

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.431 OF 2003
WITH
NOTICE OF MOTION NO.513 OF 2003
WITH
NOTICE OF MOTION NO.43 OF 2007
WITH
NOTICE OF MOTION NO.226 OF 2008**

Umakant Kisan Mane
Amrutben Chawl, Room No.19,
Behind ACP Office, Unit 7,
Dayasagar, LBS Road,
Ghatkopar (W), Mumbai – 86.Petitioner

Versus

1.The Dean,
Rajawadi Municipal Hospital,
Ghatkopar (East), Mumbai.

2. The Municipal Commissioner,
Mumbai Municipal Corporation,
Dhobi Talao, Mumbai – 400 001.Respondents

Mr. Mihir Desai, Senior Advocate a/w. Mr. Sarnath Sariputta Pramod
for the petitioner.

Mr. Ram Apte, Senior Advocate a/w. Mrs. Geeta Jogalekar for the
respondents-BMC.

**CORAM : A.S.OKA & K.R.SHRIRAM,JJ.
RESERVED ON : 25th AUGUST, 2015
PRONOUNCED ON : 21st DECEMBER, 2015**

JUDGEMENT [PER JUSTICE K.R. SHRIRAM] :-

1 By this petition, the petitioner is attributing direct negligence on the part of the respondents regarding the performance of respondents' duties, which, according to the petitioner was the proximate cause for losing the fingers of his right hand.

The petitioner, therefore, is praying for (a) direction to the respondents to take action against the employees, agents and doctors responsible for the condition of the petitioner, (b) direction to the respondents to provide to the petitioner employment and (c) direction to the respondents to pay to the petitioner a sum of Rs.10 lakhs as compensation.

2 The facts in brief are as under :-

On 1st October, 2002 around 0.55 A.M., pursuant to an attack of convulsion, the petitioner, who at the time the petition was filed was about 21/22 years of age, was admitted in Medical Unit-III of Rajawadi Hospital under Dr. S.R. Oraskar, Senior Honorary Physician. The respondent no.2, i.e., Bombay Municipal Corporation, has established and runs that hospital. Respondent no.1 is the Dean of that hospital.

Immediately on admission of the petitioner, an intravenous line was started on his right hand peripheral vein and included injections, i.e., Eptoin 600 mg. in Dextrose Saline as loading dose, IV 25% Glucose 100 cc., Injection Ranitidine, Injection Ampelox, Injection Mannitol 100 ml. and Injection Dexta and other I.V. Fluids of which Mannitol is known to cause osmotic injury and Phenytoin an irritant injury, on extravasation. These injuries would happen if the

intravenous fluids flowed out of the vein.

3 On 2nd October, 2002, the Lecturer on duty noticed swelling of the right hand and forearm and I.V. line on the right hand side was changed to the other hand.

 On 3rd October, 2002, discoloration of the skin of right hand and forearm was noticed. Treatment in that regard was started with limb elevation.

 On 4th October, 2002, blackening of the fingers were seen and there was no active fingers movements and on 5th October, 2002 when the doctors took their rounds at 8.45 a.m. it was noted that the petitioner was developing gangrene of right arm. Later, on the same day, it was noted that the petitioner had no sensation in his fingers but it was also noted that no active surgical intervention was required till line of demarcation formed.

 On 7th October, 2002, line of demarcation was formed between gangrenous and normal part of finger of right hand. On the same day it is noted that the patient was advised amputation of finger by the Orthopaedic Lecturer.

 On 22nd October, 2002 after a gap of more than two weeks, the consent of the petitioner's relatives for amputation of right hand fingers and thumb was obtained and on the same day

amputation of right hand fingers of the petitioner was done. The petitioner was discharged from the hospital, as per the record, against medical advice on 25th October, 2002 and the petitioner continued to attend the out patient department of the hospital after his discharge.

4 The case of the petitioner is that the fingers of his right hand were amputated because of the negligence of the doctors and the nurses, who were treating him in the hospital. After the petitioner served notice dated 22nd November, 2002 on the hospital, an inquiry committee consisting of four doctors, viz., Dr.M.E. Yeolekar, Dean L.T. Medical College and Sion Hospital, Dr. Avinash Supe, Professor of Surgery, KEM Hospital, Dr. N.K. Hase, Professor of Medicine, Sion Hospital and Dr. Aseem Parekh, Professor of Orthopedics, Nair Hospital was constituted. On 15th February, 2003, the inquiry committee submitted its report dated 11th February, 2003. A copy of the report has been placed on record with an affidavit in reply of one Vikramaditya B. Shukla, the Medical Superintendent of Rajawadi Hospital, in the employment of respondent no.1, affirmed on 7th March, 2003.

