

RESERVED

CRIMINAL MISC. WRIT PETITION NO.10638 OF 2006

Kanti Devi and others vs. State of U.P. And others

Hon'ble Ravindra Singh,J.Hon'ble Arvind K.Tripathi,J.

(Delivered by Hon.Arvind K.Tripathi,J)

1- Heard Shri Ravi Kiran Jain, learned Senior Advocate assisted by Shri Surendra Tewari, Advocate for the petitioners, learned Government Advocate Mr. D.R.Chauhary, for the respondents and perused the record.

2- The brief fact of this case is that on 20.6.2000 the Panchayat Election was being held in the Gram Panchayat, Chhaisa, Tehsil Dadra, District Gautambudh Nagar. When the villagers were standing in queue, at the booth, for casting their votes, during that time some disturbance was created and by order of the Magistrate, police personnel, posted there, resorted Lathi charge and also fired four rounds. According to the First Information Report lodged by the petitioner no.3, police personnel, just to close the voting, were pressurising the villagers, to leave the place and when the objection was raised by the villagers, police personnel, led by Circle Officer Kripal Singh, resorted Lathi charge and fired which hit Satpal Singh, father of the first informant Surendra Singh, petitioner no.3 and Ramanand Sharma, husband of the petitioner no.1. The petitioner no.1 is widow of deceased Ramanand Sharma, r/o village Khairpur, PS. Pilkhuwa and petitioner no.2 is widow & 3 is son of deceased Satpal Singh, r/o of Village and Post Chhaisa, PS. Jarcha, District Gautam Budha Nagar. Some other persons also received firearm injuries. The husband of the petitioner no.1 & 2 expired on the spot due to firearm injuries. Voting was also closed and forged signatures were obtained. Subsequently

due to shock, Sikander, one of the son of deceased Satpal expired on 5.7.2000. The occurrence took place at 4.00 P.M. The First Information Report was lodged and registered as Case Crime No.74/2000 under sections 302, 323 I.P.C. at PS. Jarcha, Gautam Budh Nagar.

3- After investigation the Dy. S.P., Kripal Singh and Police Constable Jai Bhagwan were found guilty and for sanction of prosecution the report was sent to the State Government. In spite of repeated reminder the sanction was not granted by the State Government hence petition was filed. The direction was also issued for Magisterial enquiry and C.D.O. Gautam Budh, Nagar inquired the matter. According to the inquiry report the negligence was found on part of the police personnel. The District Magistrate, Gautam Budh Nagar after considering the fact and circumstances and condition of the family of the deceased, recommended the matter to the State Government, for payment of Rs.10 lacs to each family of the deceased, as a financial assistance, vide letter dated 21.6.2000 addressed to the Secretary to the Chief Minister, the State of U.P., Lucknow. It was submitted on behalf of the petitioners that only Rs.20,000/- was sanctioned to pay to the family of the deceased. In spite of reminders, the State Government did not pass any order for payment as recommended by the District Magistrate.

4- In the counter affidavit filed by Circle Officer, Greater Noida, on behalf of respondent no.3, S.S.P., Gautambudh Nagar, it has been stated that after investigation the report was submitted with a request for grant of sanction and for arrest of the then Deputy Superintendent of Police, and constable who were found guilty. It was also stated in the counter affidavit that reminders were issued for payment of Rs.10 lacs to the family members of the deceased for financial assistance on 16.12.2002, 31.5.2003 and 16.3.2003. The reminder was also issued for grant of sanction to prosecute. In para-15 -17 it was stated that according to the report of Magisterial Inquiry by C.D.O. Gautambudh

Nagar, both the aforesaid police personnel were found guilty as there was negligence. It was further stated that in firing due to their negligence, two innocent persons, who were sitting on the cot of Gher of the house, lost their lives and since the negligence was proved, they were entitled for financial assistance. The District Magistrate has already recommended for payment of Rs.10 lacs each to both the family members of the deceased.

5- According to counter affidavit filed by Mr. Kunwar Fateh Bahadur, the Principal Secretary(Home), Government of U.P., Lucknow the State Government had already granted sanction for prosecution of the aforesaid two accused persons vide order dated 4.1.2008. Copy of the order issued by the State Government, granting prosecution sanction has been filed as annexure 2 to the counter affidavit dated 9.11.2009 filed along with the application dated 17.11.2009. In para -7 of the counter affidavit it was informed that according to the Chief Minister Discretionary Fund Rules, 1999, maximum compensation of Rs.20,000/- could be given, in such cases, which had already been given to the family of the victim.

