

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

FRIDAY, THE 22ND DAY OF MAY 2015/1ST JYAISHTA, 1937

WP(C).No. 24902 of 2014 (K)

PETITIONER(S):

**SHYAM BALAKRISHNAN,
'GIMLA', NILAVILPUZHA, MATTILIYAM P.O.,
WAYANAD - 670 731.**

**BY ADVS.SRI.P.SANKARANKUTTY NAIR
SRI.K.SANDESH RAJA
SRI.VENU MENON**

RESPONDENT(S):

- 1. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM - 695 001.**
- 2. THE PRINCIPAL SECRETARY TO GOVERNMENT,
DEPARTMENT OF HOME, SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.**
- 3. THE DISTRICT COLLECTOR,
COLLECTORATE , KALPETTA, WAYANAD - 673 121.**
- 4. THE STATE POLICE CHIEF,
POLICE HEAD QUARTERS VAZHUTHAKKAD P.O.,
THIRUVANANTHAPURAM - 695 014.**
- 5. THE SUPERINTENDENT OF POLICE,
KALPETTA, WAYANAD - 673 121.**
- 6. PREM KUMAR,
THE DEPUTY SUPERINTENDENT OF POLICE,
MANANTHAVADI, WAYANAD - 670 645.**
- 7. JOSE,
THE SUB INSPECTOR OF POLICE,
VELLAMUNCA POLICE STATION, WAYANAD - 670 731.**

msv/

WP(C).No. 24902 of 2014 (K)

**8. UNION OF INDIA,
REP. BY THE PRINCIPAL SECRETARY,
DEPARTMENT OF HOME AFFAIRS, NORTH BLOCK,
CENTRAL SECRETARIAT, NEW DELHI - 110 001.**

**R1-R7 BY ADV. DIRECTOR GENERAL OF PROSECUTION SRI.T.ASAF ALI
R8 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL**

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
23-01-2015 THE COURT ON 22-05-2015, DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1: TRUE COPY OF THE SALE DEED NO.3418/2010 DATED 18/8/2010 OF VELLAMUNDA SUB REGISTRAR OFFICE.

EXHIBIT P2: TRUE COOY OF THE RECEIPT ISSUED BY THE INSPECTOR OF POLICE MANANTHAVADUY EVIDENCING THE SEIZURE OF LAPTOPS AND THE MOBILE PHONES OF THE PETITIONER AND HIS LIFE PARTNER.

EXHIBIT P3: TRUE COPY OF THE REPORT PUBLISHED IN THE MADHYAMAM DAILY DATED 21/5/2014.

EXHIBIT P4: TRUE COPY OF THE RELEVANT EXTRACT OF THE MADHRUBHUMI PAPER WAYANAD EDITION.

EXHIBIT P5: TRUE COPY OF ONLINE NEWS OF THE ASIANET T.V. DATED 21/5/2014.

EXHIBIT P6: TRUE COPY OF THE REPRESENTATION DATED 5/6/2014 SENT TO THE 2ND RESPONDENT.

EXHIBIT P7: TRUE COPY OF THE REPRESENTATION DTD.5.6.2014 SENT TO THE 4TH RESPONDENT.

RESPONDENT(S)' EXHIBITS:

ANNEXURE R6(a): THE PHOTOCOPY OF THE "KAICHEETTU" IN CONNECTION WITH THE ASUSE NET BOOK AND POWER COE 2 NOS., MOBILE PHONE - GIONEE M2-1 NO.MOBILE CHARGER-1NO., EXTERNAL HARD DISK TRANSCEND AND POWER CODE-1 SIGNED BY MR.SYAM BALAKRISHNAN.

ANNEXURE R6(b): THE PHOTO COPY OF THE STATEMENT MADE BY MR.SHYAM BALAKRISHNAN BEFORE THE POLICE PERSONAL.