5 From the inquiry report and the medical reports which are placed on record, it appears that when the petitioner was admitted into the hospital, he was suffering from convulsions, cerebral malaria and meningitis. He was irritable and semiconscious. According to the report, the petitioner developed gangrene to the right hand because of extravasation of the fluids and drugs which were being administered to the petitioner. As per the report, 25% Glucose, Renitidine, Ampolox, Mannitol, which were administered to the petitioner can cause such injury if extravasation is given. Thus, according to the report, as fluid which was given extravasation instead of going into the vein spread under the skin of the petitioner's right arm and gangrene was caused. The inquiry report further shows that the consent of the father of the patient was obtained for performing the operation but the forms were not signed by the doctors and the signature of the father of the petitioner was in Marathi but the consent is in English language. There is no signature of the witnesses showing that the father was explained the nature of the ailment and the operation in the language that he knows. It does appear from the report that there was some kind of communication gap between the physicians who were treating the petitioner and the petitioner's relatives.

6 Article 21 of the Constitution gives a person his most cherished right, viz., right to life which includes right to live with human dignity. The public law remedies have also been extended to the realm of tort. The Apex Court, in its various decisions has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the government. The causing of injuries, which amounted tortuous act, was compensated by the Apex Court in many of its decisions beginning from ¹***Rudul Sah vs. State of Bihar***. In cases relating to custodial deaths and those relating to medical negligence, the Apex Court awarded compensation under the public law domain. The courts have rejected the contentions that the petitioner should have approached the Civil Court for damages and the matter should not have been considered in the petition under Article 226 of the Constitution. (²***Chairman, Railway Board vs. Chandrima Das***)

7 It is, therefore, settled law that the court in exercise of extra ordinary power under Article 226 of the Constitution of India can award damages against public authorities. The courts, however, award damages only if it can be established that there was direct negligence on the part of the public authority and that was a

1 (1983) 4 SCC 141

2 2000 (2) SCC 465

proximate cause for the injury or death of the victim and not in every case like if there was a minor infraction of public duty. In ³**Rabindra Nath Ghosal Vs. University of Calcutta & Ors.**, the Apex court held as under :-

"The courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in public law proceedings. Consequently when the court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, 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 has failed in its public duty to protect the fundamental rights of the citizens. But it would not be correct to assume that every minor infraction of public duty by every public officer would commend the court to grant compensation in a petition under Article 226 and 32 by applying the principle of public law proceeding. The court in exercise of extraordinary power under Articles 226 and 32 of the Constitution, therefore, would not award damages against public authorities merely because they have made some order which turns out to be ultra vires, or there has been some inaction in the performance of the duties unless there is malice or conscious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act."

8 The Apex Court in the matter of ⁴**Municipal Corporation of Delhi, Delhi vs. Uphaar Tragedy Victims Association and ors.** has dealt with this branch of law extensively. The Apex Court has also held that if the court comes to a conclusion that there was direct negligence on the part of the public authority, what can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount but something more and it can be by way of making monetary amends for the wrong done and by way of

3 (2002) 7 Supreme Court Cases 478

4 (2011) 14 SCC 481

exemplary damages, exclusive of any amount recoverable in a civil action based on tortious liability. The Apex Court has also held that in a case, where life and personal liberty have been violated the absence of any statutory provision for compensation in the Statute is of no consequence. Right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Article 21 of the Constitution of India has to be read into all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. Duty of care expected from the State or its officials functioning under the public safety legislation is very high.

9 Therefore, we need to see whether there was direct negligence on the part of the respondents which was the proximate cause for the petitioner losing the fingers of his right hand.

10 In the affidavit in reply filed by Vikramaditya B. Shukla affirmed on 7th March, 2003, on behalf of the respondents, it is stated that the injection Mannitol is known to cause osmotic injury and Phenytoin an irritant injury on extravasation, i.e., if the intravenous fluids flow out of the vein. If the petitioner was being administered

drugs which may have the effect of causing gangrene if they do not go properly into the vein, there is no explanation as to why care was not taken by the treating doctors and nurses to see that the medicines were not administered intraveins. It appears from the report and the case paper of the petitioner, which is also placed on record, that the drugs were not going into the vein as they were supposed to and that was noticed only on the next date, i.e., 2nd October, 2002.