6- Learned A.G.A. raised objection that the present petition for relief regarding compensation is not maintainable on two grounds: firstly that the District Magistrate has recommended for payment of compensation from the Chief Minister's Relief Fund. On the relevant date the provision was only for payment of maximum compensation of Rs.20,000/- and secondly the work of the police personnel was sovereign act, hence claim for compensation would not be maintainable against the State. He relied two judgements of the Apex Court, **State of Rajashtan vs. Mst.Vidhyawati** and another, AIR 1962 SC 933, and **M/s Kasturi Lal, Ralia Ram Jain vs. Sate of U.P.**, AIR, 1965 SC 1039.

7- Learned counsel for the petitioners submitted that there is difference in between the 'Public Law' and 'Private Law'. Under Article 226 of the Constitution of India, the High Court has been empowered

to issue appropriate writ, in the nature of certiorari and mandamus, and further has been empowered not only to grant the relief for the enforcement of fundamental right but also for “any other purposes” which would include the enforcement of public duties by the public body. It was further submitted by learned counsel for the petitioners that High Court under Article 226 of the Constitution of India has been empowered for Judicial Review. The executive and administrative action of the State or any other statutory and public body are amenable to judicial scrutiny by the High Court in exercise of the power of Judicial Review. In the present case there is violation of the fundamental right guaranteed under Article 21 and 22 of the Constitution of India, hence objection raised by the Government Advocate is not applicable in the present case because there is violation of fundamental right of the petitioners in which valuable lives of the members of the petitioners' family were taken away. Under Article 21 the life and liberty of the persons cannot be curtailed against the procedure established by law and in the present case, it was found that due to negligence of the police personnel of the State of U.P., two innocent persons lost their lives. He has relied the judgement of the Apex Court reported in AIR 1993, **Smt. Nilabati Behera alias Lalita Behera vs. State of Orissa and others** in which number of earlier judgements were considered. It was held by the Apex Court that the claim of sovereign immunity would not be applicable, in cases of violation of fundamental rights. For enforcement of the fundamental right, the Supreme Court and High Court under Article 32 & 226 of the Constitution of India can consider and allow the claim of the victim's family, for payment of the compensation, against the violation of the fundamental right. It appears that without going through the subsequent judgements the objection was raised by the learned Government Advocate.

8- So far as the first prayer of the petitioners regarding, transfer of the investigation to any other independent agency like C.B.I. and

C.B.C.I.D. is concerned, in respect of that, it is clear from the counter affidavit that after investigation by the police it was opined by the Investigating Officer that the Deputy Superintendent of Police, Kripal Singh and police constable Jay Bhagwan, were found guilty. The prosecution sanction has already been granted by the State Government, hence no further order or direction is required.

9- The second prayer is to issue mandamus commanding and directing the respondent-State to pay the adequate compensation to the petitioners No.1 & 2 who are wife of the deceased, as recommended by the then District Magistrate, Gautam Budh Nagar.

10- Article 21, of the Constitution of India is reproduced here-in-below :

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

11- In view of the fundamental right, as safeguarded by our Constitution, it is clear that life and liberty of a person cannot be curtailed or taken away, otherwise against the procedure established by law. In the present case it was found, by the Investigating Officer and in the Magisterial inquiry, that due to negligence, two persons received firearm injuries, causing their death on the spot. Sanction for prosecution has already been granted by the State Government and the order was issued on 4.1.2008. Hence admittedly there was clear violation of Constitutional right of life and liberty.

12- So far as the objection raised by Government Advocate, regarding sovereign immunity, and on that basis prayer for compensation is not maintainable, is concerned, there is difference in between 'public law' and 'private law'. In the present case there was negligence on part of the police personnel of the State of U.P. who fired causing death of two innocent villagers which is clear violation of fundamental right to life. In case of tortious act of an employee of the State, in which a suit has to be

filed for damages and in that case claim of 'sovereign immunity' may be applicable. However that will depend on the facts and circumstances of each case whether it was a sovereign act or not. The objection raised by learned A.G.A. is not applicable in the present case, since there is violation of fundamental right due to loss of invaluable life of head of the family of the petitioners. The present petition moved under Article 226 of the Constitution of India is maintainable since the remedy is available under the Public Law against the State.