ANNEXURE R6(c): THE PHOTO COPY OF THE STATEMENT MADE BY MS.GEETHA PRIYA BEFORE THE POLICE STATION.

ANNEXURE R6(d): THE PHOTO COPY OF THE STATEMENT MADE BY MR.SACHU MURALEEDHARAN BEFORE THE POLICE PERSONAL.

ANNEXURE R6(e): THE PHOTO COPY OF THE STATEMENT MADE BY MS.RAZIA SACHU BEFORE THE POLICE PERSONAL.

ANNEXURE R6(f): THE PHOTOCOPY OF THE "KAICHEETTU" IN CONNECTION WITH THE VEHICLE BEARING NO.KL08 V-4755 SIGNED BY MR.SYAM BALAKRISHNAN.

//TRUE COPY//

P.S.TO JUDGE

Msv/

A.MUHAMED MUSTAQUE, J.

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**W.P.(C).No.24902/2014**  
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Dated this the 22nd Day of May, 2015

J U D G M E N T

“C.R.”

An action initiated by the Home Department of the State through the Police force, to prevent the activities of the Maoist-idealist people in the forest area within the Vellamunda Police Station and other areas, under the name of “thunder bolt” and “anti-naxal squad” resulted in filing this writ petition on the premise of deprivation of liberty of the petitioner without justifiable reasons under law. Petitioner says that he has been arrested wrongfully and later released. He seeks action against the police officials besides compensation, in this writ petition.

2. The brief facts involved in this case are as follows:

On 20/05/2014, on receiving information that a suspected Maoist is travelling in a Motor Cycle bearing

No. KL-08/V 4755, the anti-naxal squad conducted patrolling in the area and questioned the petitioner. By that time, people had assembled and created a pandemonium. The police thereupon took the petitioner in a police jeep and interrogated after conducting body search. The General Diary produced by the learned Director General of Prosecution would indicate that the police suspected that the petitioner was a Maoist and he was taken into custody for questioning. The police version in the statement before this Court is that they were, in fact, trying to protect the petitioner from the group of people assembled in the area and took the petitioner in the jeep to the Police Station. However, it is admitted in the statement that the petitioner was interrogated by the Deputy Superintendent of Police, Mananthavady and he had collected the laptops and mobile phone of the petitioner for verification. The police deny the fact that they have arrested the petitioner and also state that no crime has been registered against him. It is submitted that all the

-:3:-

properties which were taken by the police from the petitioner have been returned to the petitioner.

3. The stand of the petitioner is that he was arrested without following any procedure established by law, as a suspected Maoist and on revealing his identity and whereabouts and on also finding that there is nothing connected to determine him as Maoist, he was released from the custody. Petitioner submits that he has been living in that area for more than four years along with his partner and is engaged in 'yoga sastra'.

4. The police version that the petitioner was taken in the jeep to the Police Station to protect him from the public who were agitating, appears to be a feeble defence put forward in this matter. The General Diary and other admitted searches conducted by the police would clearly dispel the claim of the police that the petitioner was taken to a safe place to protect him from the agitated people. If the intention of the police was only to protect the petitioner, what was the reason for the police to conduct search at the

house of the petitioner and verify his mobile phone and laptops? Police version also does not disown the search being conducted in this area to prevent Maoist action. What was the purpose of police for taking the petitioner in the jeep to the Police Station? If the action of the police is not arrest, what else is it? What is an arrest as understood in law?

5. Liberty is one of the cardinal principles, etched in any civilised society governed by law. The Constitution only declares the inherent right of a person to hold such liberty against the whole world without interference unless authorised by law. An arrest is a deprivation of movement of a person for the purpose of answering any criminal charge potentially capable for conviction. Arrest is not defined under the Code of Criminal Procedure. Nevertheless, the provisions under the Code of Criminal Procedure would indicate that arrest is an authority given to a person to deprive the liberty of another to answer a criminal charge. In Black's Law Dictionary, 'arrest' is defined

as "to deprive a person of his liberty by legal authority. Taking, under real assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand".

