

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 1566 of 2012

Bichhanda Mallick

....

Petitioner

Mr. P.K. Das, Advocate

-versus-

State of Orissa and others

....

Opposite Parties

Mr. Debakanta Mohanty, AGA

Mr. P.K. Muduli, Advocate for OP No.4

CORAM:

THE CHIEF JUSTICE

JUSTICE R. K. PATTANAİK

ORDER

28.06.2022

Order No.

08.

1. The father of a 7-year old school going girl child, Jasmin, who died in tragic circumstances, on account of the negligence of the Head Sevak of the Bilabadi Sevashram, in Kandhamal District has approached this Court for directions to the State of Orissa represented by its Commissioner-cum-Secretary, ST & SC Development Department, Government of Odisha to pay compensation.

2. Jasmin was a boarder at the Girls' Hostel of the said Sevashram, which is functioning under the ST&SC Development Department. She suffered headache and mild fever on the night of 21st April, 2011. At around 8 am the next morning, i.e., 22nd April, 2011, the Head Sevak, sent her back to her village accompanied by four other young girl students, studying in Classes-IV, V, VI and VII. On the way, Jasmin became senseless and the four young girls carried her with a lot of trouble for a short distance. Hearing them cry, one Udhaba Mallick, working in a Patraphadi, came running to the spot.

Another villager Prasant Pradhan reached there. In their presence, Jasmin expressed her inability to carry on, collapsed and died. The villagers then helped carry her dead body home.

3. The Petitioner came to know of the tragic death of his daughter at about 5 pm on that day. The Petitioner's brother went to the School at 6 pm and informed the staff about Jasmin's tragic death. He scolded the Head Sevak and other teachers for their irresponsibility and negligence. The Petitioner states that the Head Sevak, being frightened, absconded from the School. However, the Assistant Sevak and two others from the School were present at the cremation of Jasmin in the village.

4. An enquiry was ordered into the incident. The District Welfare Officer (DWO), Kandhamal, Phulbani submitted a detailed report on 23rd April, 2011. He visited the village at 10.20 am and conducted an enquiry in which he recorded the statements of the father and four girls who accompanied Jasmin. He also recorded the statement of Udhaba Mallick who helped carry her home. The findings in the report of the DWO and the suggestions made by him, reads as under:

“Findings:

1. The Head Sevak has done serious offence as he has neither administered medicine to her nor taken any step to Hospitalize the ailing child Jasmin Mallick.
2. Instead of repeated warning, he has sent the ailing child to her home and that too along with four teen aged girl students without accompanied by any teacher or CCA. But there is rule to send the children home with the parents on production of proper application with sufficient reason thereof.

3. The Head Sevak is found absconding from school after the incidence at about 7 PM on Dt.22.04.11 while he has made advance signature in the attendance register on Dt.23.04.2011.

Suggestions:

1. The Head Sevak is recommended for suspension for his gross negligence in duty and proceeding may be drawn as per law in existence as the life of the child could have been saved if proper medical treatment had been provided.
 2. As the child was staying in the Hostel till Dt.21.04.11 and was forced to move to her home while she died on the way, an Ex-gratia amount of Rs.50,000/- may kindly be sanctioned in favour of Sri Bichhanda Mallick the father of late Jasmin Mallick as per the provision of Govt. Letter No.5882 Dt.08.02.10 from available fund till receipt of same from Govt.”
5. In response to the notice issued in this present petition on 1st March 2012, a counter affidavit has been filed by the Additional DWO, Phulbani on behalf of Opposite Party Nos.1 &2. The fact of Jasmin’s death in the manner indicated in the report of the DWO is not denied. It is stated that Sri Brahma Kumar Behera, the Head Sevak who was in charge of the Sevashram and the Boarding at the relevant time, was placed under suspension by an order dated 28th April, 2011. By Memorandum dated 4th January 2012, departmental proceedings were initiated against him for negligence in duty and misconduct. In the counter affidavit filed on 4th August 2012, it was stated that the said departmental proceedings were at the ‘enquiry stage’. Today, Mr. Debakanta Mohanty, learned Additional Government Advocate (AGA) states that he does not have instructions on the further progress in the said proceedings.