13- In case of **State of Rajasthan vs. Mst. Vidhyawati and another**, AIR 1962 SC 933, the first defendant Lokumal, was a temporary employee of the State of Rajasthan, as a motor driver on probation. In February, 1952, he was employed as the driver of a Government Jeep, under the Collector of Udaipur. The car had been sent to a workshop for necessary repair. After repairs, first defendant while driving the car back along a public road on February 11, 1952 knocked down one Jagdishlal, who was walking on the footpath by the side of the public road, in Udaipur City, causing him multiple injuries, resulting in his death, three days later in the hospital, where he was admitted for treatment. The widow of Jagdishlal and minor daughter, through her mother as next friend, filed a suit for damages for tort, against Lokumal and the State of Rajasthan, claiming the compensation of Rs.25,000/- from both the defendants. The suit was contested by the State of Rajasthan. It was held by the court below that the first defendant was rash and negligent, in driving the jeep resulting in the accident and ultimate the death of Jagdishlal. The objection was raised on behalf of the State of Rajasthan chiefly on the ground that State was not liable for tortious act of its employee. After considering the argument of the parties, the suit was decreed against the first defendant ex-parte, and was dismissed without cost against the second defendant. The appeal was preferred before the High Court of Rajasthan. The appeal was allowed and the suit, against the

second defendant, State of Rajasthan, was also decreed with cost in both the courts. The certificate was issued under Article 133(1)(c) of the Constitution of India, for filing an appeal before the Apex Court, as important point of law of general public importance, with regard to the liability of the State, in tort, was involved. Considering earlier judgements and provisions, which were applicable before and after independence, the appeal filed by the State was dismissed.

14- It was observed by the Constitution Bench of the Apex Court in the aforesaid case “Rule of Immunity in favour of the crown, based on common law in the United Kingdom has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution.”

15- In the aforesaid judgement the fact and provisions applicable before Constitution of India were also considered including Government of India Act, 1858, the Crown Proceeding Act, 1947 which came into force in January 1948 in the United Kindgom, Government of India Act, 1915 and 1935. Paragraphs 9, 10, 14 and 15 of the aforesaid judgement are reproduced herein below:

9- Before the Supreme Court of Calcutta, it was contended by the learned Advocate General, on behalf of the defendant, that the State cannot be liable for damages occasioned by the negligence of its officers or of persons in its employment. It was pointed out, “ it is true that it is an attribute of sovereignty that a State cannot be sued in its own courts without its consent.” In England, the Crown,” it was further pointed out, “ cannot be made liable for damages for the tortious acts of its servants either by petition of right or in any other manner, as laid down by Lord Lyndhurst in the case of Viscount Canterbury vs. Attorney General: (1843) 1 Ph.306. That decision was based upon the principle that the King cannot be guilty of personal negligence or misconduct, and

consequently cannot be responsible for the negligence or misconduct of his servants. The Court further pointed out that it was in view of these difficulties in the way of getting redress that the liability of the Secretary of State, in place of that of the East India Company, was specifically provided for by S.10 aforesaid. The East India Company itself could not have claimed any such immunity as was available to the sovereign. This view was based on the opinion expressed by Grey, C.J., in the case of the Bank of Bengal v. The East India Company Bignell Rep. 120 that "the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns. This dictum was also founded upon the recital in 50 Geo.III c. 155, by which the territories in possession and under the government of East India Company were vested in them without prejudice to the undoubted sovereignty of the Crown. The Court also pointed out that the liability of the Secretary of State was in no sense a personal liability, but had to be satisfied out of the revenues of India.