11 The respondents have stated that as the patient was rowdy, the relatives were asked to take special care of the patient but the relatives did not. It is rather strange, even if we go along with the respondents for a moment to say in a municipal hospital because of the sheer volume of patients it is very difficult to give personalised attention to every patient. Can we accept that the doctors and the nursing staff have taken adequate or proper care of the patient by asking the relatives to take care of the patient? Was it not the duty of the treating doctors and nurses to periodically check whether the drugs were going into the vein of the petitioner as it was supposed to? Infact it gives an impression that while fixing the needle itself no care has been taken to ensure that the needle is inserted properly into the vein. Was it not the duty of the doctors and the nursing staff,

particularly, when they are aware that Mannitol and Phenytoin are known to cause osmotic injury and irritant injury on the section? If some of the drugs are known to cause such injuries that could lead to gangrene if flown out of the vein, then in our opinion, the duty of care was greater. Why was it not observed earlier by the treating doctors and the nursing staff when there was a gap of more than 24 hours between the time the medicines were administered and for the first time they noticed something was wrong. Is it that all the while neither the doctors nor the nurses even bothered to check on the patient or they came but did not bother to check if everything was alright. It appears from the inquiry report also that the doctors and the nursing staff were negligent and the petitioner was a helpless victim of this negligence.

Moreover, on 3rd October, 2002, it was observed that there were no movements, there were swelling over the palms and the forearm had blackened, it was tense and shiny, tender and there were blackish blue discoloration of fingers. On 5th October, 2002, it was noted that gangrene had developed on the right arm but the surgery was done only on 22nd October, 2002. There is no explanation for such a long delay. Further, there is no explanation as to what the doctors and nurses did to prevent setting in of gangrene. Perhaps it was because the patient was poor and his parents could

not afford the treatment. We are making this observation because in the case notes, which is at Exhibit D-12, it is noted as under :-

"05.10.2002 at 8.45 A.M. To M.S.W.

Kindly make arrangement for the medication of pt. Umakant developing gangrene of Rt. Arm. Pt. relatives are not affording to bring for such amount of medicines. Kindly do the needful. Thanks.

H.O. SRO

Rx.Ct.all."

12 If the medication had been given properly inside the vein and the doctors and nurses were not negligent, the injury would not have happened and the gangrene could not have set in and the fingers could have been saved. It is a clear case of gross negligence on the part of the doctors and the nurses of the respondents to allow this to happen. Moreover, from the report of the inquiry committee it appears that the doctors were negligent in informing the relatives of the petitioner about the nature of the ailment and the nature of the operation. Even proper form was not filled in because the consent form is in English whereas the patient's father has signed in Marathi. Paragraph 6 of the observation of the inquiry committee's report dated 11th February, 2003 states that "Consent form lacked the proper form, witness signature and doctor's signature. It could have been in Marathi". The inquiry committee has also noted that the relatives were not much concerned about the patient but at the same time that has no direct relationship with the events relating to

gangrene of fingers. It is also observed that the patient was discharged against medical advice as per the wish of relatives but there is nothing on record to show why the patient was discharged after 2-3 days of amputation and the patient continued to attend the out patient department after his discharge for receiving treatment.

13 We also find it rather strange that when public visiting hours in the hospital are restricted and duty to take care of the patient is that of the employees of respondents how were the relatives asked to look after the patient. In any event that would not lessen the duty of the doctors and nurses treating the patient. When a patient is admitted in the hospital, it is the duty of the doctors and nursing staff of the hospital to give best possible care and treat the patient. We find the conduct of the doctors and the nurses to be outrageous. It shocks the conscience of this court. There has been wanton disregard on the part of the doctors, the nurses and the respondents. If the doctors and the nurses had any regard for the patient, they would have, particularly when they are aware that the drugs that were administered may have the effect of causing gangrene if it did not go properly into the vein, taken proper care and not been negligent. Moreover, there was some problem in the hand was noticed more than 24 hours later. All this leads to only one

conclusion – gross negligence and wanton disregard towards the patient by the doctors and the nurses and the patient is a helpless victim. Infact the inquiry committee report also confirms that it is the extravasation that led to gangrene in the fingers. In paragraph 2 of the observations in the report dated 11th February, 2003 of the inquiry committee, it is noted as under :

