

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Miscellaneous No.33693 of 2016**

Arising Out of PS.Case No. -40 Year- 2016 Thana -ALIPUR District- GAYA

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Shailesh Kumar @ Shalesh Kumar, son of Shaligram Mahto, resident of Village Dharnei, PO. Berka, Police Station Makhdumpur, District Jehanabad.

.... Petitioner/s

Versus

1. The State of Bihar

.... Opposite Party/s

Appearance :

For the Petitioner/s : Mr/s. Lilawati Singh-Advocate

For the Opposite Party/s : Mr. S. M. Rahman-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

Date: 11-01-2017

Instant petition originally been filed on behalf of the petitioner for grant of bail under Section 439 Cr.P.C., as he stood an accused for non-bailable offence initially registered under Sections 341, 354, 376/511 I.P.C. as well as Section 08 of POCSO Act, however, chargesheet was submitted under Sections 341, 354, 509 of the I.P.C. and Section 08 of POCSO Act, which was registered on the fard-bayan of Anuradha Kumari and allowed vide order dated 18.08.2016, but during course thereof, it was divulged by the learned counsel for the petitioner that petitioner was produced by the prosecution party before the police on 08.06.2016 and was kept at Police Station lockup and was produced before the Magistrate on 13.06.2016 without having cogent reason in contravention of statutory provision, whereupon the District & Sessions Judge, Gaya was



directed to submit a report after verifying the concerned record. The District & Sessions Judge, Gaya had submitted Letter No.118/Confidential dated 3.9.2016 wherefrom it is evident that from the written report itself it is apparent that petitioner/ accused Shailesh Kumar @ Shalesh Kumar was handed over to the police by the prosecution party on 08.06.2016 itself which the Investigating Officer incorporated in Paragraph-4 of the case diary. Furthermore, the aforesaid Paragraph-4 of the case diary speaks that the S.D.P.O., Tekari, Gaya directed the Officer-in-Charge, Alipur P.S. that after verification and full inquiry, the accused may be arrested and on account thereof, he was kept at the Thana Hazat and lastly, he was produced on 13.06.2016. In the aforesaid background, the Special Judge, POCSO, Gaya was also directed to submit his report as well as the Senior Superintendent of Police, Gaya, the S.D.P.O., Tekari along with Officer-in-charge of Alipur P.S. were directed to submit explanation and those are on the record. Although, the S.D.P.O., Tekari as well as Officer-in-charge of Alipur filed belatedly.

2. After going through the show-cause having been filed on behalf of the Senior Superintendent of Police, Gaya, it is apparent that apart from disclosing the activity of the supervising authority that means to say, the S.D.P.O., Tekari while supervising the case, it has also been incorporated that after getting the Court's order dated 21.09.2016, an inquiry was directed to be conducted and as per



Paragraph-6, it is evident that under inquiry having been conducted, completed, found the Investigating Officer of the case A.S.I. Santosh Kumar as well as S.H.O. Alipur Bipin Kumar Singh responsible for the lapses and for that, they have been recommended to be suspended. Simultaneously, they are to be dealt with by way of departmental proceeding. The aforesaid show-cause also contains different Annexures divulging the steps having been taken which, by way of supplementary explanation, has been reiterated. Thus, from the show-cause, it is abundantly clear that till receipt of Court's order, S.S.P., Gaya was ignorant of the fact, which she ought to be in terms of police manual, which expected to be being District head.

3. The show-cause having been filed on behalf of the S.D.P.O., it is evident that apart from his activity as a supervising authority, it has further been submitted that as per direction of the Senior Superintendent of Police, Gaya, an inquiry was conducted wherein S.H.O. Alipur S.I. Bipin Kumar Singh and I.O. A.S.I. Santosh Kumar have been found responsible for the lapses and for that, they are being departmentally proceeded with. However, there happens to be complete silence over the episode as well as disclosure having been made in Para-4 of the case diary whereunder it has specifically been incorporated that by an order of supervising authority, accused was kept in Thana Hazat.

4. From the show-cause on behalf of S.H.O. Alipur, more



particularly Paragraph-5, that on account of having the custody of accused, large number of villagers in support of informant as well as accused came at the police station and on account thereof, for the safety of the accused as well as protection of his life, the accused was kept under vigilance. Furthermore, the area being naxal infested as well as to keep surveillance over the Post Panchayat Election, he was very much engaged, coupled with the fact that due to Chief Minister's programme, he was to attend and during course thereof, out of slip, the accused could not be produced in time before the Magistrate, which was neither intentional nor malafidely. So, all of them tendered unconditional apology whereupon prayed for acceptance of the same. However, there happens to be complete absence over disclosure made under Para-4 of the case diary which contains the fact that custody of accused was directed by the supervising authority.

5. Heard learned counsel for the petitioner as well as learned PAAG-1. There happens to be no controversy nor denial at the end of police officials that petitioner/ accused Shailesh Kumar @ Shalesh Kumar was taken under custody on 08.06.2016 and was produced before the Court on 13.06.2016. ***Article 22 of the Constitution of India*** which happens to be one of the limb of fundamental right mandate in following way:-

“Article-22. Protection against arrest and detention in certain cases.