6. In **Directorate of Enforcement v. Deepak Mahajan and another [AIR 1994 SC 1775]** it is stated by the Hon'ble Supreme Court in para.48 as follows:

48. The word 'arrest' is derived from the French 'Arreter' meaning 'to stop or stay' and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest' is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in *Roshan Beevi v. Joint Secretary, Government of Tamil Nadu*, 1984 Cri LJ 134: (AIR 1984 NOC 103 (FB)) had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various text books and dictionaries, the New Encyclopedia Britanica, Halsbury's Laws of England, 'A Dictionary of Law' by L.B. Curzon,

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Black's Law Dictionary and 'Words and Phrases'. On the basis of the meaning given in those text books and lexicons, it has been held that "the word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go wherever he pleases. When used in the legal sense in connection with criminal offences, an 'arrest' consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

7. Chapter V of the Code of Criminal Procedure lays down the provisions for arrest. Section 41 of

Chapter V of the Code of Criminal Procedure provides the power to the police to arrest a person without an order from a Magistrate which reads as follows:

“41. When police may arrest without warrant.-

(1)Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

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(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured.....”

8. The Code of Criminal Procedure for arrest itself is a defined path based on sound values cherished on the line of civil liberty and also to protect and safeguard individuals against arbitrariness. Flouting any of the norms prescribed under the Code for arrest would itself result in deprivation of liberty.

9. The Hon'ble Supreme Court on various occasions has dealt with the issues regarding 'personal liberty' and 'arrest', namely:-

(i) In **Smt. Nandini Satpathy v. P.L.Dani and another [1978 SC 1025]** quoting Lewis Mayers, it is stated therein as follows:

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny.' As the century has unfolded, the danger has increased."

(ii). In **Joginder Kumar v. State of U.P [AIR 1994 SC 1349]**, it is stated as follows:

"No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing.

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The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reaonsable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reaonsable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter."

In paras. 8 & 9 it is further observed as follows:

"8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In *People v. Defore*, (1926) 242 NY 13, 24:150 NE 585, 589, justice Cardozo observed:

'The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other,

the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams case (People v. Adams, (1903) 176 NY 351 : 68 NE 636) strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that change has come to pass'."

(iii). In **D. K. Basu v. State of W.B. [AIR 1997 SC 610]** the Hon'ble Supreme Court has given certain directions to be followed in the cases of arrest or detention in paras.36 to 39, which read as follows:

"36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(1)The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel

-:13:-

who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be

-:14:-

notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5)The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6)An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7)The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the

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arrest and its copy provided to the arrestee.

(8)The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9)Copies of all the documents including the memo of arrest, referred to above, should be sent to the (sic) Magistrate for his record.

(10)The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11)A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the

-:16:-

police control room it should be displayed on a conspicuous police board.

37.Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

38.The requirements, referred to above flow from Articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

39.These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee."

10. The arrest connotes deprivation of "negative liberty" which is a primordial freedom from interference by other people which every human being

inherently possesses except for any reason established under law. In **Deepak Mahajan's** case supra, the Hon'ble Supreme Court held that "in every arrest there is a custody but not vice versa. But both words 'custody' and 'arrest' are not synonymous terms". "Custody of a person" in normal sense denotes a control or charge over a person by another. It also implies physical detention of a person from movement based on his own free will. Thus, in the matter of arrest, the person who arrests has control over the body and person of the arrestee.

11. Upon examination of law and facts involved, to explore the lawfulness of the arrest and detention of the petitioner, the State has to answer the following critical questions:

i. Did the arresting Officer, in fact, had any belief for reasonable suspicion or information that the petitioner has committed a cognizable offence?

ii. Did the arresting Officer make out elements of any offence, on which the petitioner could be implicated under law?

iii. Did the arresting officer apply his mind to distinguish between powers and functions to be exercised in relation to criminal investigation or as a protective measure to secure the safety of the petitioner?

