

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 385 OF 2016

1. Smt. Jyoti W/o Sudhir @ Natwar
@ Nattu Dayaram Chawariya,
Age: 32 Years, Occu.- Household.
2. Ku. Divya D/o Sudhir @ Natwar
@ Nattu Dayaram chawariya,
Age: 06 Years, Occu.- Education
3. Ku. Uday S/o Sudhir @ Natwar
@ Nattu Dayaram Chawariya,
Age: 03 Years, Occu.- Nil,
Petitioner No. 2 & 3 are minor
through mother namely petitioner no.1.
4. Shri. Dayaram Jagan Chawariya,
Age: 70 Years, Occ.- Nil.
5. Sau. Tejabai W/o Dayaram Chawariya,
Age: 65 Years, Occu.- Household.

All R/o. Walmik Nagar,
Ramabai Ambedkar Nagar,
Near Girls High School, Jamner Road,
Bhusawal, District – Jalgaon.

... **Petitioners**

Versus

1. State of Maharashtra,
Through Secretary,
Home Department,
Mantralaya, Mumbai – 32.
2. Special Inspector General of Police,
Nashik Range, Gadkari Chowk, Nashik,
Taluka & District – Nashik.
3. The District Collector,

Jalgaon, District - Jalgaon.

4. The Superintendent of Police,
Jalgaon, at S.P. Office,
In front of Bus Stand,
Tal. & Dist. Jalgaon.
5. Assistant Police Inspector,
Bazarpeth Police Station,
Bhusawal, Taluka Bhusawal,
District Jalgaon,
6. The Superintendent of Police,
Dhule, S.P. Office, Dhule.

... **Respondents**

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Mr. Naseem R. Shaikh, Advocate for the Petitioners.

Mr. S.B. Yawalkar, A.P.P. for Respondents-State.

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**CORAM : T.V. NALAWADE &
MANGESH S. PATIL, JJ.**

**DATE OF RESERVING THE JUDGMENT : 01.04.2019
DATE OF PRONOUNCING THE JUDGMENT : 09.07.2019**

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JUDGMENT :- (Per: Mangesh S. Patil, J.)

Heard. Rule. Rule is made returnable forthwith. Learned A.P.P. waives service for the respondents. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioners are invoking the powers of this Court under Article 226 of the Constitution of India to lay a claim in public law for compensation on account of death of the bread winner of their family Sudhir

@ Natwar @ Nattu Dayaram Chawariya who was the husband of the petitioner no.1, father of the petitioner nos. 2 and 3 and son of the petitioner nos. 4 and 5.

3 (i). Shorn of unnecessary details, the averments in the petition are to the effect that deceased Sudhir along with co-accused were accused of committing murder of one Mohan Barse on account of animosity. Crime No.128 of 2015 was registered for the offences punishable under Sections 302, 120-B, 109 read with Section 34 of the Indian Penal Code and under Section 25 read with Section 4 of the Arms Act. Sudhir was arrested and was in magisterial custody. It is alleged that Mithun Barse who is the son of Mohan Barse was also involved in criminal activities and was accused of murdering one Nandu Chawariya with a revolver.

(ii) Uncle of deceased Sudhir by name Shaligram Jagan Chawariya has lodged a complaint with the respondents on 28.12.2015. On that basis a search of the house of Mithun Barse was taken and a revolver was found however it was not seized. In this complaint it was specifically alleged that Mithun Barse and his accomplices were threatening to kill the entire family of deceased Sudhir. It was also alleged that he had hatched a conspiracy to kill deceased Sudhir while he was being escorted to the Court. Lastly he had requested to provide adequate security to deceased Sudhir and a video

conferencing facility be used to safeguard him.