(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:



Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) *When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order*

(6) *Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.*

(7) *Parliament may by law prescribe-*

(a) *the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory*



Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4) Right against Exploitation.”

6. Considering the provisions under Article 22(2) of the Constitution of India, **Section 57 of the Criminal Procedure Code** also speaks the same in following way:-

“Sec.57. Person arrested not to be detained more than twenty- four hours. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate' s Court.”

7. So, apprehension of petitioner on 08.06.2016 and producing him before the Court on 13.06.2016 being admitted one though, some sort of explanation has been furnished at the end of the S.H.O. which is not at all appreciable in the background of the fact



that same has not been substantiated with any Annexure. That being so, by such activity, the police officials not only violated the mandate of law rather encroached upon fundamental right of the petitioner/accused by an illegal activity.

8. In *Shabnam vs. Union of India and others reported in (2015) 6 SCC 702*, it has been held:-

*“12.3. Article 21 of the Constitution lays down that nobody shall be deprived of his life and liberty except according to the procedure established by law. After long judicial debate, it now stands settled that the procedure established by law has to be 'due procedure' (See **Maneka Gandhi v. Union of India** (1978 1 SCC 248). By judicial interpretation, this Court has read the principle of reasonableness into the said procedure contemplated by Article 21, holding that it must be 'right and just and fair' and not arbitrary, fanciful or oppressive. Even as per the statute book, this procedure does not culminate with the dismissal of appeals of the convicts by the final Court. No doubt, when an accused is tried of an offence by a competent court of law and is imposed such death penalty and the said death penalty is upheld by the highest Court, the procedure that is established by law has been followed up to this stage. However, in the*



statutory framework, further procedural safeguards in the form of judicial review as well as mercy petitions are yet to be traversed. This would also be covered by the expression 'procedure established by law' occurring in Article 21. Therefore, till the time limitation period for filing the review petition and thereafter reasonable time for filing the mercy petition has not lapsed, issuing of death warrants would be violative of Article 21.

12.4 *There is another facet of right to life enshrined in Article 21 of the Constitution which needs to be highlighted at this juncture, namely, 'human dignity'. Article 21 has its traces in the dignity of human being. It has been recognized as part of Article 21 of the Constitution. We would like to extract the following passage from **National Legal Services Authority v. Union of India & Ors.** (2014)5 SCC 438:*

“106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to



give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.”

13. *Once we recognize this aspect of dignity of human being, it does not end with the confirmation of death sentence, but goes beyond and remains valid till such a convict meets his/her destiny. Therefore, the process/procedure from confirmation of death sentence by the highest Court till the execution of the said sentence, the convict is to be treated with human dignity to the extent which is reasonable and permissible in law.*

14. *This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being 'as a human being'. Another element, which needs to be highlighted, in the context of the present case, is*



that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being. These may include the presumption that every person is innocent until proven guilty; the right of the accused to a fair trial as well as speedy trial; right of legal aid, all part of human dignity. Even after conviction, when a person is spending prison life, allowing humane conditions in jail is part of human dignity. Prisons reforms or Jail reforms measures to make convicts a reformed person so that they are able to lead normal life and assimilate in the society, after serving the jail term, are motivated by human dignity jurisprudence.

*15. In fact, this principle of human dignity has been used frequently by Courts in the context of considering the death penalty itself. Way back in the year 1972, the United States Supreme Court kept in mind this aspect in the case of **Furman v. Georgia** 408 US 238 (1972). The Court, speaking through Brennan, J., while considering the application of Eighth Amendment's prohibition on cruel and unusual punishments, summed up*



*the previous jurisprudence on the Amendment as 'prohibit(ing) the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual', therefore, if it does not comport with human dignity'. In **Gregg v. Georgia** 428 US 153 (1976), that very Court, again through Brennan, J., considered that 'the fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as non-humans, as objects to be toyed with and discarded. (It is), thus, inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity'. The Canadian Supreme Court, the Hungarian Constitutional Court and the South African Supreme Court have gone to the extent of holding that capital punishment constitutes a serious impairment of human dignity and imposes a limitation on the essential content of the fundamental rights to life and human dignity and on that touchstone declaring that dignity as unconstitutional."*

9. In *Mohd. Arif @ Ashfaq v. Supreme Court of India and others with C. Muniappan and others v. Registrar, Supreme*



Court of India with B. A. Umesh v. Registrar, Supreme Court of India with Sundar @ Sundarrajan v. State by Inspector of Police and others with Yakub Abdul Razak Memon v. Registrar, Supreme Court of India and others and Sonu Sardar v. Union of India and others reported in (2014) 9 SCC 737, it has been held:-

“27. The stage was now set for the judgment in Maneka Gandhi (1978) 1 SCC 248. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See: at page 646-648 per Beg, C.J., at page 669, 671-674, 687 per Bhagwati, J. and at page 720-723 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus:

“85. “To sum up, ‘procedure’ in Article 21 means fair, not formal procedure. ‘Law’ is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal



liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses." (at page 723)

28. Close on the heels of Maneka Gandhi's case (1978) 1 SCC 248 came Mithu vs. State of Punjab, (1983) 2 SCC 277, in which case the Court noted as follows:

"6. In Sunil Batra vs. Delhi Administration, (1978) 4 SCC 494 while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in the Bank Nationalisation's case (1978) 1 SCC 248 and Maneka Gandhi's case (1978) 1 SCC 248. ...

