

(2015) 07 BOM CK 0219

In the Bombay High Court

Case No : Criminal Writ Petition No. 657 of 2009

Asha and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 141(3), 357(5)
Penal Code, 1860 (IPC) — Section 143, 201, 302

Citation : (2015) ALLMR(Cri) 3398

Hon'ble Judges : S.S. Shinde, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : R.K. Ashtekar, for the Appellant; S.D. Kaldate, APP, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.I.S. Cheema, J—Namdeo Vajjnath Sable, the husband of petitioner No. 1 died unnatural death on 28.3.2009 when he was lodged in the Central Jail, Beed. Thus, the present petition by petitioner No. 1, the wife of Namdeo and petitioners No. 2 to 4, the minor children, for compensation of Rs. 5,00,000/- for the custodial death.

2. The petition, in brief, is as follows:-

The petitioners claim that, deceased Namdeo died due to head injury suffered by him while he was lodged in the Central Jail, Beed. He had been arrested due to the orders passed by Judicial Magistrate, First Class, Majalgaon on 15.3.2009 and was sent in judicial custody. Namdeo had been arrested in view of the orders issued in R.C.C. No. 320/2002. The Judicial Magistrate, First Class sent him to magisterial custody till 26.3.2009. On 26.3.2009 the custody was extended. On 28.3.2009 at about 2.00 a.m. Namdeo started vomiting. He was taken to Civil Hospital but was declared dead. Only thereafter the incident was informed to the petitioners. When the petitioners reached hospital, post mortem was yet to take

place. Namdeo died in suspicious circumstances. Petitioner No. 1 - wife made several representations that her husband had been killed in the prison. Matter was reported in the newspapers also. The newspaper reports claimed that Namdeo died due to negligence in giving medical attention. In spite of representations to various authorities, nothing happened. In the post mortem report, doctor gave opinion that Namdeo died due to head injury. Subsequently, F.I.R. came to be lodged on 16.6.2009 at Shivajinagar Police Station, Beed. The employees at the prison had beaten Namdeo and he sustained head injury and died. The petition has enclosed the copy of F.I.R. and medical report. Information was collected under the Right to Information Act and death due to head injury was confirmed. With the loss of Namdeo, petitioners have lost the only earning member in the family and the family is on starvation. The State is bound to provide assistance to the family for livelihood. No help has been given to the family. The act of the respondents are contrary to Article 21 of the Constitution of India. Family has not received any economical assistance. The act is against the policy of welfare State. The petitioners claim compensation of Rs. 5,00,000/- and enquiry into the matter.

3. The respondents No. 3 and 4 - Deputy Inspector General of Prison, Aurangabad Division and the Superintendent of Prison, District Central Jail, Beed filed affidavit-in-reply. There is no dispute that Namdeo was undertrial prisoner and died on 28.3.2009 when he was in the District Jail at Beed. Namdeo had been arrested on 14.3.2009 with reference to Criminal Case R.C.C. No. 320/2002 for offence under section 143 of the Indian Penal Code and had been produced before the Judicial Magistrate, First Class on 15.3.2009 and was sent to District Prison at Beed. When he was sent in M.C.R., on 15.3.2009 he was examined by Medical Officer and there were no signs of injuries or symptoms of marks of beating on his person, but the Medical Officer had noted that he was alcoholic. Namdeo was sent to attend the Court on 26.3.2009 along with police squad and returned to the prison at 4.30 p.m. on the same day and appeared healthy. He was keeping well even on 27.3.2009. After the evening meal on 27.3.2009, he slept. In the morning of 28.3.2009 at 4.15 a.m. the prisoners, who were working in the kitchen of the prison, were asked to come out. Out of 7 prisoners, 6 responded, but Namdeo kept sleeping. His body was warm, but he did not respond to voice. He was taken to hospital, but was declared dead. The claim of the petitioners that he had vomited at 2.00 a.m. is not true. On petitioners submitting representation, District Magistrate initiated magisterial enquiry, report of which was awaited (as on the date of filing of the affidavit dated 16.1.2010 - the same, however, is subsequently received on 11.3.2010). Crime has been registered at 106/2009 under Section 302 and 201 of the Indian Penal Code against duty officers who were there in the week concerned ending 28.3.2009. The Jailer, Subhedar and Hawaldar had been arrested. The prisoner was found unconscious in the early morning of 28.3.2009. He was fit and healthy till he went to sleep in the night of 27.3.2009. Thus, these respondents claim that there was no negligence on the part of prison authorities. As per forensic report, the

deceased died due to internal head injury. The post mortem report and inquest panchanama did not show external injuries. The inquest panchanama showed only scratch injury on right hand. Dead body may have got head injury in transportation as it was first taken to Ambajogai Rural Medical College Hospital and then to Aurangabad Medical College for post mortem.