10- This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare state, whose functions are not confined only to maintaining law and order, but extent to engaging in all activities including industry, public transport, state trading to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its power as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this

respect, the present set up of the government is analogous to the position of the East India Company, which functioned not only as Government with sovereign powers, a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, post and telegraphs and road transport business. It was in the context of those facts that the Supreme Court of Calcutta repelled the argument advanced on behalf of the Secretary of State in these terms.:

It was contended in argument that the Secretary of State in Council as regards his liability to be sued, must be considered as the State, or as a public officer employed by the State. But, in our opinion his liability to be sued depends upon an express enactment in the 21st & 22nd Vict. C .106, by which he is constituted a mere nominal defendant for the purpose of enforcing payment out of the revenues of India, of the debts and liabilities which had been contracted or incurred by the East India Company, or debts or liabilities, of a similar nature, which might afterwards be contracted or incurred by the Government of India. We are further of opinion that the East India Company were not sovereign, and therefore, could not claim all the exemption of a sovereign: and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged transactions partly for the purposes of government, and partly on their own account which without any delegation of sovereign right, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually sovereign powers, and acts done in the conduct of undertakings which might be carried on by

private individuals without having such powers delegated to: Moondalay vs. Morton (1785) 1 Bro C.C.469”.

14-From the resume of the formation of the State of Rajasthan given above, it is clear that we need not travel beyond the stage when the Rajasthan Union was formed on the eve of the Constitution, It has not been shown that the Rajasthan Union would not have been liable for the tortious act of its employee, in the circumstances disclosed in the present case. The issue framed at the trial, on this part of controversy, was issue no.9 in these terms:

“Whether the State of Rajasthan is not liable for the act of Defendant No.1? The State of Rajasthan has not shown that the Rajasthan Union its predecessor, was not liable by any rule of positive enactment or by Common law. It is clear from what has been said above that the Dominion of India, or any Constituent Province of the Dominion, would have been liable in view of the provisions aforesaid of the Government of India Act, 1858. We have not been shown any provision of law, statutory or otherwise, which would exonerate, the Rajasthan Union from vicarious liability for the act of its servant, analogous to the Common Law of England. It was impossible, by reason of the maxim “The King can do no wrong” to sue the Crown for the tortious acts of its servant. But it was realised in the United Kingdom that that rule had become outmoded in the context of modern developments in State Craft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2(1) of the Act provides that the Crown shall be subject to all those liabilities, in tort, to which it would be subject if it were a private person of full age & capacity, in respect of torts committed by its servants or agents,

subject to the other provisions of the Act. As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the Common Law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also. It has not been claimed before us that the common law of the United Kingdom before it was altered by the said act with effect from 1948, applied to the Rajasthan Union in 1949, or even earlier. It must, therefore, be held that the state of Rajasthan has failed to discharge the burden of establishing the case raised in Issue No.9, set out above.

15-Viewing the case from the point of views of first principles, there should be no difficulty in holding that the State should be as much liable for torte in respect of tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of Justice, namely that the King was incapable of doing a wrong, and, therefore of authorising or instigating one, and thus he could not be sued in his own courts. In India, ever, since the time of the East India Company, the sovereign has been held liable to the sued in tort or in contract, and the Common Law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employment a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot be maintain a suit against

the Crown. In the case of State of Bihar vs. Abdul Majid, 1954 SCR 786: (AIR 1954 SC 245), this Court has recognised the right of a government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution, As the cause of action in this case arose after the coming into effect to the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Art. 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of the East India Company.

16- In case of **M/s Kasturi Lal Ralia Ram Jain vs. The State of Uttar Pradesh**, AIR 1965 Supreme Court 1039 it was held that for tortious act committed by public servant in course of the employment and in discharge of statutory function, the State was immune from the liability, if acts were in exercise of sovereign power delegated to the public servant. However, if the tortious acts were committed by the public servant, in discharge of the duties assigned to him, not by virtue of the delegation of any sovereign power, an action for damages would lie.

17- The brief fact of the aforesaid case is that appellant Ralia Ram was one of the partner of the firm. On 20.9.1947 Ralia Ram arrived at Meerut by Fronteir Mail about mid night. His object in going to Meerut was to sell gold, silver and other goods in the market. While he