In Bachan Singh 1980 SCC (Cri) 580 which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority,



said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi (1978) 1 SCC 248, it will read to say that:

‘136. “No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.”

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.”

10. In ***Bhim Singh vs. State of J. K. reported in A.I.R. 1986 SC 494*** wherein petitioner Bhim Singh was kept in police lockup for four days without his production before the Court, the Hon’ble Apex Court held that the constitutional right of the petitioner were violated with immunity and on account thereof, a compensation of Rs.50,000/- was awarded to be paid to the petitioner by the State Government.

11. In ***Smt. Nilabati Behera alias Lalita Behera vs. State of Orissa and others reported in A.I.R. 1993 SC 1960*** which relates with custodial death on account of multiple injuries having sustained by the detenu, the Hon’ble Apex Court again decided the issue against the State, it has been held:-

“10. In Rudul Sah (supra), it was held that in a petition under [Article 32](#) of the Constitution, this



Court can grant compensation for deprivation of a fundamental right. That was a case of violation of the petitioner's right to personal liberty under [Article 21](#) of the Constitution. Chandrachud, C.J., dealing with this aspect, stated as under:-

"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. The instant case is illustrative of such cases.....

.....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 to 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 violaters 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 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" (pp.513-14) (emphasis supplied)

11. It does appear from the above extract that even though it was held that compensation could be awarded under [Article 32](#) for contravention of a fundamental right, yet it was also stated that 'the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial' and '[Article 32](#) cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes'. These observation may tend to raise a doubt that the remedy under [Article 32](#) could be denied 'if the claim to compensation was factually controversial' and, therefore, optional not being a distinct remedy available to the petitioner in addition to the ordinary processes. The later decisions of this Court proceed on the assumption that monetary compensation can be awarded for violation of constitutional rights under [Article 32](#) or [Article 226](#) of the



Constitution, but this aspect has not been adverted to. It is, therefore, necessary to clear this doubt and to indicate the precise nature of this remedy which is distinct and in addition to the available ordinary processes, in case of violation of the fundamental rights.

20. *We may also refer to [Article 9\(5\)](#) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. [Article 9\(5\)](#) reads as under:-*

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

21. *The above discussion indicates the principles on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in Rudul Sah and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and*



Kasturilal distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son.”

12. In ***Mahesh Ram and others vs. State of Bihar and others reported in 2007(4) P.L.J.R. 250*** was also adjudicated upon against the State, it has been held:-

*“24. Now, having found that there was deliberate and flagrant violation, as a matter of fact, of the constitutional protection available to a citizen, what is the consequences? Learned AAG submits that the consequence is nothing. I am afraid much water has flown down to the Ganges. Not only that the citizen will not an should not sleep over the matter it is the constitutional obligation of this court to intervene and grant compensation and damages. State and its officials are answerable for their actions or inactions. This has been settled over a decade back in the judgment of ***Smt. Nilabati Behara @ Lalita Bahera vs. State of Orissa &****



Ors., since reported in AIR 1993 SC 1960 wherein the Apex Court reviewed the cases starting from Rudul Sah vs. State of Bihar to Bhagalpur Blinding Case including Bhim Singh vs. State of J & K. I will advert to it later on. As held in the words of Dr. A. S. Anand, J., (as he then was) concurring with Justice J. S. Verma (as he then was) in the case of Smt. N. Nilabati Behera (supra):

“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 taken 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 facts and circumstances of the case is possible.”

25. This decision establishes not only the jurisdiction of this court under Article 226 but the constitutional obligation of this court as well.

*26. The next decision that I would like to refer is the case of **Bhim Singh, MLA vs. State of J&K and Ors.**, since reported in AIR 1986 SC 494. In this case a citizen, who happened to be the member of Legislative Assembly was arrested while on route to assembly. The Apex Court considered the matter and held that a police officer who is the custodian of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stopping to bizarre acts of lawlessness. The Apex Court in the said case (**Bhim Singh**) held that such cases are fit cases in which compensation has to be awarded by the courts. That case arose out of a writ petition filed in the Supreme Court directly. In the present case it is worse where the police connived to virtually send persons to gallows on a totally trumped up charge, which was fabricated by them.*