"2. IV line was started with a venous cannula on right hand. Patient was rowdy, irritable and there were no relatives. Lumbar puncture was carried out on same day. Many drugs were given through the IV line including IV Mannitol, 25% Glucose and Eptoin. There appears to be extravasation of the fluid and these drugs in the subcutaneous and muscle compartment of right hand and right forearm which had caused the further events. It is difficult to pinpoint the exact timing of the extravasation, but appears to be on 2nd October early morning. This appears to have been promptly noted by the lecturer of Medicine and treatment was initiated."

(emphasis supplied)

14 Paragraph 7 of the observations of the inquiry committee report dated 11th February, 2003 also reads as under :

"7. It is evident from statement from all doctors and staff nurses that relatives did not appear to be concerned about the patient and have stated incidences where patient was physically dealt by the relatives. This is noted but has no direct relationship with the events relating to gangrene of fingers."

(emphasis supplied)

15 There has been a breach of legal duty on the part of the respondents resulting in the petitioner losing his fingers of his right hand. In our view, due to this inaction on the part of the respondents, the fundamental rights of the petitioner is infringed. The claim made in this petition is in public law, for compensating the petitioner, for

deprivation of life and personal liberty. In this case, when the doctors were administering medication which could cause injury if not properly administered, the principle of Res Ipsa Loquitur applies.

16 The maxim of Res Ipsa Loquitur is explained in ⁵**Ashish Kumar Mazumdar Vs. Aishi Ram Batra Charitable Hospital Trust & Ors.**, where para-10 & 11 read as under :-

"10. The maxim res ipsa loquitur in its classic form has been stated by Erlc, C.J.

"...where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The maxim applies to a case in which certain facts proved by the plaintiff, by itself, would call for an explanation from the defendant without the plaintiff having to allege and prove any specific act or omission of the defendant.

11. In Shyam Sunder v. State of Rajasthan it has been explained that the principal function of the maxim is to prevent injustice which would result if the plaintiff was invariably required to prove the precise cause of the accident when the relevant facts are unknown to him but are within the knowledge of the defendant. It was also explained that the doctrine would apply to a situation when the mere happening of the accident is more consistent with the negligence of the defendant than with other causes."

17 The principle of Res Ipsa Loquitur explained in a medical negligence case can be found in ⁶**V.Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.**, where paragraph-48 and 49 read as under :-

"48. In the treatises on Medical Negligence by Michael Jones, the learned author has explained the principle of res ipsa loquitur as essentially an

⁵ (2014) 9 Supreme Court Cases 256

⁶ (2010) 5 Supreme Court Cases 513

evidential principle and the learned author opined that the said principle is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The principle has been explained in the case of *Scott v. London & St. Katherine Docks Co.* [reported in (1865) 3 H & C. 596], by Chief Justice Erle in the following manner:- "...where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

49. The learned author at page 314, para 3-146 of the book gave illustrations where the principles of *res ipsa loquitur* have been made applicable in the case of medical negligence. All the illustrations which were given by the learned author were based on decided cases. The illustrations are set out below:-

"Where a patient sustained a burn from a high frequency electrical current used for "electric coagulation" of the blood [See *Clarke v. Warboys*, *The Times*, March 18, 1952, CA];

Where gangrene developed in the claimant's arm following an intramuscular injection [See *Cavan v. Wilcox* (1973) 44 D.L.R. (3d) 42]; 7
When a patient underwent a radical mastoidectomy and suffered partial facial paralysis [See *Eady v. Tenderenda* (1974) 51 D.L.R. (3d) 79, SCC];

Where the defendant failed to diagnose a known complication of surgery on the patient's hand for Paget's disease [See *Rietz v. Bruser* (No.2) (1979) 1 W.W.R. 31, Man QB.];

Where there was a delay of 50 minutes in obtaining expert obstetric assistance at the birth of twins when the medical evidence was that at the most no more than 20 minutes should elapse between the birth of the first and the second twin [See *Bull v. Devon Area Health Authority* (1989), (1993) 4 Med. L.R. 117 at 131.];

Where, following an operation under general anaesthetic, a patient in the recovery ward sustained brain damage caused by hypoxia for a period of four to five minutes [See *Coyne v. Wigan Health Authority* {1991} 2 Med. L.R. 301, QBD];