(iii) It is alleged that in spite of such apprehension expressed in the complaint of the uncle of deceased Sudhir, the latter was deliberately paraded while taking to the Court at Bhusawal on various dates exposing him to danger. It is alleged that the suspicion turned out to be true when on 17.12.2015 in the afternoon in front of the premises of the court at Bhusawal the cousin brother of the deceased Sudhir by name Vinod Laxman Chawariya and Nandu Chawariya were having tea, Mithun Barse along with four persons arrived at the scene and shot at both Vinod and Nandu with a revolver as a result Vinod sustained a bullet injury to the left shoulder and Nandu died of a bullet injury received on the head. A crime in that respect was also registered. It is alleged that during that episode even a police constable Rehan Sadik sustained a bullet injury when he tried to catch hold the assailants.

(iv) It is then alleged that on 13.01.2016 Assistant Police Inspector Ankush Bhalchandra Shirsath was assigned the duty to escort deceased Sudhir and Gopal Shinde from Dhule District Prison to attend the Court proceeding at Bhusawal in connection with Crime No.128 of 2015. While the police party and the two accused were travelling in a state transport bus and when it arrived up to Nahata College at Bhusawal, at about 14.15 hours Mithun Barse boarded the bus and fired a bullet which hit deceased Sudhir on the left side

of the chest and fled from the spot. Deceased Sudhir was shifted to the Government Medical College and Hospital at Dhule but succumbed on the next day to the bullet injury.

4. The learned advocate for the petitioners vehemently submitted that though deceased Sudhir was an under trial prisoner, he was not denuded of fundamental rights enshrined in the Constitution and the State was duty bound to protect him particularly when he was in the custody of the State. Since the State machinery has failed to protect his life the petitioners being dependent on him should be duly compensated. The learned advocate also placed reliance on the decision in the case of **State of Andhra Pradesh. Vs. Challa Ramkrishna Reddy; 2000 AIR (SC) 2083, Smt. Nilabati Behara Vs. State of Orissa and Ors.; AIR 1993 SC 1960, and Sube Singh Vs State of Haryana; AIR 2006 (SC) 1117**. The learned advocate submitted that due to previous animosity the life of deceased Sudhir was in danger. The respondents were made aware about the threats and still they failed to provide him adequate protection which has cost his life and therefore there is an apparent negligence on the part of the respondents in preserving fundamental right to life. In the facts and circumstances the petitioners deserve to be compensated adequately by awarding compensation of Rs.25,00,000/-.

5. The learned A.P.P. referring to the affidavit in reply filed on behalf of the respondent no.6 who is the Superintendent of Police, Dhule submitted that deceased Sudhir was an under trial prisoner accused of committing murder of Mohan Barse and was being produced before the Court of Sessions at Bhusawal on the date of hearing. It is only because of the over crowding of the prison at Jalgaon, on a request of the Jail Superintendent of that prison that he was transferred to Dhule District Prison along with few other prisoners. He submitted that deceased Sudhir was being produced along with other accused for the trial by providing adequate protection. Before the unfortunate incident at least on five occasions he was taken from Dhule prison to the Sessions Court at Bhusawal by the state transport bus by providing sufficient security. The Kaidi Party escorting him was consisting of an Assistant Sub Inspector by name Ankush Shirsath and three police constables. An automatic weapon i.e. Carbine Machine Gun of caliber 9 mm with 30 rounds was also provided to the Kaidi Party for the safety and security of deceased Sudhir and it was handed over to police constable J.A. Chaudhary who was in the Kaidi Party. In support of his submission he pointed out the extract of daily arm distribution register (Exhibit R-2). He further pointed out that when the bus slowed down near a speed breaker the assailant who was sitting on the seat behind the place where Kaidi Party was sitting suddenly got up and fired at deceased Sudhir and fled away by alighting from the bus by

taking advantage of the melee. Immediately the bus was taken to a nearby police station and deceased Sudhir was shifted to a hospital but unfortunately succumbed. The learned A.P.P. therefore submitted that on the facts it cannot be said that there was any apparent negligence on the part of the respondents in providing adequate security to deceased Sudhir and merely because he has been killed while he was being escorted to the court in custody of a Kaidi Party one cannot *per se* find any negligence. There are no other circumstances to demonstrate that the respondents had failed in their duty and could be said to be liable in public law for compensation.