27. The next submission of learned AAG-3 is that neither the police officials can be held guilty and



*proceeded against nor can the State be held liable for damages and/or compensation on the strength of the case of **M/s Kasturi Lal Ralia Ram Jain vs. The State of Uttar Pradesh** since reported in AIR 1965 SC 1039 as they have a sovereign immunity. This argument is only noted to be rejected. The said argument is only noted to be rejected. The said decision has been the subject matter of consideration by the Apex Court several times since then and stands clearly disapproved. (See AIR 1993 SC 1960 (supra), 1994 SC 2663 (**N. Nagendra Rao & Co. vs. State of A.P.**) and 2000 SC 1988 (**Chairman, Railway Board and Others vs. Mrs. Chandrima Das & Ors.**)). Sovereign immunity does not absolve State from its liability to pay damages if it infringes the fundamental right of a citizen.*

*28. In the case of **N. Nagendra Rao & Co. vs. State of A.P.** (supra) the State was held liable to account for and pay damages in respect of fertilizers which were seized in purported exercise of statutory power but could not be returned to the rightful owner. It was not disputed that the same was seized pursuant to the exercise of statutory power but still the State was liable to pay.*

*29. In the case of **Chairman, Railway Board** (supra) the Apex Court had the occasion to consider the case of a Bangladeshi lady, who was*



*raped at the Howrah railway station by the railway employees. All defence of the State were rejected and the State was held liable to compensate the lady, in question. The defence that it was individual action of the individual was also rejected. One may usefully refer the two other cases of **Bhagalpur blinding** decided by the Apex Court in 1981 for this matter.*

30. Thus, here what has been found by this court is that on a wrong identification of dead body the police became active. Then they drew up a false concocted confession of a crime which not only the petitioners never committed but confessed to a crime, which was never committed. No reasonable man will ever accept a person making such a confession. The S.P. having come to know of the girl's recovery, which falsified the entire investigation and the charge-sheet, merely sent information to the I.O. regarding that. Two months thereafter the petitioners were released on bail. This establishes flagrant disregard to the Constitution and the constitutional safeguard. It shocks this Court. State failed to protect the rights of its citizens. This is a fit case in which damages are to be awarded. The question is what sort of damage and to what extent? In my view, this case calls for damage and in addition thereto exemplary



*damages. “Exemplary damages” have been explained by Krishna Iyer, J. in the case of **Organo Chemical Industries & Anr. Vs. Union of India & Ors.** since reported in AIR 1979 SC 1803:-*

“For instance, ‘exemplary damages’ are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called “punitive” or “punitory” damages or “vindicate” damages, and (vulgarly) “smart-money”.

13. In **Subhashree Das @ Milli vs. State of Orissa and others reported in (2012) 9 SCC 729**, it has been held:-

“7. Having given due consideration to the contention advanced at the hands of the learned counsel for the appellant, we are of the view that the claim of the appellant under Article 226 of the Constitution of India



before the High Court of Orissa, could not have been determined on the basis of disputed facts. In a case where a petitioner/appellant wishes to press his/ her claim before a High Court under Article 226 of the Constitution of India, the claim raised by such a petitioner/appellant must be determined on the basis of the factual position acknowledged by the respondent. This is so because a High Court in exercise of jurisdiction under Article 226 of the Constitution of India, would ordinarily not adjudicate a matter, where the foundational facts are disputed. It is, therefore, apparent that the High Court would have ordinarily been fully justified in determining the claim of the appellant by accepting the factual position depicted by the functionaries of the police department, namely, that the appellant was arrested at 3:00 PM on 15.1.2010. The High Court, however, chose not to fully rely upon the assertions made on behalf of the respondents. The High Court, in fact, personally verified the factual position from the case diary and on its scrutiny, arrived at the conclusion extracted above. We



find absolutely no infirmity in the conclusion rendered by the High Court. In the absence of any material (relied upon by the appellant) to the contrary, we find no infirmity in the determination rendered by the High Court, in so far as the time of detention of the appellant is concerned.”

14. In ***Sube Singh vs. State of Haryana and others*** reported in ***A.I.R. 2006 SC 1117***, it has been held:-

Compensation as a public law remedy :

12. Though illegal detention and custodial torture were recognized as violations of the fundamental rights of life and liberty guaranteed under Article 21, to begin with, only the following reliefs were being granted in writ petitions under Article 32 or 226 :

- a) direction to set at liberty the person detained, if the complaint was one of illegal detention.
- b) direction to the concerned Government to hold an inquiry and take action against the officers responsible for the violation.
- c) If the enquiry or action taken by the concerned department was found to be not satisfactory, to direct an inquiry by an independent agency, usually the Central Bureau of Investigation.



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 half decades.

13. *In the Bhagalpur Blinding case, [Khatri (II) vs State of Bihar 1981 (1) SCC 627], Bhagwati J., (as he then was), speaking for the Bench, posed the following question while considering the relief that could be given by a court for violation of constitutional rights guaranteed in Article 21 of the Constitution :-*

"... but if life or personal liberty is violated otherwise than in accordance with such procedure, is the Court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty."