was passing through Chaupala Bazar, he was taken into custody by three police constables. His belongings were then searched and he was taken to the Kotwali Police Station. He was detained in police lock-up and there his belongings which consisted of gold weighing 103 tolas 6 mashas and 1 Ratti and silver weighing two mounds and 6-1/2 seers, were seized from him and kept in police custody. On 21.9.1947 he was released on bail and sometime thereafter silver seized was returned to him. Ralia Ram then made repeated demands for the return of the gold which had been seized from him and since he could not recover the gold from the police officers, he filed suit for damages in which he claimed a decree that the gold seized from him should either be returned to him or in alternative, its value should be ordered to be paid to him. The claim was resisted on several grounds. It was urged that the respondents were not liable to return either the gold or to pay money for its value. It was alleged that the gold in question had been taken into custody by one Mohd. Amir who was the then head constable and it had been kept in the police Malkhana under his charge. Mohd. Amir, however, misappropriated the gold and fled to Pakistan. He had also misappropriated some other cash and articles deposited in Malkhana before he left India. The case under Section 409 I.P.C. as well as under section 29 of the Police Act had been registered against him but nothing effective could be done in respect of the said case in spite of the best efforts made by the police department, he could not be apprehended. It was pleaded on behalf of the respondent that this was not a case of negligence of the police officer and even if the negligence was proved against the said police officer, respondent State cannot be said to be liable for the loss resulting from such negligence. It was found that the police officials were negligent in dealing with Ralia Ram's property after it was seized from him. The manner in which it was dealt at the Malkhana shows gross negligence.

18- Earlier decision of the Apex Court in case of **State of**

Rajasthan vs. Vidhyawati and another (Supra) was considered. It was held that the act of negligence was committed by the police officers while dealing with the property of Ralia Ram. The power to arrest a person, to search him, and to seize property found with him, were powers conferred on the specified officers by statute, which can be properly characterised as sovereign powers and so there was no difficulty in holding that the act which gave rise to claim for damages, had been committed, by the employee of the respondent State, during the course of its employment but the employment in question, being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained. In that case there was suit. The suit was for the return of the property (gold) seized from the Plaintiff and further to issue direction that if the seized article could not be returned then in the alternative order should be passed to pay its value. Hence that case is not applicable, in the present case, where there is violation of the fundamental right and not claim for damages regarding loss of goods. Apart from that even in **Kashturi Lal Ralia Ram's** case it was observed by the Apex Court:

“In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a Court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position of law. The remedy to cure this position, however, lies in the hands of the Legislature.”

19- In case of **Rudal Shah** in which illegal detention was challenged after acquittal. It was held by the Apex Court that even after acquittal he remained in jail. Taking into consideration that great harm was done to the petitioner, hence as an interim major the direction was issued to the State to pay the compensation. The objection from the State was not

accepted that the petitioner might have filed a suit to recover the damages from the State Government.

20- In case of **Khatri and others vs. State of Bihar and others**, AIR 1981 SC 1068 the Apex Court observed as follows:

“ where the action taken by the State has already resulted in breach of the Fundamental Right under Article 21, by deprivation of some limb of the petitioner, would the petitioner have no remedy under Art.32, for breach of the Fundamental Right guaranteed to him? Would the Court permit itself to become helpless spectator of the violation of the Fundamental Right of the petitioner by the State and tell the petitioner that though the Constitution has guaranteed the Fundamental Right to him and has also given him the Fundamental Right of moving the Court for enforcement of his Fundamental Right, the Court cannot give him relief.”

21- In the case of **Bhim Singh** (A.I.R. 1986 Supreme Court 494) who was member of the Legislative Assembly (Jammu & Kashmir). He was going to attend the Session of the Legislative Assembly which was to meet on 11.9.1995, and just to preventing him, from this Sessions, he was detained. The fact of this case was that on August 1985, during the Budget Sessions of Legislative Assembly, Bhim Singh was suspended from Assembly. However, that order for suspension was stayed by the High Court (Jammu & Kashmir), in 1985. On the intervening night of 9th and 10th September, 1985 he was proceeding from Jammu to Srinagar. At about 3.00 A.M. On 10.9.1985 he was arrested at a place which was about 70 km away from Srinagar and from where he was taken by the police. The efforts to trace him proved futile. His wife filed an application on his behalf for the issue of a writ to direct the respondents to produce him before the court, to declare his detention illegal and to set him at liberty. On Sept. 13, 1985, notice was issued to the respondents. On September 16, 1985 he was released on bail by the learned Additional Sessions

Judge of Jammu before whom he was produced. It was asserted that he was kept in police lock up from 10th to 14th and he was produced before the Magistrate for the first time only on 14.9.1985. It was observed by the Apex Court, “the police officers acted in most high handed way. We do not wish to use stronger words to condemn the authoritarian act of the police. If the personal liberty of a Member of the Legislature Assembly is to be played in this fashion one can only wonder what may happen to lesser mortals? Police officers who are the custodian of 'law and order' should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness.” It was held that there certainly was gross violation of Bhim Singh's constitutional right under Article 21 & 22 of the Constitution of India.

It was further observed that in appropriate cases, the court have jurisdiction to compensate the victim, by awarding suitable monetary compensation by way of exemplary costs or otherwise. The direction was issued to the respondent State for the payment of sum of Rs. 50,000/-.

22- In case of **Saheli, a Women's Resources Centre through Ms. Nalini Bhanot and others vs. Commissioner of Police, Delhi and others**, AIR 1990 SC 513. The nine years old child expired due to beating and assault by police officer. It was observed that:

“An action for damages lies for bodily harm which includes battery, assault false imprisonment, physical injuries and death. In cases of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held herein before that the son of Kamlesh Kumar aged 9 years died due to beating and assault by the S.H.O., Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. The respondent no.2, Delhi Administration is liable for payment of

compensation to Smt Kamlesh Kumar for the death of her son due to beating by the S.H.O. of Anand Parbat Police Station, Shri Lal Singh.”

23- Considering the judgement of **Joginder Kaur vs. State of Punjab**, 1969 L.A.B. IC 501 and the case of **State of Rajasthan vs. Mst.Vidhyawati and another** (supra) the direction was issued for payment of compensation because there was violation of fundamental right to life and liberty.

24- In case of **State of Maharashtra and others vs. Ravikant S.Patil**, (1991)2 (SCC) 373 an undertrial prisoner was handcuffed and was taken through streets in a procession by police during investigation. It was held by the Apex Court that right under Article 21 was violated, the police officer was not responsible for the act who had acted only as an official and even assuming that he exceeded his limit still he cannot be made personally liable to pay the compensation to the victim under trial prisoner. Hence the compensation awarded by the High Court was modified and compensation was directed to be paid by the State. However, further observation was made that the authority might, if consider necessary, to hold inquiry, against the police officer and then decide whether any further action was to be taken or not. Earlier decisions including the case of **Sunil Batra vs. Delhi Administration** were considered.

25- In case of **Union Carbide, Corporation etc. etc. vs. Union of India, etc. etc.**, AIR 1992 SC 248 (Five Hon. Judges Constitution Bench) it was observed by Hon.R.N.Mishra, Chief Justice of India: Paragraph 260 of the aforesaid judgement is reproduced

“Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situation arise the law has to

be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order”

26- In case of **Smt. Nilabati Behera alias Lalita Behera**, AIR 1993 SC 1960 one Suman Behera was taken from her home in police custody on 1.12.1987 by the the Assistant Sub Inspector of Police of Jaraikela Police outpost under Police Station Bisra, District Sundergarh, in connection with the investigation of an offence of theft and was detained at the Police out Post. At about 2.00 P.M. The next day on 2.12.1987 the petitioner came to know that the dead body of her son Suman was found on the railway track, near a bridge at some distance from Jaraikela railway station. There were multiple injuries on the body of Suman Behera. His death was unnatural, caused by those injuries. A letter dated 14.9.1988 was sent to the Apex Court, by Lilawati Behra which was treated as writ petition under Article 32 of the Constitution of India for determining the claim of the compensation for contravention of fundamental right to life as guaranteed under Article 21 of the Constitution of India. After considering earlier decision including the judgement of **Kasturi Lal Ralia Ram Jain** (Supra), it was held by the Apex Court that where there was violation of fundamental right by the State the writ petition for compensation under Article 32 & 226 of the Constitution of India was a remedy available in 'public law'. It was further held that the Principle of sovereign immunity was not applicable in case of violation of fundamental right. Paragraph -16, 33 & 34 of the aforesaid judgement are reproduced herein-below:

16-*"It follows 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 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 of Arts.32 & 226 of Constitution. This is what was indicated in Rudul Sah (AIR 1983 SC 1086) and is the basis of the subsequent decisions in which compensation was awarded under Art. 32 and 226 of the Constitution, for contravention of fundamental rights.*

33-*"The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the*

guaranteed basic and inalienable rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting “ compensation” in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in its duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental right of citizen. The compensation is in the nature of 'exemplary damages' awarded against wrongdoer for the breach of its public law duty and is independent of rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or and prosecute the offender under the penal law.

