

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.3433 of 2020

(Through Hybrid mode)

Benadikta Digal

....

Petitioner

Mr. P. C. Chhinchani, Advocate

-versus-

State of Odisha and others

....

Opposite Parties

Mr. T. K. Patnaik, Addl. Standing Counsel

CORAM: JUSTICE ARINDAM SINHA

ORDER

27.09.2022

Order No.

07. 1. Mr. Chhinchani, learned advocate appears on behalf of petitioner and submits, his client's brother was grievously injured on 26th August, 2008 in the communal riot that followed assassination of Swami Laxmanananda Saraswati on 23rd August, 2008. There is no dispute that compensation and additional compensation were paid by State from, inter alia, Chief Minister's Relief Fund as well as pursuant to direction of the Supreme Court, to those killed in communal violence. He submits, taking advantage of direction in procedural order dated 5th September, 2022 requiring State to file objection to the additional affidavit filed by his client, State filed affidavit and raised defence of delay, against his client's claim for compensation. He submits, this contention was not there in the counter statement filed and subsequently taking it in response to the additional affidavit disclosing documents of injuries

suffered and hospital treatment leading to death of his client's brother, should not be entertained or looked at by Court.

2. He submits, the writ petition was presented on 28th January, 2020. Coordinate Bench had required satisfaction from him, to admit the writ petition. Satisfaction rendered was by reliance on judgment of the Supreme Court in **Tukaram Kana Joshi v. M.I.D.C.**, reported in **AIR 2013 SC 565**. He submits further, there be direction for payment of compensation, as has already been paid out to victims of the communal riot.

3. Mr. Patnaik, learned advocate, Additional Standing Counsel appears on behalf of State and submits, the writ petition should be dismissed on ground of delay. Without prejudice he relies on the objection affidavit. Paragraph 7 is reproduced below.

“That, regarding the averment made in writ petition relating to FIR registered at Kharavelanagar Police station Case No.282/2008 U/s.147/148/436/307/302/149 of I.P.C. the same was subsequently investigated by the Crime Branch and after completion of the investigation, charge sheet has been submitted under section 147,148,341,323,325,149 IPC against the accused persons mentioned in the charge sheet. As during investigation by the Crime Branch no offence under section 302 IPC is established, the Noks of Fr. Bernard Digal are not entitled to receive any compensation awarded for the riot victims by the Government.”

He submits further, though FIR was registered in the police case, inter alia, under section 302 of IPC, upon investigation

by the Crime Branch, charge sheet was filed invoking sections 147, 148, 341, 323, 325, 149 IPC against accused persons. During investigation by the Crime Branch, no offence under section 302 IPC was established and as such next of kin of the deceased is not entitled to receive the compensation awarded for the riot victims. This is corroborated on petitioner's brother having died much later, on 28th October, 2008.

4. First point of controversy between petitioner and State is delay in presenting the writ petition. Assuming at this point death was consequent to grievous injury received in the communal riots, death happened on 28th October, 2008 and the petition was presented on 28th January, 2020. More than eleven years is the delay.

5. In **Tukaram** (supra) compensation had been claimed by land losers on the very large chunk of land notified under section 4 of Land Acquisition Act, 1894, on 6th June, 1964. The land losers were appellants in the Supreme Court. They were deprived of their immovable property in year 1964, when article 31 in the Constitution was still intact and right of property was part of fundamental rights under article 19. However, the writ petition, which culminated in the appeal before the Supreme Court, was filed in year 2009. Delay in that case was much more than eleven years.

6. The Supreme Court in **Tukaram** (supra) said, inter alia, question of condonation of delay is one of discretion. It will depend upon what the breach of fundamental right and remedy claimed are and when and why the delay arose. It is not that

there is any period of limitation for the Courts to exercise their powers under article 226. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The Court went on to say, in event claim made by the applicant is legally sustainable, delay should be condoned where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. The Court should not harm innocent parties if their rights have in fact emerged, by delay on the part of petitioners. A passage from paragraph 10 is extracted and reproduced below.

“10. xx xx xx The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.”