6. The counter affidavit further states that the family of Jasmin was sanctioned an Ex-gratia amount of Rs.50,000/- by an order dated 10th May 2011 of the Collector, Kandhamal (Welfare Section). The said Ex-gratia amount was paid on 4th July, 2011. The explanation offered for the conduct of the Head Sevak in sending Jasmin back to her house accompanied by four other young children is that, “no teachers were available on that day due to holiday”. It is stated that the Head Sevak remained in the Hostel to take care of the 140 inmates and did not anticipate that the mild fever and headache would take away the life of Jasmin. It is admitted in the counter affidavit that the Sewashram is located in a Malaria-prone area. In para 10 of the counter affidavit, it is stated as under:

“10. That it is a fact that Bilabadi Sevashram is situated in the most inaccessible G.P of Phulbani Sub-Division. It is 55 K.Ms away from District Head Quarter out of which 25 K.Ms is dense forest with serious Ghats. No communication facilities are available to that area as it is in hill top. It is very difficult to go there by Motor Cycle also. Tractor/4 Wheeler jeeps can go there.

Nobody cannot (*sic*) believe the inaccessibility of the institution until unless he visits the sevashram. It is very difficult to manage a 140 seated hostel in such a remote area where no communication is available. Negligence of Head Sevak is that he has taken lightly to the headache and mild fever of Jasmin Mallick on Dt.21.04.2011 night, but sent her to home on 22.04.2011 with 4 children as no teacher was available on 22.04.2011 due to holiday for Good Friday. Nearest Phulbani hospital is 55 K.Ms away from that place and at least 20 K.Ms will have to go by walk to catch the bus towards Phulbani. So Head Sevak has preferred to watch the other inmates than to accompany the Jasmin Mallick for hospitalization.”

7. It is apparent from the averments in the counter affidavit of Opposite Parties 1 and 2, that the children staying as boarders in the hostel forming part of the Bilabadi Sevashram under the Khajuripada Block of Kandhamal District belonged largely to economically weaker sections. It is also apparent that the Sevashram was located in a remote and inaccessible place with the nearest hospital being 55 Kms away. Further, even the nearest bus to go to Phulbani was available only at a distance of 20 Kms and one had to walk till there to board a bus. Knowing these difficulties and with the Sevashram being a residential hostel in a remote area, there could be no excuse for the State not having arranged for a doctor to be on call to deal with emergencies. It is also unacceptable that not a single teacher was available on 22nd April, 2011 despite it being a holiday on account of Good Friday. In a 140-seater residential hostel, with the inmates being young children, there had to be at least one teacher at all times, even by rotation, to respond to emergencies.

8. The counter affidavit itself states that it is a Malaria-prone area and therefore, the Administration should have anticipated health emergencies and put in place adequate arrangements to deal with such emergencies. The Administration of the Sevashram functioning under the SC & ST Welfare Department had a constitutional obligation to ensure the health and safety of the children studying there. Those staying in the hostel ought not to be placed at a grave risk to their health and safety.

9. The report of the District Welfare Officer leaves no manner of doubt that the Head Sevak sent an ailing 7-year old girl child back home in the company of four other young girl children,

unaccompanied by an adult. While it is imaginable that he was in a quandary having to choose between accompanying the girl for treatment and staying back to look after the 140 odd inmates of the Sevashram, the responsibility for the sorry state of affairs must rest primarily on the State through its local administration as the hostel facility was part of the Sevashram functioning under the ST&SC Development Department. It reflects poorly on the local administration that the responsibility for entire Sevashram with 140 inmates was left on a holiday to just one Head Sevak with no teacher present and no medical facilities available to deal with emergencies.

10. The death of Jasmin in the above circumstances was clearly an avoidable one. There was a culpable failure on the part of the authorities in charge of the Sevashram in failing to put in place adequate measures to take care of medical emergencies like the one in which Jasmin found herself and for which she got no assistance whatsoever.