6. The learned A.P.P. further submitted that whether and in what manner the respondents and the Kaidi Party had failed to discharge their duties is a pure question of fact and in the absence of any clear material to point out that there was some negligence or omission to perform the public duty, this Court under Article 226 of the Constitution of India should not award compensation and the petitioners may be left to invoke a remedy under torts through a suitable civil proceeding.

7. We have carefully considered the rival submissions and the decisions cited on behalf of the petitioners and also several other judgments of the Supreme Court laying down various principles regarding claims in public law for compensation. The law is far too well settled. Apart from the

principles laid down in the case of **Challa Ramkrishna Reddy, Smt. Nilabati Behara** and **Sube Singh** (supra) there are several other judgments which pertain to such claims in respect of custodial death or persecution by the police, to name a few, **D.K. Basu Vs. State of West Bengal; (1997) 1 SCC 416**, **Bhagalpur Blinding Case [Khatri (II) Vs. State of Bihar; 1981 (1) SCC 627]**, **Bhagalpur Blinding Case [Khatri (IV) Vs. State of Bihar; 1981 (2) SCC 493]**, **M.C. Mehta Vs. Union of India; (1987) 1 SCC 395** etc. It is in the light of these decisions that we now approach the matter in hand.

8. As far as facts are concerned there is not much of dispute except in respect of the alleged negligence in providing adequate security to deceased Sudhir while he was being escorted from the prison to the Court. There can be no doubt that since he was in the custody of the State, it was duty bound to protect his life but unfortunately he could not be saved and died of a bullet injury while he was being transported in a public transport bus. However, the principle of *res ipsa loquitur* or the principle of strict liability would not be applicable in the given facts and circumstances. No negligence can be readily inferred merely because deceased Sudhir was killed while he was being escorted to the Court in a public transport bus by the Kaidi Party.

9. As is pointed out by the learned A.P.P there is enough material to show that apart from an officer of the rank of Assistant Sub Inspector of Police

there were three constables one of whom was carrying an automatic machine gun with as many as 30 rounds. *Prima facie* it cannot be said that no necessary precaution was being taken by the Kaidi Party for the safety of the deceased Sudhir. It is not the case of the petitioners that there was any malice or ulterior motive on the part of Kaidi Party.

10. In our considered view, therefore, it is quite a disputed fact as to whether there was any negligence or omission on the part of State machinery as a result of which the deceased Sudhir was killed. There has to be some nexus between the two which could be established only on the basis of some concrete material which is not available before us.

11. In this regard it would be apt to refer to the following observations of Dr. A.S. Anand, J. (as he then was) in the case of **Smt. Nilabati Behara** (supra) from paragraph no.37:

“37. This Court and the High Courts, being the protectors of the civil liabilities of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the

right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law – through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with Rudul Sah v. State of Bihar and Anr. MANU/SC/0380/1983 : 1983 CriLJ 1644 granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the Courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the Courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the Courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental rights of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred

to by Brother Verma, J.”

12. It is equally important also to refer to the following observations from the case of **Rudul Sah v. State of Bihar; (1983) 4 SCC 141**, from paragraph no. 12:

“12. This Court ordered payment of compensation in lieu of illegal detention. While rejecting the State's plea that the petitioner should be relegated to the remedy of suit, the Court observed:

*“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 this claim. But we have no doubt that*”

(Emphasis supplied)

13. It is therefore quite clear that it is only when the facts are incontrovertible that a High Court under Article 226 of the Constitution of India can award compensation, leaving the aggrieved persons to invoke the remedy to claim damages from a civil Court when there is a dispute as to the fact whether there is any breach of public duty. Bearing in mind these principles, in our considered view there are no such incontrovertible or clinching facts to demonstrate that the respondents and the Kaidi Party escorting deceased Sudhir from the prison to the Sessions Court at Bhusawal had failed to discharge their duty. Simply on the basis of the fact that he was

killed while being taken to the Sessions Court in a public transport bus one cannot jump to such a conclusion.