Where, following a routine appendisectomy under general anaesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma [See *Lindsey v. Mid-Western Health Board* (1993) 2 I.R. 147 at 181]; 7

When a needle broke in the patient's buttock while he was being given an injection [See *Brazier v. Ministry of Defence* (1965) 1 Ll. Law Rep. 26 at 30];

Where a spinal anaesthetic became contaminated with disinfectant as a result of the manner in which it was stored causing paralysis to the patient [See *Roe v. Minister of Health* (1954) 2 Q.B. 66. See also *Brown v. Merton, Sutton and Wandsworth Area Health Authority* (1982) 1 All E.R. 650];

Where an infection following surgery in a "well-staffed and modern hospital" remained undiagnosed until the patient sustained crippling injury [See *Hajgato v. London Health Association* (1982) 36 O.R. (2d) 669 at 682];

Where an explosion occurred during the course of administering

anaesthetic to the patient when the technique had frequently been used without any mishap [Crits v. Sylvester (1956) 1 D.L.R. (2d) 502]."

(emphasis supplied)

18 In this case also gangrene had developed in the petitioner's arm following an intravenous injection which extravasated. Therefore, it was for the respondents to prove the absence of any negligence and due care and attention on its part, in which it has failed.

19 The respondents, which is the State, has failed in its public duty to protect the fundamental rights of the petitioner. The vicarious liability can be linked with the negligence of the doctors and nursing staff. In ⁷***Nagendra Rao & Co. Vs. State of Andhra Pradesh*** the Apex court in para-25 held as under :

"25. The determination of vicarious liability of the State being linked with the negligence of his officers, if they can be sued personally for which there is no dearth of authority, and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued."

Specific reference may also be made to the decision of the Apex court in ⁸***Nilabati Bahera Vs. State of Orissa***, wherein the Apex court also held that the concept of sovereign immunity is not applicable to cases of violation of fundamental rights. In paragraph 17

⁷ (1994) 6 SCC 205

⁸. 1993 (2) SCC 746

it is summarised as under :-

“17..... 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 right, 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 Articles 32 and 226 of the Constitution.....”

Paragraph-96 and 97 of MCD vs. Uphaar (supra) also

read as under :-

“96. Courts have held that due to the action or inaction of the State or its officers, if the fundamental rights of a citizen are infringed then the liability of the State, its officials and instrumentalities, is strict. The claim raised for compensation in such a case is not a private law claim for damages, under which the damages recoverable are large. The claim made for compensation in public law is for compensating the claimants for deprivation of life and personal liberty which has nothing to do with a claim in a private law claim in tort in an ordinary civil court.

97. This court in Union of India V. Prabhakaran Vijaya Kumar extended the principle to cover public utilities like the Railways, electricity distribution companies, public corporations and local bodies which may be social utility undertakings not working for private profit. In Prabhakaran a woman fell on a railway track and was fatally run over and her husband demanded compensation. The Railways argued that she was negligent as she tried to board a moving train. Rejecting the plea of the Railways, this Court held that her “contributory negligence” should not be considered in such untoward incidents- the Railways has “strict liability”. A strict liability in torts, private or constitutional do not call for a finding of intent or negligence. In such a case the highest degree of care is expected from private and public bodies, especially when the conduct causes physical injury or harm to persons. The question as to whether the law imposes a strict liability on the State and its officials primarily depends upon the purpose and object of the legislation as well. When activities are hazardous and if they are inherently dangerous the Statute expects the highest degree of care and if someone is injured because of such activities, the State and its officials are liable even if they could establish that there was no negligence and that it was not.

intentional. Public safety legislations generally fall in that category of breach of statutory duty by a public authority. To decide whether the breach is actionable, the Court must generally look at the statute and its provisions and determine whether legislature in its wisdom intended to give rise to a cause of action in damages and whether the claimant is intended to be protected."

(emphasis supplied)

20 In MCD vs. Uphaar (supra) the Apex court has held that right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Para-98 of MCD vs. Uphaar (supra) reads as under :

"98. But, in a case, where life and personal liberty have been violated, the absence of any statutory provision for compensation in the statute is of no consequence. Right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Article 21 of the Constitution of India has to be read into all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. Duty of care expected from State or its officials functioning under the public safety legislation is, therefore, very high compared to the statutory powers and supervision expected from the officers functioning under the statutes like the Companies Act, the Co-operative Societies Act and such similar legislations. When we look at the various provisions of the Cinematograph Act, 1952 and the Rules made thereunder, the Delhi Building Regulations and the Electricity laws the duty of care on officials was high and liabilities strict."