*The question was expanded in a subsequent order in **Bhagalpur Blinding case [Khatri (IV) vs State of Bihar (1981)3 SCR145]**, thus :-*

"If an officer of the State acting in his official capacity threatens to deprive a person of his life or personal liberty without the authority of law, can such person not approach the court for injuncting



the State from acting through such officer in violation of his fundamental right under Article 21 ? Can the State urge in defence in such a case that it is not infringing the fundamental right of the petitioner under Article 21, because the officer who is threatening to do so is acting outside the law and therefore beyond the scope of his authority and hence the State is not responsible for his action ? Would this not make a mockery of Article 21 and reduce it to nullity, a mere rope of sand, for, on this view, if the officer is acting according to law there would ex concessione be no breach of Article 21 and if he is acting without the authority of law, the State would be able to contend that it is not responsible for his action and therefore there is no violation of Article 21. So also if there is any threatened invasion by the State of the fundamental right guaranteed under Article 21, the petitioner who is aggrieved can move the court under Article 32 for a writ injuncting such threatened invasion and if there is any continuing action of the State which is violative of the fundamental right under Article 21, the petitioner can approach the court under Article 32 and ask for a writ striking down the continuance of such action, but 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 Article 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 any relief."

Answering the said questions, it was held that when a court trying the writ petition proceeds to inquire into the violation of any right to life or personal liberty, while in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioners under Article 21 has been violated and the State is liable to pay compensation to them for such violation. This Court clarified that the nature and object of the inquiry is altogether different from that in a criminal case and any decision arrived at in the writ petition on this issue cannot have any relevance much less any binding effect, in any criminal proceeding which may be taken against a



particular police officer. This Court further clarified that in a given case, if the investigation is still proceeding, the Court may even defer the inquiry before it until the investigation is completed or if the Court considered it necessary in the interests of Justice, it may postpone its inquiry until after the prosecution was terminated, but that is a matter entirely for the exercise of the discretion of the Court and there is no bar precluding the Court from proceeding with the inquiry before it, even if the investigation or prosecution is pending.

*14. In **Rudul Sah vs. State of Bihar [1983 (4) SCC 141]**, the petitioner therein approached this Court under Article 32 of the Constitution alleging that though he was acquitted by the Sessions Court on 3.6.1968, he was released from jail only on 6.10.1982, after 14 years, and sought compensation for his illegal detention. This Court while recognizing 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, raised for consideration the important question as to whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for payment of money, as compensation*



for the deprivation of a fundamental right. This Court answered the question thus while awarding compensation:-

"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."



Rudul Sah was followed in *Bhim Singh vs. State of J&K* [1985 (4) SCC 677] and *Peoples' Union for Democratic Rights vs. Police Commissioner, Delhi Police Headquarters* [1989 (4) SCC 730].

15. The law was crystallized in *Nilabati Behera vs. State of Orissa* [1993 (2) SCC 746]. In that case, the deceased was arrested by the police, handcuffed and kept in a police custody. The next day, his dead-body was found on a railway track. This Court awarded compensation to the mother of the deceased. J.S. Verma J., (as he then was) spelt out the following principles :-

"Award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the 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.

Enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.

A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in



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

[Emphasis supplied]

Dr. A.S. Anand J., (as he then was) in his concurring judgment elaborated the principle thus :-



"... Convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental rights by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody.

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 the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 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 seeking enforcement or protection of fundamental rights, it does so under the public law



by way of penalizing 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. "

16. In **D. K. Basu v. State of West Bengal (1997 (1) SCC 416)**, this Court again considered exhaustively the question and held that monetary compensation should be awarded for established infringement of fundamental rights guaranteed under Article 21. This Court held :-

"Custodial violence, including torture and death in the lock ups strikes a blow at the Rule of Law,



which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society.

Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilized nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him ? Can the right to life of a citizen be put in abeyance on his arrest. ... The answer, indeed, has to be an emphatic 'No'.

Police is, no doubt, under a legal duty and has



legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it."

17. *It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress 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 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 enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure.*



18. *This takes us to the next question as to whether compensation should be awarded under Article 32/226, for every violation of Article 21 where illegal detention or custodial violence is alleged.*

Whether compensation should be awarded for every violation of Article 21

19. *In M.C. Mehta vs. Union of India [1987 (1) SCC 395], a Constitution Bench of this Court while considering the question whether compensation can be awarded in a petition under Article 32, observed thus :-*

"We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should



be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue act in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32.

If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation."

(emphasis supplied)

In Nilabati Behera (supra), this Court put in a word of caution thus:-



"Of course, relief in exercise of the power under Article 32 or 226 would be granted only (when) 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 facts and circumstances of the case, is possible.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."

(emphasis supplied)

In D. K. Basu (supra), this Court repeatedly stressed that compensation can be awarded only for redressal of an established violation of Article 21. This Court also drew attention to the following aspect :

"There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist



activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smugglers who have organized, gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation, it is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself."