4. Respondent No. 5 Dattatraya, Prison Officer, Grade-II has also filed affidavit-in-reply, claiming that the A.G.P. and I.G., Prison had conducted enquiries and did not find him responsible for the death of Namdeo. The Superintendent of Central Jail, nasik was appointed Enquiry Officer for various charges. Charge No. 5 related to the death of Namdeo, but for the said charge, this respondent was not found guilty as can be seen from copy of enquiry report annexed. The Sessions Judge recorded perverse finding of conviction against this respondent in Sessions case No. 134/2010 regarding which appeal is pending. The respondent has annexed the copies of concerned documents.

5. We have heard counsel for both sides. The learned counsel for the petitioners submitted that, the documents on record abundantly show that Namdeo who had been sent in judicial custody to the jail, was hale and hearty till 27.3.2009. It is surprising that on 28.3.2009 he should be found dead with head injury. The learned counsel submitted that the authorities tried to suppress the cause of death and initially it was tried to be shown that Namdeo did not respond to call in the morning on 28.3.2009 and appeared to be sick and was taken to hospital, but was found to be dead. It was wrongly tried to show that he had no external injuries. The fact that Namdeo died due to head injury while he was in the custody of the State from 15.3.2009 till his death on 28.3.2009 is undisputed fact and the State is liable to pay compensation to the petitioners. The State may recover the same from such of the officials who are responsible.

6. The learned A.P.P. for the State submitted that, Namdeo died while he was in prison and the State has taken action against its employees by filing the Criminal Case, and report of the magisterial enquiry was also obtained. Thus, according to the learned A.P.P., necessary steps had been taken.

7. The learned counsel for respondents No. 5 to 7 submitted that, against the conviction of respondent No. 5, appeal is pending and the offence is yet to be established. According to him, in the departmental action, respondent No. 5 has not been found responsible for the death of Namdeo. He submitted that, observations against respondent No. 5 in the writ petition are likely to affect the Criminal Appeal filed by Dattatraya against his conviction.

8. The present petition is for compensation for death of the sole earning member of the family of petitioners, which took place on 28.3.2009. The matter cannot be allowed to be kept pending only because respondent No. 5 has filed an appeal. We make it clear at the threshold that our observations regarding the role of respondents No. 5 to 7 in the instant petition are limited for the purpose of deciding present writ petition.

9. Looking to the rival pleadings of the parties itself, it is clear that there is no dispute regarding the fact that, Namdeo who was in custody of the State and in prison from 15.3.2009, had been produced before the Judicial Magistrate, First Class on 26.3.2009, and was hale and hearty. Even on 27.3.2009, according to the respondents, he was quite well and took care of his day-to-day activities. It is surprising and shocking that on 28.3.2009 in the morning the prison authorities should declare that Namdeo did not respond to calls and when he was taken to hospital, he was declared dead. Respondents No. 3 and 4 have filed copy of inquest panchanama which was carried out by Executive Magistrate Abhay Devidas Mhaske (Exhibit R-2). The document keeps referring to various parts of the body of Namdeo and goes on recording that there were no injuries. The document claims to have been recorded at 6.15 Hrs. of 28.3.2009 at the Government Hospital, Beed. It appears that, the post mortem was carried out at Ghati Hospital, Aurangabad. The contents of the post mortem have been referred to by the Sessions Judge in his judgment dated 25.9.2012 in para 21, which require to be extracted. We are aware that appeal is pending, but we are only referring to the contents of the documents reproduced by the Sessions Judge. The Sessions Judge referred to the evidence of P.W. 10 Dr. Sachin Gadge, who recorded following external and internal injuries in the post mortem report:-

"External injuries:

- (i) Evidence of contused abrasion of size 3 x 2 cms. present over posterior aspect of right elbow, irregular in shape, Reddish Brown scab present.
- (ii) Evidence of contusion of size 2 x 1 cm. present over medial aspect of right arm, middle one third, Reddish Blue in colour. (Contusions mentioned above on cut section show blood infiltration in underlying tissues).
- (iii) Linear scratch abrasion of length 5 cms. present over lateral aspect of right side of chest, middle one third, Reddish Brown scab present.