21 Therefore, in such cases the claimant can be awarded compensation which, in the broader sense means 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 rights of the citizen. The Apex Court in the matter of ***Nilabati Bahera vs. State of Orissa*** (supra) has held that compensation in such cases is in the nature of exemplary damages awarded against the wrongdoer for the breach of its public law duty and is independent of the 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. Paragraph 34 of Nilabati Bahera (supra) reads as under :-

"34. Therefore, when the court molds 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 has failed in its public 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 rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the 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 persecute the offender under the penal law."

22 In ⁹***Sube Singh Vs. State of Harayana*** the Apex Court held as under :-

"It is now well settled that the award of compensation against the State is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and

9 (2006) 3 SCC 178

circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 Cr.PC. Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a-half decades."

23 In MCD vs. Uphaar (supra) also the court has held that what can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount but something more. It can be by way of making monetary amounts for the wrong done or by way of exemplary damages, exclusive of any amount recoverable in a civil action based on tortious liability. Para-64 therein reads as under :-

"64. Therefore, what can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount, but something more. It can be by way of making monetary amounts for the wrong done or by way of exemplary damages, exclusive of any amount recoverable in a civil action based on tortious liability....."

24 On the measure of damages, a constitutional court can award monetary compensation against the State and its officials for failure to safeguard fundamental rights of citizens. In MCD vs. Uphaar (supra) the Apex court in para-99 states as under :-

"99. The law is well settled that a constitutional court can award monetary compensation against the State and its officials for its failure to safeguard fundamental rights of citizens but there is no system or method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact situations. The yardsticks normally adopted for determining the compensation payable in private tort claims are not as such applicable when a constitutional court determines the compensation in cases where there is violation of fundamental rights guaranteed to its citizens."

25 The Apex court in MCD vs. Uphaar (supra) has also held that even punitive damages can be awarded where the situation warrants. Para-105 & 108 reads as under :-

"105. Compensatory damages are intended to provide the claimant with a monetary amount necessary to recoup/replace what was lost, since damages in tort are generally awarded to place the claimants in the position he would have been in, had the tort not taken place ; which are generally quantified under the heads of general damages and special damages. Punitive damages are intended to reform or to deter the wrongdoer from indulging in conduct similar to that which formed the basis for the claim. Punitive damages are not intended to compensate the claimant which he can claim in an ordinary private law claim in tort. Punitive damages are awarded by the constitutional court when the wrongdoer's conduct was egregiously deceitful.

106.

107.

108. Several factors may gauge on a constitutional court in determining the punitive damages such as contumacious conduct of the wrongdoer, the nature of the statute, gravity of the fault committed, the circumstances, etc. Punitive damages can be awarded when the wrongdoers' conduct "shocks the conscience" or is "outrageous" or there is a wilful and "wanton disregard" for safety requirements. Normally, there must be a direct connection between the wrongdoer's conduct and the victim's injury."

26 This court at the admission stage had observed prima facie that the employees of the respondent no.2 were negligent in treating the petitioner resulting in virtually ruining the life of the petitioner. The court had appointed a committee of a retired judge of this court, i.e., Justice (retd.) Shri H. Suresh. From the records and proceedings it does not appear whether Justice Suresh's committee conducted any inquiry or gave any report.

27 Be that as it may, this court after hearing the counsel for the petitioner and the counsel for the respondent no.2 had asked the counsel for the respondents as to whether he would take instructions of the Municipal Corporation as to whether the Corporation on its own is ready to offer any compensation (monetary as well as rehabilitation). The counsel for the respondent no.2 stated that rehabilitation was not possible but he would take instructions about the monetary compensation. It is for that reason this court after reserving the matter for judgment on 25th August, 2015 waited for the counsel for the Municipal Corporation to revert. The counsel for the Municipal Corporation wanted some time and therefore, we did not write the judgment earlier expecting a positive response. On 8th October, 2015, the counsel for the respondents - BMC requested for some more time to take instructions and time was granted upto 23rd October, 2015. On 30th October, 2015, the counsel appearing for the respondents – BMC expressed their inability to consider any payment or offer any compensation. Thereafter we proceeded to write this judgment.