[Emphasis supplied]

In Shakila Abdul Gafar Khan v. Vasant Raghunath



Dhoble [2003 (7) SCC 749] and Munshi Singh Gautam v. State of M.P. [2005 (9) SCC 631], this Court warned against non-genuine claims:

"But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence."

In Dhananjay Sharma vs. State of Haryana [1995 (3) SCC 757], this Court refused compensation where the petitioner had exaggerated the incident and had indulged in falsehood. This Court held :

"Since, from the report of the CBI and our own independent appraisal of the evidence recorded by the CBI. we have come to the conclusion that Shri Dhananjay Sharma and Sushil Kumar had been illegally detained by respondents 3 to 5 from the afternoon of 15.1.94 to 17.1.94, the State must be held responsible for the unlawful acts of its officers and it must repair the damage done to the citizens by its officers for violating their indivisible fundamental right of personal liberty without any



authority of law in an absolutely high-handed manner. We would have been, therefore, inclined to direct the State Government of Haryana to compensate Dhananjay Sharma and Sushil Kumar but since Sushil Kumar has indulged in falsehood in this Court and Shri Dhananjay Sharma, has also exaggerated the incident by stating that on 15.1.94 when he was way laid along with Sushil Kumar and Shri S.C. Puri, Advocate, two employees of respondents 6 and 7 were also present with the police party, which version has not been found to be correct by the CBI, they both have disentitled themselves from receiving any compensation, as monetary amends for the wrong done by respondents 3 to 5, in detaining them. We, therefore do not direct the payment of any compensation to them."

[Emphasis supplied]

20. Cases where violation of Article 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent



to accept claims of human right violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the State or as to prevent or thwart further investigation. Courts should, therefore, while jealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence, should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable Police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture.

21. In cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, courts may award compensation in a proceeding under Article 32 or 226. However, before awarding compensation, the Court will have to pose to itself the following questions : (a) Whether the violation of Article 21 is patent and incontrovertible, (b) whether the violation is gross and of a magnitude to shock the conscience of the court, (c) whether the custodial torture alleged has resulted in death or whether custodial torture is supported by medical report or



visible marks or scars or disability. Where there is no evidence of custodial torture of a person except his own statement, and where such allegation is not supported by any medical report or other corroboration evidence, or where there are clear indications that the allegations are false or exaggerated fully or in part, courts may not award compensation as a public law remedy under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/criminal action.

22. *We should not, however, be understood as holding that harassment and custodial violence is not serious or worthy of consideration, where there is no medical report or visible marks or independent evidence. We are conscious of the fact that harassment or custodial violence cannot always be supported by a medical report or independent evidence or proved by marks or scars. Every illegal detention irrespective of its duration, and every custodial violence, irrespective of its degree or magnitude, is outright condemnable and per se actionable. Remedy for such violation is available in civil law and criminal law. The public law remedy is additionally available where the conditions mentioned in the earlier para are satisfied. We may also note that this Court has*



softened the degree of proof required in criminal prosecution relating to such matters. In State of MP vs. Shyamsunder Trivedi - 1995 (4) SCC 262, reiterated in ABDUL GAFAR KHAN and MUNSHI SINGH GAUTAM (supra), this Court observed :-

"Rerely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available..... Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues..... The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case....., often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to



directly implicate them with the torture."

15. At the present moment, the feeling of father of nation, Mahatma Gandhi seems to be quoted " To deprive a man of his natural liberty and to deny to him the ordinary amenities of life is worse than starving the body, it is starvation of the soul, the dweller in the body."

16. Now, coming to responsibilities as well as liabilities of the State, it is to be seen in the background of principle laid down by the Hon'ble Supreme Court in *State of Rajasthan vs. Mst. Vidhyawati and another reported in A.I.R. 1962 SC 933*, it has been held:-

"7. As compared to the terms of Art. 300, it will be noticed that part (1) of that Article corresponds to sub-s. (1) of s. 32 above, part (2) roughly, though not exactly, corresponds to sub-s. (2), and part (3) of the Article, as indicated above, does not find a place in s. 32. Sub-section (2) of s. 32 has specific reference to "remedies", and has provided that the remedies against the Secretary of State in Council shall be the same as against the East India Company, if the Government of India Act of 1858, and the Government of India Act, 1915, had not been passed. We are, thus, referred further back to the Act 21 & 22 Victoria Ch. CVI, entitled "An Act



for the better Government of India." As this Act transferred the Government of India to Her Majesty, it had to make provisions for succession of power and authority, rights and liabilities.

Section 65 of the Act of 1858 is in these terms:

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

It will thus be seen that by the chain of enactments, beginning with the Act of 1858 and ending with the Constitution, the word "shall and may have and take the same suits, remedies and proceedings" in s. 65 above, by incorporation, apply the Government of a State to the same



extent, as they applied to the East India Company.