7. Keeping above in mind, Court is required to see whether this is a fit case to exercise discretion to condone the delay of more than eleven years. Facts regarding the assassination and following communal riot are not in dispute. State, however, has disputed petitioner's assertion that his brother died on being grievously injured in the following

communal riot. The additional affidavit filed by petitioner says that the deceased was brutally assaulted on 26th August, 2008, at night, by a group of people armed with deadly weapons and thereafter treated at UPHC, Tikabali and then referred to District Headquarters Hospital, Phulbani on 27th August, 2008. From there, upon having been given emergency treatment, there was referral to SCB Medical, Cuttack. The deceased was then brought to Kalinga Hospital, Bhubaneswar, where he was admitted on 28th August, 2008 and discharged on 1st September, 2008 after being treated for head injuries and fracture on vital parts of the body. Upon discharge he was shifted to Holy Spirit Hospital at Mumbai and admitted there on 2nd September, 2008 with history of assault by a mob, at Odisha. The Bombay Hospital discharged the patient on 17th September, 2008. Upon his second discharge, condition of the injured deteriorated and he was taken to and admitted in St. Thomas Hospital, Chennai on 20th October, 2008. Death happened on 28th October, 2008 as aforesaid. The additional affidavit discloses documents in support of above statements. The documents have not been disputed.

8. State filed objection affidavit. Paragraph 7 has already been reproduced above. It appears from said paragraph, sections 436, 307 and 302 IPC were omitted in the charge-sheet. Instead, sections 341, 323 and 325 were added. Section 436 relates to mischief by explosive substance with intention to destroy a house etc. Clearly it was misapplied in the FIR. Section 302 is murder, while section 307 is attempt to murder. State has sought to build its contention in resistance to the

claim, by relying on omission of these two sections from the charge-sheet.

9. Sections 147 to 149 relate to rioting, rioting with deadly weapon and deeming offence committed by any member of an unlawful assembly, to include every other member of such assembly, as guilty of the offence. State relying on the charge-sheet bearing the sections, which were also there in the FIR, establishes nexus between the riot and the victim. Court needs look no further. A person grievously injured in a riot later succumbing to his injuries may have led the investigating agency to distinguish the death as caused by rioting with deadly weapon and not an attempt to murder or murder with motive. The fine distinction made appears to be that rioting with deadly weapon is an offence and death caused thereby is not the same as a person attempting to murder another or actually does so. In other words, by invoking section 149 the investigating agency made out a case that an unlawful assembly of people caused riot. Hence, the agency did not say that the unlawful assembly was an attempt to murder or for murdering the deceased.

10. Annexure 5 in the writ petition is representation dated 28th June, 2017 made to the Collector requesting grant of ex-gratia. Paragraph 7 therefrom is extracted and reproduced below.

“7. xx xx xx

Taking all the evidence on records and personal I had met him in the hospital, it is true that my brother Bernard Digal died because of

Kandhamal violence and I have been running pillar to post to get justice for him. The cases have been registered and it never came to any verdict. I have made many representation to the concerned authorities (Collector and others) also personally met to Collector and put all the grievances before him to get ex-gratia which was announced by both the Central Govt. and State Govt. but I have not been received any compensation till date. My brother used to help my children for their studies and now they are not able to study properly due to financial difficulties.”

Court is convinced there were mitigating factors and continuity of cause of action of petitioner. Rejection of claim for compensation in the face of ultimately the Supreme Court having directed payment of additional compensation in respect of victims of the communal violence by **Archbishop Raphael Cheenath S.V.D. v. State of Orissa**, reported in **AIR 2016 SC 3639**, is position taken by State that shocks the judicial conscience. In the circumstances, as declared in **Tukaram** (supra), discretion is to be exercised to hold that the petition is not hit by doctrine of delay and laches, as the same are not a constitutional limitation.

11. State is directed to pay aggregate compensation as were paid to other victims of the riot, to petitioner. The aggregate is to be the compensation paid by State with Central Government assistance, including from the Chief Minister's Relief Fund, along with additional compensation directed to be paid by **Archbishop Raphael Cheenath S.V.D.** (supra). Petitioner will produce this order before the Collector, giving particulars of his claim on the aggregate compensation. The Collector (opposite party no.3) is directed to sanction and

disburse the compensation within four weeks of communication. In so doing, the Collector will factor in the component of Central assistance. In event the Central assistance is not obtained, petitioner has liberty to apply.

12. The writ petition is disposed of.

(Arindam Sinha)
Judge

RKS