28 While determining compensation, the age, income, impairment of future earning capacity and number of dependents are determining factors. There is no straight jacket formula. There is no

uniformity or yardstick followed in awarding damages for violation of fundamental rights. In a similar matter, ¹⁰**Alfred Benddict & Anr. Vs.M/s.Manipal Hospital, Bangalore & Ors.**, the Apex court awarded Rs.20 lakhs for a two year old child. The relevant paragraphs are reproduced herein :-

“ The facts in a nutshell are that complainants took their two years old daughter, who was suffering from normal cold and cough, to Dr.Arvind Shenoy, Consultant Pediatric, who after giving treatment for few days, advised for her admission to M/s. Manipal Hospital Bangalore (in short, "the Hospital"). On admission, she was taken to pediatric intensive care unit and diagnosed that she was suffering from cold and cough as well as from pneumonia. She was given intravenous fluids by inserting needle on the dorsal aspect of right wrist from August 26, 2002 to August 28, 2002. However, the baby developed gangrene initially in the finger tips, which spread to the portion of the hand below wrists joint, due to blockage of blood supply. It is contended on behalf of complainants (parents of the baby) that Hospital Doctors conducted Angiogram and confirmed that there was complete blockage of blood supply to the right forearm and they conducted operation on the right forearm to restore blood supply but the same could not be restored and, eventually, the daughter of the complainants had to lose her right forearm. It is alleged that the complainants, thereafter, came to know that the needle was wrongly inserted into artery instead of vein due to which the blood supply was blocked.

The complainants were shocked and highly dismayed at the conduct of the hospital Doctors, who had admitted their daughter for treating cough, cold and fever and now she was on the brink of losing her hand due to utter negligence of the Hospital and their Doctors. The complainants-Parents did not agree for the amputation as the child was merely two years old at that time. It is alleged that Dr. Vasudeva Rao, Vascular Surgeon of the Hospital, even threatened and forced the parents to give their consent for amputation on the pretext that any delay would endanger the life of child. Thus imputing the opposite parties i.e. the Hospital and the concerned Doctors, complainants filed a complaint before the Karnataka State Consumer Disputes Redressal Commission, Bangalore (in short, "the State Commission") praying for grant of compensation of Rs.One crore.

The National Commission affirmed the quantum of compensation and directed to pay a further sum of Rs.10,000/- to the complainants towards the cost. We have heard learned counsel for the parties and have gone through the finding recorded by the State Commission as also the National Commission. We do not find any reason to differ with the finding that it was only because of the negligence on the part of the Hospital the two years' child developed gangrene resulting into amputation of her right arm.

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However, taking into consideration the sufferings of the girl child, who is now 13 years of age, in our opinion the compensation awarded by the Commission is in a lower side. Learned counsel appearing for the complainant submitted that every year she has to incur battery charges for the artificial limb, which costs Rs.80,000/- annually. There cannot be any dispute that the girl will have to suffer throughout her life and has to live with artificial limb. Not only she would have to face difficulty in her education but would have also to face problem in getting herself married. Although the sufferings, agony and pain, which the girl child will carry cannot be compensated in terms of money, but, in our view, a compensation of Rs.20,00,000/- (Rupees Twenty Lakhs only) will be just and reasonable in order to meet the problems being faced by her and also to meet future troubles that will arise in her life.

With the aforesaid reason, we allow the appeal filed by the complainants being Civil Appeal arising out of SLP(C)No.35632 of 2013 by enhancing the compensation to Rs.20,00,000/- (Rupees Twenty Lakhs only), which shall carry simple interest of 9 per cent per annum from the date of this order. It may be made clear that out of the total compensation, a sum of Rs.10 lakhs shall be deposited in a long term fixed deposit in a nationalized bank so that this amount along with interest, that may accrue, shall take care of her future needs. The balance Rs.10 lakhs shall be utilized by investing Rs.5 lakhs in a short term fixed deposit in a nationalized bank so that this amount along with accrued interest will take care of her needs in near future. The rest Rs.5 lakhs may be spent for her further medical treatment.

The aforesaid compensation amount shall be paid by owner of the Hospital within six weeks from today. It is needless to say that the amount, which has already been paid, shall be adjusted out of the amount awarded by this Court."