8. The question naturally arises: What was the extent of liability of the East India Company for the tortious acts of its servants committed in course of their employment as such ? The exact question now before us arose in a case in Calcutta, before the Supreme Court of Calcutta, in the case of The Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India (1). The Calcutta case appears to have been cited before the High Court in Bombay in the case of Narayan Krishna Land v. Gerard Norman, Collector of Bombay(2). The Bombay case related to an action of trespass, brought by the plaintiff against the Collector of Bombay in respect of certain land, which the Collector believed was Government property. Of immediate importance to us in his case is the report of the Calcutta case, which does not appear to have been reported in any Calcutta legal, journal though, on the face of it, it was judgment of far reaching importance and has always been cited as the leading case on the subject. It was a case decided by a Full Bench, consisting of Peacock, C.J., and Jakson and Wells, JJ., of the Supreme Court of Calcutta. It arose out of a reference by



the Small Cause Court Judge under s. 55 of Act IX of 1850. The case, as stated to the Supreme Court, was to the following effect. A servants of the plaintiffs was proceeding on a highway in Calcutta driving a carriage drawn by a pair of horses belonging to the plaintiffs. The accident, which took place on the highway, was caused by the servants of the Government, employed in the Government dockyard at Kidderpore, acting in a negligent rash manner. As a result of the negligent manner in which the Government employees in the dockyard were carrying a piece of iron funnel, one of the horses drawing the plaintiffs carriage was injured. The plaintiff company claimed damages against the Secretary of State for India for the damage thus caused. The learned Small Cause Court Judge came to the finding that the defendant's servants were wrongdoers in carrying the iron funnel in the centre of the road, and were, thus, liable for the consequences of what occurred. But he was in doubt as to the liability of the Secretary of State for the tortious acts of the Government servants concerned in the occurrence in which the injury was caused to the plaintiffs' horse. So the question, which was referred to the Court for its answer, was whether the Secretary of State was



liable for the damage occasioned by the negligence of the Government servants, assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable. In the course of their judgment, their Lordships began by examining the question whether the proviso to the jurisdiction of the Small Cause Courts to the following effect could be a bar to the suit:

"Provided always that the Court shall not have jurisdiction in any matter concerning the revenue, or concerning any act ordered or done by the Governor, or Governor- General or any member of the Council of India, or of any Presidency, in his public capacity, or done by any person by order of the Governor-General or Governor in Council, or concerning any act ordered or done by any Judge or Judicial Officer, in the execution of his office, or by any person in pursuance of any judgment or order of any Court, or any such Judge or Judicial Officer, or in any suit for libel or slander." (Proviso to [s. 25](#) of the Small Cause Court Act.).

The Court came to the conclusion that the proviso was not a bar to the suit. Having disposed of the preliminary question, the Court addressed itself to the main controversy, which it



described as "one of very considerable importance and of some difficulty". Then the Court considered the provisions of s. 65 of the Act of 1858, and pointed out that as the Queen could not be sued in her own courts, as the East India Company could have been, it was necessary to provide by that section the mode for enforcing the liabilities of the Company now devolved upon the Secretary of State. Then the Court addressed itself to the question. Would the East India Company have been liable in the present action if the Act (21 & 22 Vict. ch. 106) had not been passed ? With reference to the provisions of 3 & 4 Wm IV, c. 85, it was pointed out that the Company not only exercised powers of government, but also carried on trade as merchants. The Court then examined in great detail the provisions of the Act aforesaid and pointed out that by that Act the Company was directed to close its commercial business and cease to have any interest in the territorial acquisitions in India, which were to be held by the Company until April 30, 1854, in trust for the Crown. Section 10 of the Act, which may be characterised as the ancestor of s. 65 of the Act of 1858, provided as follows:

"That so long as the possession and government



of the said territories shall be continued to the said Company, all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the said Company, in respect of debts and liabilities as aforesaid, and the property vested in the said Company in trust as aforesaid shall be subject and liable to the same judgments and execution, in the same manner and form respectively as if the said property were hereby continued to the said Company to their own use."

It is noteworthy that the provisions of s. 10, quoted above, are materially similar to the latter part of s. 65 of the Act of 1858. It was in accordance with the provisions of s. 10, followed up by s. 65 aforesaid, that the Court laid it down that the Secretary of State for India was subject to the same liabilities as those which previously attached to the East India Company.

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 extend 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 powers 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 a Government with sovereign powers, as a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, posts 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 sovereigns, 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 persons; but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own account and for their own benefit, and were engaged in transactions partly for the purposes of government, and partly on their own account, which without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals



without having such powers delegated to them: Moodaley v. The East India Company and The Same v. Morton (1 Bro. C. C. 469)".

17. Under law of tort, it is permissible that joint wrong doers are jointly and severally responsible for the whole damage, the person injured may sue any one of them separately for the full amount at the loss or he may sue all of them jointly in the same action and the judgment so obtained against all of them may be executed in full or against any of them.