11. The principle on which the strict liability of the State is attracted in such cases and for which one remedial measure is the payment of compensation, was explained by the Supreme Court of India in ***Smt. Nilabati Behera @ Lalita Behera v. State of Orissa AIR 1993 SC 1960***. There the Supreme Court observed:

“10. It may be mentioned straightway that 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 defense in private law in an

action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.”

12. It was further held as follows:

“17. It follows that 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 rights 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 defense of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defense being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental rights is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.”

“34. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of

the guaranteed basic and inalienable rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of 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 wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

13. The Delhi High Court in *Darshan v. Union of India* 1999 (79) *DLT* 432 explained the circumstances in which compensation could be awarded in a writ petition under the Article 226 as under:

“Compensation had also been awarded by this Court as well as by the Apex Court in writ jurisdiction in several cases of custodial deaths. Coming to instant case, it is one of *res ipsa loquitur*, where the negligence of the instrumentalities of the State and dereliction of duty is writ large on the record in leaving the manhole uncovered. The dereliction of duty on their part in leaving a death trap on a public road led to the untimely death of Skattar Singh. It

deprived him of his fundamental right under Article 21 of the Constitution of India. The scope and ambit of Article 21 is wide and far reaching. It would, undoubtedly, cover a case where the State or its instrumentality failed to discharge its duty of care cast upon it, resulting in deprivation of life or limb of a person. Accordingly, Article 21 of the Constitution is attracted and the petitioners are entitled to invoke Article 226 to claim monetary compensation as such a remedy is available in public law, based on strict liability for breach of fundamental rights.”

14. In *All India Lawyers Union v. Union of India & others AIR 1999 Del 120*, a public interest litigation was filed by a voluntary organisation for directions on the unfortunate death of a student of M.C.D. Primary School aged about 7 years, who was crushed to death by a vehicle while crossing the road in front of the school. He had gone outside the school during school hours to fetch drinking water for himself as potable hygienic water was not available in the school. The Delhi High Court directed that a compensation of Rs. 2 lakhs shall be paid by the school authorities to the parents of the deceased child on account of breach of Article 21 of the Constitution of India. The Court stated that:

“6. It is important to note that the respondent have not disputed that the child went outside the school during the school hours. It follows that the child was not prevented from leaving the school to quench his thirst. The school authorities were under a duty of care which has been clearly breached by them. When the parents leave the children in school they are in the custody of the school authorities. They are required to take such care of their pupils as would be taken by a careful and prudent parent. The fact that the child could move out of the school during school hours shows that either the gate was unmanned or the security at the gate was lax. The

school authorities owe a duty to provide adequate security to the children to prevent chances of injury to them. That duty has not been performed by the authorities. But for their negligence in discharge of the duty, the child would have been alive. In the circumstance, therefore, respondent No. 5, which runs the school is liable to pay compensation to the parents of the deceased child.”

15. The link between the State’s liability arising for its constitutional obligation to ensure protection of the right to life under Article 21 and the right to education under Article 21-A of the Constitution was made by the Supreme Court in *Avinash Mehrotra v. Union of India (2009) 6 SCC 398*, where it was held that the right to education includes the right to safe education. In a public interest litigation filed in relation to an unfortunate incident where 93 school children were burnt alive in a school, the Court issued specific directions to the Educational Department all over the country to ensure compliance of those conditions, as a condition precedent for grant of recognition or approval of school, which was functioning without proper infrastructure facilities and approval under the authorities. The Court noted that:

“34. Similarly, we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. We reached a similar conclusion, on the comprehensive guarantees implicit in the right to education, only recently in our opinion in *Ashoka Kumar Thakur v. Union of India (2008) 6 SCC 1*.

35. The Constitution likewise provides meaning to the word “education” beyond its dictionary meaning. Parents should not be compelled to send their children

to dangerous schools, nor should children suffer compulsory education in unsound buildings.

36. Likewise, the State's reciprocal duty to parents begins with the provision of a free education, and it extends to the State's regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.

37. In the instant case, we have no need to sketch all the contours of the Constitution's guarantees, so we do not. We merely hold that the right to education incorporates the provision of safe schools.”