12. A reasonable suspicion or belief is more than a mere possibility of commission of offence. It involves exercise of due diligence by an Officer bestowed with the power in terms of the Code of Criminal Procedure to be exercised in a given set of circumstances as a foundation to ignite a reasonable suspicion in his mind to act upon. Factual foundation is essential for such suspicion or belief. Being a Maoist is no crime, though the political ideology of Maoists does not synchronize with our constitutional polity. It is a basic human right to think in terms of human aspirations. The freedom of thought and liberty

of conscience is a natural right and cannot be surrendered by any human being and that freedom is ingrained in human mind and soul. However, that freedom becomes unlawful when it confronts with the positive laws of the State. If the Maoist organisation is a proscribed organisation under law, activities of the Maoist organisation can be interfered. If an individual or organisation abhors and resorts to physical violence, law agency can prevent or take action against that individual or organisation. It is only when private thoughts or ideas become repugnant to the public values as envisaged under law, the private activities become unlawful. In a famous essay, "*Two Concepts of Liberty*", *Isaiah Berlin*, while assimilating distinction between negative and positive liberty argues that, "It follows that a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument, indeed of haggling. Men are largely interdependent, and no man's activity is so completely

private as never to obstruct the lives of others in any way." It is our Constitution which sets the boundary through the legitimate procedure of ordinary law on arrest. In Introduction to the Study of the Law of the Constitution by A.V.Dicey, it is stated as follows:

"The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence.

The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification."

Therefore, Police cannot detain a person merely because he is a Maoist, unless Police forms a reasonable opinion that his activities are unlawful.

13. The petitioner was taken in the jeep at around 4.30 p.m. on 20/05/2014. The petitioner's case is that he was stripped by the police for body search from the Police Station. It is the admitted case that,

-:21:-

thereafter, the police party took the petitioner to his house in the police vehicle. There is no denial of the fact that the police conducted a search in the house of the petitioner. Petitioner's further case is that around 20 Police personnel reached his house for the search and one group of armed Policemen surrounded the house and another group searched inside the house. It is also the case of the petitioner that the Police personnel left the house only on the next morning at 12.30 a.m. However, it is admitted that the police left the house around 11 p.m. Therefore, these facts would clearly indicate that the petitioner was arrested as a suspected Maoist. This is the reason why the petitioner was interrogated by the police and further his movables were taken into custody by the Police. At the relevant time, the Police had no clue about commission of any offence by the petitioner. The only reason on which the petitioner was arrested was for the reason that the petitioner was a suspected Maoist. No

doubt, the Police, on realising the mistake, released the petitioner without registering any crime.

14. It is evident from the pleadings as well as the General Dairy that the State is unable to refer to any materials for the foundation of belief or suspicion as to whether the petitioner was engaged in any of the activities which have been declared as unlawful or in any of the offence declared under law. Thus, the Police violated liberty of the petitioner by taking him to custody without satisfying that the petitioner has been involved in any cognizable offence punishable under law.

15. The Police version that the petitioner has been rescued from the agitated mob cannot be believed. The General Diary and other action on the part of the Police in searching house of the petitioner would clearly indicate that the petitioner was taken into custody being a suspected Maoist.

16. The State instrumentalities and machineries function through individuals. Any institution manned

by human beings may commit error. However, it is institution's responsibility to admit such error. It is unfortunate that a responsible Government have shrugged to call it as a mistake on their part and render apology. The State stridently defended the police action as part of duty to combat Maoist. The liberty of the individual, however small or high, has to be protected. The police have to display sensitiveness and appeal to the intelligence while exercising the power bestowed on them. Any aberration on this exercise resulting deprivation even by mistake has to be owned up with responsibility to create a sense of accountability to honour a citizen.