“18. Salmond and Heuston on the Law of Torts (Twentieth Edition) defined who are joint tortfeasors by providing as under:-

“(1) Who are joint tortfeasors

Where the same damage is caused to a person by two or more wrongdoers those wrongdoers may be either joint or independent tortfeasors. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort—that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases—namely, agency, vicarious liability, and common action, i.e. where a tort is committed in the course of a common action, a



joint act done in pursuance of a concerted purpose. In order to be joint tortfeasors there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage. The injuries as well as the damnum must be the same. ...”

The learned Author in Chapter 21 while dealing with Vicarious Liability defined “Vicarious Liability” as under: -

“A master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment. This is by far the most important of the various cases in which vicarious responsibility or vicarious liability is recognised by the law. Vicarious liability means that one person takes or supplies the place of another so far as liability is concerned. Although the doctrine-has its roots in the earliest years of the common law, it was Sir John Holt (1642-1710) who began the task of adapting medieval rules to the needs of a modern society, and his work was continued by the great Victorian judges.”

19. Clerk & Lindsell on Torts (Nineteenth Edition) in Chapter 6- Vicarious Liability, while dealing with Liability of employer for torts of employee, held as under: -



“Liability of employer for torts of employee

Where the relationship of employer and employee exists, the employer is liable for the torts of the employee so long only as they are committed in the course of the employee's employment. The nature of the tort is immaterial and the employer is liable even where liability depends upon a specific state of mind and his own state of mind is innocent. It is not sufficient to make the employer liable if the acts of the employee for which he is responsible do not themselves amount to a tort but only amount to a tort when linked to other acts which were not performed in the course of the employee's employment. All the features of the wrong necessary to make the employee liable, have to occur in the course of employment. Where they do so occur, and the question of the employer's liability in contribution proceedings arises, the decision of the House of Lords in Dubai Aluminium Co. Ltd. v. Salaam MANU/UKHL/0075/2002: [2002] UKHL 48; MANU/UKHL/0075/2002: [2003] 2 A.C. 366 becomes relevant. For it was held there that the innocence of the employer was irrelevant; he should be treated as standing in the employee's shoes.”

Further, the learned Author in paragraph 6-51



while dealing with “Employee's breach of statutory duty” held as under: -

*“Employee's breach of statutory duty The “master's tort” / “servant's tort” debate comes to the fore when a statutory duty imposed directly and solely on an employee is broken by the employee without his being guilty of common law negligence. Only if the “servant's tort” approach is accepted can the employer be liable. The House of Lords three times considered, and three times left open, the question of whether an employer could be liable for the breach of statutory duty imposed on an employee. But in *Majrowski v Guy's and St. Thomas' NHS Trust* it was held, authoritatively, that an employer can be so liable. According to Auld L.J.: “it is now clear that, in general, an employer may be vicariously liable for a breach of statutory duty imposed, on his employee, though not on him” on the *Lister* basis that “his breach of the statutory obligation is so closely connected with his employment and/or is a risk reasonably incidental to the employer's business, that it is fair and just to hold the employer vicariously liable”.*

20. *Winfield & Jolowicz on Tort (Sixteenth Edition) in Chapter 20 Vicarious Liability,*



defined “The Nature and Basis of Various Liability” as under: -

“The expression “vicarious liability” signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. The fact that A is liable does not, of course, insulate B from liability, though in most cases it is unlikely that he will be sued or that judgment will be enforced against him. It is not necessary for vicarious liability to arise that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship. A's liability is truly strict, though for it to arise, a case of negligence, there has to be fault on the part of B. The commonest instance of this in modern law is the liability of an employer for the torts of his servants done in the course of their employment. The relationship required is the specific one, that arising under a contract of service, and the tort must be referable to that relationship in the sense that it must have been committed by the servant in the course of his employment. It is with this instance of vicarious liability that the first part of



this chapter is concerned, but there are other instances which cannot be followed in detail in a work of this kind. Such are the liability of partners for each other's torts and, perhaps, the liability of a principal for the torts of his agent." Same Author while dealing with Scope of Employment in paragraph 20.9 held that "it is necessary that the acts done by the servant within the scope of his employment constitute an actionable wrong in themselves".

21. Thus, a master is vicariously liable for the wrong committed by the servant acting during course of employment.

18. After giving thoughtful consideration to the facts and circumstances of the case, it is apparent that mandate of law has been violated by the State machinery and on account thereof, State, being master, is liable to answer for the misdeeds having been committed by its servants. Furthermore, though petitioner being an accused was liable to be confined, but such confinement at the end of police officials was not permissible beyond period of 24 hours (excluding time consumed in production before nearest Court), and so, they have had illegally encroached upon fundamental right of the petitioner whereupon, petitioner is entitled to get compensation and is accordingly awarded. So, Rs.50,000/- (fifty thousand) is awarded as compensation against the State which must be paid within eight weeks. Furthermore, the State will be at liberty to identify the



wrongdoer individually or conjointly and further, be at liberty to recover the same from them, apart from taking such legal action, as permissible in the eye of law against them. For proper compliance, let a copy of the order be served upon learned Advocate General.

(Aditya Kumar Trivedi, J)

Vikash/-

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