29 As stated in the petition, the petitioner was about 21/22 years of age and he was doing an ITI - fitter course but now due to amputation of his right hand fingers he could not complete the course and is not in a position to secure any job. The petitioner had prayed for a direction to the respondent no.2 to employ him so that he gets means of his livelihood. The respondent no.2 declined to employ him. It is stated in the petition that there are 10 members in the family of the petitioner and the father of the petitioner was old and the only earning member in the family. Due to amputation of the

fingers, the petitioner is a physically challenged person. Though in the service of the respondent no.2 there are reservations made for physically challenged/disabled persons, still the respondent no.2 refused to employ the petitioner on humanitarian ground. Infact the petitioner had even offered to work as a peon. The respondent no.2 is a large organisation and could have employed the petitioner but had declined to do so. Moreover negligence attributable to the responsible staff not only ruined the future of the petitioner but also permanently handicapped him.

30 In our view, the cause for the petitioner losing the fingers of his right hand is directly attributable to the gross and direct negligence on the part of the doctors and nursing staff of Rajawadi Hospital run by the respondent-State. There has been gross negligence on the part of the respondents in performing its duties. The petitioner, therefore, is certainly entitled to compensation in the nature of exemplary damages from the respondents. The petitioner in the petition has stated that fitters earn in the region of Rs.5000/- – Rs.7000/- per month, which in our view is rather reasonable. This was the position in 2002/2003 when the petition was filed. Based on this, the petitioner has claimed Rs.10,00,000/-. Factoring inflation and the changed economic scenario, the petitioner

should be entitled to higher compensation. The petitioner, however, is claiming only Rs.10 lakhs. We are, therefore, granting this amount as compensation. The respondents are, therefore, directed to pay the amount of Rs.10 lakhs to the petitioner. The respondents also to pay interest @ 9% p.a. on the said amount for the period beginning from 1st November, 2002 until payment/realisation. The principal and interest amount shall be deposited in this court with the Prothonotary and Senior Master within two months from today. Failure to do so will attract further interest @ 9% p.a. on the principal amount of Rs.10 lakhs and the accumulated interest.

31 This amount of Rs.10 lakhs plus accumulated interest as on 21st December, 2015 works out to about Rs.21,82,500/-. This amount of Rs.21,82,500/- has to be paid over to the petitioner/dealt with by the Prothonotary and Senior Master as under :-

(i) Any amount in excess of Rs.20,00,000/- to be handed over to the petitioner immediately.

(ii) The balance amount of Rs.20,00,000/- to be invested by the Prothonotary and Senior Master in a fixed deposit with a nationalized bank for 5 years. The interest generated to be paid over to the petitioner monthly by transferring the same to the petitioner's bank account as per the particulars supplied by the petitioner.

(iii) At the end of 5 years/once the fixed deposit matures, a sum of Rs.5 lakhs will be handed over to the petitioner. The balance amount shall be invested for a period of 5 years in fixed deposit with a nationalized bank and monthly interest will be handed over to the petitioner by transferring the same to the petitioner's bank account as per the particulars supplied by the petitioner.

(iv) When this fixed deposit matures, immediately, another Rs.5 lakhs will be handed over to the petitioner. The balance amount shall be invested by the Prothonotary and Senior Master for a period of 5 years in fixed deposit with a nationalized bank and monthly interest will be handed over to the petitioner by transferring the same to the petitioner's bank account as per the particulars supplied by the petitioner.

(v) When this fixed deposit matures, immediately, another Rs.5 lakhs will be handed over to the petitioner. The balance amount shall be invested by the Prothonotary and Senior Master for a period of 5 years in fixed deposit with a nationalized bank and monthly interest will be handed over to the petitioner by transferring the same to the petitioner's bank account as per the particulars supplied by the petitioner.

(vi) When this fixed deposit matures, immediately, the final Rs.5,00,000/- will be handed over to the petitioner by the Prothonotary and Senior Master.

32 As the matter is also very old, it will be very difficult to pinpoint negligence on an individual. Many may have retired or died or left the service and moved on in life. We, therefore, do not think it is necessary to consider prayer (a) of the petition.

33 Accordingly, rule is made absolute and the petition stands disposed.

34 The respondents also to pay sum of Rs.1,00,000/- as cost to the petitioner by way of cheque drawn in favour of the advocate on record for the petitioner within four weeks.

(K.R.SHRIRAM,J)

(A.S.OKA,J.)