14. In this regard it is also necessary to note that almost of the decisions cited **Smt. Nilabati Behara (supra)**, **Sube Singh (supra)**, **D.K. Basu (supra)** **Bhagalpur Blinding Case [Khatri (II) (supra)**, **Bhagalpur Blinding Case [Khatri (IV) (supra)**, **M.C. Mehta (supra)**, **Rudul Sah (supra)** except the case of **Challa Ramkrishna Reddy (supra)** pertain to custodial death/persecution. Obviously in case of jail in met while being in the custody of the State prison brings with it and an added responsibility on the state to protect his life and personal liberty. The principle of strict liability, therefore can easily be invoked in such cases. However, in the matter in hand, the facts are quite different. The deceased Sudhir has been killed while a Kaidi Party was escorting him to the Court. In our considered view in peculiar facts, the principle of strict liability is not available for being resorted to.

15. In the case of **Challa Ramkrishna Reddy (supra)**, the deceased who was a prisoner was killed while he was present in the jail and on facts it was demonstrated that adequate security was not provided at the jail where he was lodged thereby exposing him to danger. It was established in that matter as a fact that though it was imperative that nine members of police

party should have stayed in the said jail premises during the night, only two were present in the night. The learned Magistrate who had visited the jail immediately after the incident had stated in his report submitted to the Additional District and Sessions Judge that only two constables were guarding the jail during that night. The bombs were hurled at cell no.7 which was on the first floor by the culprits who had used a ladder which was tied by a rope to the wooden parapet for climbing to the first floor. Even while fleeing from the spot the three persons who were sleeping outside the jail and which were kept present there by the deceased as an additional precaution tried to nab the culprits but the bombs were hurled at them killing one of them. There were inspection notes of the Magistrate and it was concluded that there was no adequate man power provided for the security and the constables guarding the jail were also not vigilant, one of whom was found sleeping and it was concluded that the culprits could effect entry into the jail only because of the negligence on the part of the police guards which was a complete violation of Rule 48 of the Madras Rules. It was also found that a specific request was also made for making additional protection and failure to do so had resulted in the incident and there was omission to perform statutory responsibility. As against this, in the matter in hand, the facts are entirely different. The facts discussed above *per se* do not demonstrate that there was any negligence on the part of the State machinery to provide adequate protection to the

deceased Sudhir. Merely because he was shot at and killed by a culprit while being transported from prison to the Court one cannot jump to the conclusion that there was some negligence. Therefore the petitioners are not entitle to seek any benefit from the decision in the case of **Challa Ramkrishna Reddy** (supra).

16. Certainly, it is an unfortunate incident wherein the deceased Sudhir has died. Obviously being the bread winner of the family it is a great loss for the petitioners which otherwise cannot be compensated. We certainly do not intend to deprive them of some solace albeit on facts and in law they are not entitle to lay any claim in public law for compensation. We therefore find no merit in the writ petition and the petitioners need to be left to have their remedy under civil law. However only by way of some sympathy and extend some succor to the destitute family we award some compensation to them to meet the exigencies.

17. The writ petition is dismissed. However the respondent no.1 shall pay to the petitioners Rs.2,00,000/- within three months. It is made clear that the petitioners are at liberty to invoke suitable remedy for claiming compensation on account of death of deceased Sudhir and the amount of Rs.2,00,000/- directed herein-above shall be adjusted towards such compensation if any to be received by them.

18. The Rule is discharged.

[MANGESH S. PATIL, J.]

[T.V. NALAWADE, J.]

KAKADE