16. The Madras High Court in *V. Subramaniam v. State of T.N. (2008) 8 Mad LJ 850*, while dealing with a writ petition filed by the father of one Satish, a 5th Standard student of Panchayat Elementary Union School, Thudupatty, Erode District seeking compensation for the death of his son due to compound wall collapse in the school, held the State vicariously liable for negligence of subordinate officials in not maintaining the school building properly. Compensation of Rs. 2 lakhs plus Rs. 1,50,000 as 10% interest was directed to be paid to petitioner/father of deceased student. The court observed that:

“7. The Honourable Supreme Court in *J.P. Unnikrishnan v. State of Andhra Pradesh*, 1993 (1) SCC 645, which was approved by the Constitution Bench Judgment in *T.M.A. Pai Foundation v. State of Karnataka* 2002 (8) SCC 481 and also by the recent Constitution Bench Judgment made in *Ashoka Kumar Thakur v. Union of India* 2008 (6) SCC 1, held that right to education up to the age of 14 years

is a fundamental right guaranteed to a child. Thus, it is incumbent on the respondents 1 and 2 and those who are in management of the educational institutions to give proper and safe educational institutions, then only the said right guaranteed under Article 21-A will be a meaningful fundamental right. The safety of the students studying in the schools should be given topmost priority and no defence is available to the State to deny it.”

17. In *Akshatha v. The Secretary, B.N.M. Education Institutions AIR 2021 SC 4558*, the Supreme Court was hearing an appeal against reduction of compensation by National Consumer Disputes Redressal Commission (NCDRC) in case of a student taken ill during a school tour and being consequentially bed ridden due to School's negligence. The Supreme Court restored the compensation amount of Rs.88,73,798 awarded to her by the State Commission. There the facts were that the complainant was a child aged 14 years at the time of the incident studying in Class 9 in an educational institution in Bangalore. In December 2006, she went on an educational tour with other students to several places in North India, accompanied by teachers of the school. While on the tour, she was taken ill with viral fever, and diagnosed with meningo encephalitis. The doctors had opined that had she been given timely medical aid and attention, she could easily have been cured. Ultimately, she had to be airlifted in an air ambulance to Bangalore. Consequentially, she became bed ridden. Her memory and speech were affected with no prospects for recovery. She stood deprived of a normal life. The Supreme Court noted that there was no discussion by the NCDRC and no reasons were provided for reducing the compensation. It concluded that "In absence of any

such material, discussion or reasoning, the reduction of the compensation patently becomes arbitrary and therefore, unsustainable."

18. In the present case, the death of 7-year old Jasmin was undoubtedly on account of the negligence of the authorities in charge of the Sevashram where she was an inmate and therefore the liability to compensate for her death has to be squarely fixed on the State under whose administrative control the Sevashram was functioning. The liability of the State stems from Articles 21 and 21-A of the Constitution of India as well as Article 19 of the United Nations Convention on the Rights of the Child, which has been ratified by India, and which provides as under:

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

19. Having considered the facts and circumstances, and in particular the economic and social strata to which Jasmin and her family

belonged, the Court considers it to be in the interests of justice to direct that the State of Orissa will pay the Petitioner, in addition to the Ex-gratia amount of Rs.50,000/- already paid, a further compensation of Rs.5 lakhs. The said sum shall be paid to the Petitioner by the State within a period of eight weeks from today, failing which the State will be liable to further pay simple interest on the said sum @ 6% per annum for the period of delay.

20. Mr. Mohanty, learned AGA, urged that the State must be at liberty to recover the aforementioned amount from the delinquent employee. The Court would like to emphasise that the unfortunate and avoidable death of 7-year old Jasmin was due to the collective failure by the local administration functioning under the SC & ST Welfare Department of the Government of Odisha. The 140-seater hostel was left on the fateful day in the charge of just one Head Sevak. It may, therefore, not be entirely justified to fix the blame only on him. It is further observed that any move in that regard will have to await the outcome of the disciplinary enquiry against him and will have to be in accordance with law.

21. The writ petition is disposed of in the above terms.

(Dr. S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge