper control and supervision of opposite party No.1-State, such tragedy took place. The undisputed facts are that HIV +ve can only be infected through the following four causes :- (i) Unsafe sex, (ii) child born through HIV affected person, (iii) through needles, and (iv) through blood transfusion.

9. In the instant case, the son of the petitioner was found infected with HIV+ve at the age of 17 months. Therefore, the possibility of infection of HIV through unsafe sex is totally out of consideration. Since blood of the father and mother of the infected baby was tested in ICTC Centre and the reports under Annexure-9 series are found to be negative, it cannot be said that the child was born through HIV affected parents. The scope of infection through needle is remote since according to the petitioner disposable needle was used in transfusion of blood by opposite party No.4.

Circumstances of the case reveal that only after second surgery, the baby was found to be infected with HIV +ve. It further reveals that the baby has been infected with HIV +ve soon after the transfusion of blood during the second operation which was done on 19.08.2008 and the infection was identified on 25.02.2009. According to the petitioner, as per the study of medical science length of time following the infection of an individual to develop detectable antibodies is about three months after the infection and this is called the "Window Period". In the case of son of the petitioner, the same was detected on 25.02.2009 which is five months

after the blood transfusion. Therefore, the petitioner's case is that the blood brought from the Blood Bank on 19.08.2008 was infected with HIV +ve. Further assertion of the petitioner is that as per the medical science during window period unless the special test known as Antizen test is conducted through Polymer Chain Reaction (PCR) method, the virus cannot be identified. The further case of the petitioner is that such Antizen test conducted through PCR method is not available in the State of Orissa, therefore, there was no scope for opposite party No.2 to conduct Antizen test through PCR after collecting the blood from the donor. Annexure-A/1, enclosed to the counter affidavit filed by opposite party No.1-State, is the report on the HIV status of two units of blood issued to Adarsh Nayak, son of Pratap Kumar Nayak which is alleged to have transmitted HIV. According to the said report, the second blood bag No.2077 was collected on 01.08.2008 from the donor Prafulla Kumar Sahoo, in respect of which HIV test was done on 04.08.2008 and found negative. The same blood was issued to the petitioner's son on 19.08.2008. As admitted by opposite party No.2, no PCR test has been done in respect of the blood issued to the petitioner's son on 19.08.2008. The assertion of the petitioner that unless the special test, known as Antizen test is conducted through PCR method, the virus of HIV +ve cannot be identified and such a test is not available in our State is not denied by the opposite parties. From the letter addressed to Sri Manas Mohapatra, learned advocate appearing for opposite party No.2 by Blood Bank Officer, B.M.C. Hospital, Bhubaneswar-2, it reveals that opposite party No.2 does not have the facility for PCR test and therefore, such

methodology has not been adopted in the present case. It is also not the case of opposite party No.1-State that the said Antizen test is conducted through PCR method to identify the HIV +<sup>ve</sup> virus. Therefore, in the absence of Antizen test through 'PCR' method after collecting the blood from donor, the receipt given by the Blood Bank stating therein that the blood units are tested against HIV +ve is not worth acceptable. After collection of blood from the donor, the Antizen test through PCR method was required to be done to identify the virus of HIV +ve but without such test the blood collected on 01.08.2008 has been supplied to the petitioner on 19.08.2008. It is certainly an act of negligence on the part of opposite party No.2 as well as opposite party No.1-State, who have not ensured such test.

10. The apex Court in ***Common Cause vs. Union of India and others***, AIR 1996 SC 929, held that:

“Blood is an essential component of the body which provides sustenance to life. There can be no greater service to the humanity than to offer one's blood to save the life of other fellow human-being. At the same time blood, in stead of saving life, can also lead to death of the person to whom the blood is given if the blood is contaminated. As result of developments in medical science it is possible to preserve and store blood after it has been collected so that it can be available in the case of need. There are blood banks which undertake the task of collecting, testing and storing the whole blood and its components and make the same available when needed. In view of the dangers inherent in supply of contaminated blood it must be ensured that the blood that is available with the blood banks for use is healthy and free from infection”

In the above case, considering the serious deficiency and shortcomings in the matter of collection, storage and supply of blood

through various blood bank centres operating in the country, the Hon'ble Supreme Court issued direction to the Union Government and the State Government to take speedy action to remove serious deficiency and shortcomings.

11. The apex Court in ***Vincent Panikurlangara vs. Union of India and others***, AIR 1987 SC 990, observed that the branch of health care of citizens involves an ever changing challenge. The problem is a shifting one and one cannot have a fixed process to deal with the situations that would arise from time to time. The Central Government on the basis of the expert advice can indeed adopt and approved national policy and prescribe an adequate number of formulations which would on the whole meet the requirement of the people at large.

12. The right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution of India, right to life includes protection of health (See ***Consumer Education and Research Centre and others vs. Union of India and others***, AIR 1995 SC 922).

13. The apex Court, in the case of ***Chameli Singh & others Vs. State of Uttar Pradesh and another***, AIR 1996 SC 1051, held as follows:

“Right to life” means to live like a human being and it is not ensured by meeting only the animal needs of man. It includes the right to live in any civilised society implies the right to food, water, decent environment, education, medical care and shelter.”

14. The term “life” used in Article 21 of the Constitution of India has a wide and far-reaching concept. It means something more than

mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. (vide **Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni**, AIR 1983 SC 109; **Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.**, AIR 1986 SC 180; and **Kapila Hingorani Vs. State of Bihar**, (2003) 6 SCC 1).”

15. In the peculiar facts and circumstances of this case and taking note of above judicial pronouncement, we are of the view that opposite party No.1-State Government and opposite party No.2-Director, Red Cross Blood Bank are negligent in not conducting Antizen Test through PCR method at the time of collecting blood which is the only method to detect the virus of HIV during the window period and therefore, they are jointly and severally liable to pay compensation to the petitioner, whose son was affected in HIV +ve after transfusion of the blood obtained from opposite party No.2 on 19.08.2008 which was collected from the donor on 01.08.2008.

16. At this juncture, it is profitable to refer to the decision of the Apex Court with regard to the award of compensation for contravention of human rights. The Apex Court in **Smt. Nilabati Behera @ Lalita Behera vs. State of Orissa and others**, AIR 1993 SC 1960, held that:

“A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for

damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution.

17. In ***Consumer Education and Research Centre*** (*supra*), the Apex Court held that:

“In public law claim for compensation is a remedy available under Article 32 or 226 for the enforcement and protection of fundamental and human rights. The defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the constitution of the law”.

18. In view of the above, we direct opposite parties 1 and 2 to pay the compensation of Rs.3,00,000/- (rupees three lakhs) to the petitioner. Both the opposite parties 1 and 2 are jointly and severally liable to pay the above said compensation awarded in this petition. Out of the total amount of compensation, Rs.2,00,000/- (rupees two lakhs) shall be kept in a fixed deposit in any nationalized bank in the joint

names of the petitioner and his wife for a period of ten years and monthly interest accrued thereon shall be paid to the petitioner on proper identification. If the amount directed to be kept in fixed deposit is required to meet any pressing needs or for any development of the family, the same may be withdrawn by filing an application before this Court for grant of such permission. The balance amount of Rs.1,00,000/- (rupees one lakh) shall be paid to the petitioner on proper identification.

19. Needless to say that blood donated by one saves life of another. Donation of blood is a noble work. In order to achieve this avowed objective all necessary safeguards must be taken while collecting, testing, storing and supplying blood. Otherwise, instead of saving the life, the contaminated blood would take the life. It is not disputed that during window period, unless the special test known as Antizen test is conducted through Polymer Chain Reaction (PCR) method, the virus cannot be identified. Therefore, the Government must ensure that in all blood Banks the Polymer Chain Reaction (PCR) method is available to identify the virus of HIV during window period. We, further direct opposite party no.1-State to provide free medical treatment to the baby of the petitioner who is a HIV patient.

20. In the result, the writ petition is allowed with above observations and directions.

No order as to costs.

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B.N.Mahapatra,J.

*Orissa High Court, Cuttack*  
*Dated 28<sup>th</sup> July, 2011/ssd/ssj/skj*

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Chief Justice