34-This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen,

notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course, has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the fact and circumstances of the case is possible. The decision of this Court in the line of cases starting with *Rudul Sah vs. State of Bihar* (1983) 3 SCR 508: AIR 1983 SC 1086, granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental rights of a citizen under the Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disguised

substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma,J.

27- The Apex Court has considered the distinction in between the two remedies available in 'public law' and 'private law' and approved the view of the earlier bench in case of **Ravikant S.Patil** (Supra) with regard to award of compensation in proceeding under Article 32 and 226 by the Supreme Court and High Court. It was observed that award of compensation in a proceeding under Article 32 by the Apex Court or by the High Court under Art.226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.”

28- In view of the fact, the defence of sovereign immunity is not available in the constitutional remedy under writ jurisdiction. The writ petition is maintainable to exemplary cost in cases of violation of Constitutional right enshrined under Article 21 & 22 for the negligent act of the Police of State of U.P. in exercise of the power on behalf of State. The defence of sovereign immunity may be applicable in Appropriate Cases in private law, wherein vicarious liability of State in tort may arise. Our State is a welfare State. The Government and its employees have to protect the fundamental and Constitutional right of our citizen. High Court being the protector of civil liberties, has not only power and jurisdiction under Article 226 to entertain the petition but there is obligation also to grant appropriate relief to the victim or heir of the victim for violation of fundamental right of life and liberty, notwithstanding the remedy available for filing civil suit for damages for vicarious liability in tort and further to prosecute for offence. Hence in view of the aforesaid discussion, it is clear that the objection raised by the learned Government

Advocate in the present case that the action of the appellant was in exercise of sovereign power and the petition is not maintainable for compensation against the State, is misconceived and the same cannot be accepted.

29- Now considering the circumstances prevailing in the society and welfare of the public the wrongdoer not only to be punished but the victim or heir of the victim may also be granted monetary compensation for breach of public duty and for infringement of Constitutional right in appropriate cases. The purpose is not only to provide financial assistance but also to check the repetition of infringement of fundamental rights, by punishment and grant of exemplary damages and cost.

30- However, the courts are required to have self restraint while granting such relief under Article 226 of the Constitution of India, to check and discourage the misuse of the jurisdiction and to grant relief only in appropriate cases where there is breach of public duty and violation of Constitutional right.

31- In the present case no further inquiry is required because during investigation the police personnel were found guilty being negligent and the prosecution sanction has already been granted. In Magisterial inquiry also it was found that there was negligence of the police personnel in which they resorted firing causing death of two innocent villagers who were sitting in **GHER** of the house of one of the deceased.

32- So far as the quantum of compensation is concerned, certainly the fact and circumstances of each cases are required to be reconsidered. The life of a person is invaluable and cannot be compensated in terms of money. However, the compensation is necessary to provide financial assistance and further to give a message that a guilty person may also be liable to pay damages besides the punishment for the

offence, and to check the increase of such cases of negligent and malicious act. In the present case after inquiry considering the fact and circumstances including condition of the deceased's family the District Magistrate found that Rs.10 lac would be proper, hence payment of Rs.10 lac to the members of the deceased family was recommended to the State.

33- Since it was mentioned in the recommendation of the District Magistrate that the payment of compensation might be made from the Chief Minister's relief fund and only due to this reason the compensation has not been awarded on the pretext that on relevant date. The maximum relief for payment from Chief Minister's relief fund was Rs.20,000/-, hence in the present case only Rs.20,000/- was paid.

34- On behalf of the State it was informed by the State counsel that the matter was under consideration. However from the record it appears that the file was never placed before the Chief Minister. It is a welfare State. Even in those cases where there were no fault of the State or its instrumentalities, financial assistance are being granted by the State and Central Government, in accident matters and in natural calamities.

35- In the present case it is clear that there was violation of fundamental right because due to negligence of the police personnel of State of U.P. two innocent persons lost their lives. The recommendation of the District Magistrate was in the year 2000, hence after ten years either the aforesaid amount has to be enhanced or at least it should not be less than the amount which was recommended by the District Magistrate.

36- In view of the aforesaid discussion, it is appropriate case in which direction has to be issued, for payment of the compensation, to provide financial assistance to the members of deceased's family. Hence we direct the respondent no.1 to pay the compensation of a sum of Rs.10 lac, each, to the petitioners no.1 and 2/their legal heirs, within three months.

37- Accordingly, the present petition is allowed .

Dated: 16.9.2011

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