17. In such circumstances, I am of the view that the State is bound to compensate the petitioner. No doubt, the individual officers who acted in the interest of the State cannot be mulcted with any liability. The action which resulted in deprivation is only on account of impervious outlook towards individual liberty and the inability of the law agency

to regiment their power in tune with declaration of law by the Hon'ble Supreme Court while combating any criminal activities of Maoists. It is the activities of the Maoists which have to be curbed if it affronts to the law of the land. But, the State moved to nab the Maoist like a predator vying for prey. This is nothing but disguised aberration of law in the cloth of uniform and the protector has become aggressor.

18. In **Rudul Shah v. State of Bihar & Anr. [(1983) 4 SCC 141]** the Hon'ble Supreme Court held as follows:

"9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential

upon the deprivation of a fundamental right.....

10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were

limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. **The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."** (emphasis in bold)

19. In Nilabati Behera (Smt.) Alias Lalita Behera v. State of Orissa & Ors. [(1993) 2 SCC 746], the Hon'ble Supreme Court declared the law that:

“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 indefeasible 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 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 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."

20. The Hon'ble Supreme Court in the above judgment also referred to Article 9(5) of the International Covenant on Civil and Political Rights, 1966. Article 9(5) reads as follows:-

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

21. Thus, there cannot be any difficulty in holding that Article 226 can be moulded for compensation for a victim of an unlawful arrest. The petitioner claimed a sum of Rs.1,00,000/- as compensation. No doubt, he would have been entitled for a higher amount of compensation considering the trauma and mental agonies suffered by him. In that view of the matter, with liberty to claim any compensation if otherwise can be claimed by him before the civil court, the State shall pay to the petitioner a sum of Rs.1,00,000/- (Rupees one lakh only) as compensation.

22. As has been noted in the aforesaid paragraph, individual officers need not be mulcted with any liability. Their action stems from failure to create a balance between executive duty to secure liberty and of the law enforcement agencies to take action in a crime. A finer craft of balance is required while

exercising the power of arrest and combating Maoist activities. Law enforcement is not a mere tool for security. It is also equally a duty bestowed to uphold non interference of liberty of individual as well, to the extent of common good of all. The State failed to create adequate supervisory oversight mechanism to safeguard deprivation of liberty of individuals. It is an imperative requirement of law enforcement agencies to act cohesively in relation to intelligence gathering and evidence gathering through oversight mechanism to secure the freedom and liberty of individuals while being engaged in combating terrorism or violence. The total absence of such machineries resulted in insensitive action of police in relation to individual deprivation. Therefore, the State machinery failed in the action and not the individual officers. Action of the individual officers is the reflection of approach of the machinery itself. When individual liberty is deprived on account of any State action, it is the

State and not the officer who carried out the action is liable.

23. Next point to be answered is with regard to the action sought against individual officers for departmental action. The individual officers appear to have been acting without any *mala fide* intention. The facts clearly indicate that none of the police officers had any *mala fide* intention. Any aberration in the procedural law need not result in initiation of disciplinary action unless such action is found unbecoming of an officer endowed with a duty. This must be wilful as propounded in **D.K.Basu's** case (*supra*). There is no material on record warranting action against individual police officers. However, the petitioner is at liberty to approach the Police Complaints Authority of competent jurisdiction. Therefore, without prejudice to the right of the petitioner to approach the Police Complaints Authority, the petitioner's prayer to initiate departmental action against the police officers is declined.

W.P.(C).No.24902/2014

--:32:--

24. The writ petition is disposed of by directing the State to pay a sum of Rs.1,00,000/- (Rupees one lakh only) as compensation to the petitioner within a period of two months. The State shall also pay the costs of the litigation at Rs.10,000/- (Rupees ten thousand only) along with the compensation quantified. The Registry shall return the General Diary to the learned Director General of Prosecution.

**Sd/-
A.MUHAMED MUSTAQUE, JUDGE**

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