Internal Injuries:

- (i) Under scalp contusion of size 3 x 2 cms. present over left frontal region, Brownish Black in colour.
- (ii) under scalp contusion of size 5 x 3 cms. present over left parietal-temporal region, Brownish Black in colour.

There was no fracture of scalp, meninges were intact, sub-dural haematoma of size 8 cms. x 6 cms. x 1.5 cms. present over left parieto temporal region. Seen adherent to dura, Brownish Black in colour, Diffuse patchy sub arachnoid hemorrhage seen over left cerebral hemisphere, Brownish Black. Brain was edematous."

The evidence was brought that these were ante-mortem injuries and the head injury was sufficient in ordinary course of nature to cause death. Now, when we go back to the inquest panchanama, where details regarding the injuries were

noted, in the last part, four lines have been squeezed in to show certain injuries. Possibly this was done after the post mortem report became available. When Executive Magistrate is recording the inquest panchanama, earlier preparing of such inquest appears to be dishonest, may be due to the fact that the death had occurred in the prison and the approach was to protect the prison officials.

10. The Sub-Divisional Magistrate, who conducted Magisterial enquiry and whose report dated 11.3.2010 has been filed, appears to have done the magisterial enquiry at leisure. First he goes on giving publication by beat of drum in the village and claims that he pasted notice at the Tahsil Office on 10.7.2009 (for a death in prison, which had taken place in March 2009) and then he keeps waiting for people to come. Naturally nobody comes. He receives the documents from P.I., Majalgaon and then fixes the enquiry to 31.7.2009 and 13.8.2009, but does not make enquiry claiming that he had revenue work. He keeps waiting for people even on 26.8.2009 and again publishes a notice on board for people to come forward. It is beyond our understanding as to what this Sub-Divisional Magistrate was expecting to find sitting in his office when the death had taken place at the prison and evidence, if any, was and could be found only at the prison, which is an enclosed. Only in September 2009 he makes a request to the prison authorities to give the names of other inmates in the cell. Then he records their statements which are referred in the report. The three persons referred by him do not give any information and claim that they did not know as to how Namdeo died. The three page report of this magisterial enquiry concludes that, on the day concerned, Namdeo was unable to move from bed and he was taken to Civil Hospital, Beed and during treatment he died. It notes that, final certificate of death issued by panel of Doctors shows cause of death as Head Injury. The Sub-Divisional Magistrate does not appear to have been able to ignore the post mortem report. It is quite clear from reading this report of the Sub-Divisional Magistrate that the magisterial enquiry was done in most unsatisfactory manner. We direct the respondent N. 1 State to consider inquest report (Exhibit R-2) recorded by Executive Magistrate Abhay Devidas Mhaske and read the same with the post mortem report and looking to the manner in which this inquest panchanama was recorded, take suitable action against the Executive Magistrate for his approach while recording the inquest panchanama which was either negligent or a conscious effort to shield those who were guilty at the prison.

11. Copy of the F.I.R. filed in the matter at Crime No. 106/2009, available at Exhibit D, shows that, P.I. Onkar Chavan registered the offence claiming that A.S.I. H.B. Jadhav had informed that on 28.3.2009, Namdeo Vajinath Sable, Aged 40 years, was found in unconscious condition with froth coming out from his mouth and that he had vomited. He was brought to the hospital and had been declared dead. A.D. No. 7/2009 had been registered. The A.D. was received by the P.I. for enquiry. The P.I. got the inquest panchanama done from the Executive Magistrate at Aurangabad. Due to directions of the Medical Officer, in camera post mortem was got done and documents had been collected. The post

mortem report found that, the death had occurred due to head injury. The victim was in jail and due to beating by the employees of the prison, he had suffered head injury, is clear. The officials on duty, for reasons not known, had assaulted the victim and due to the injury, he had expired.

12. In the Sessions Case, on the basis of such F.I.R. and the investigation and evidence, Court has found respondent No. 4 guilty. No doubt the appeal is pending. However, for the decision of the present Writ Petition, what is sufficient for us is the fact that while in the prison, death of Namdeo took place due to head injury. There is no reason why the State should not have cameras including night vision cameras, to cover all portions of the prison other than the changing room and toilet s. There is no reason why, when such incident takes place, the State is unable to show from scientific evidence of video recordings as to what exactly happened when the victim is alleged to have slept in the cell along with other prisoners. When a prisoner enters the prison, he is responsibility of the State. He has to be protected by the State from other inmates in the cell and even prison officials, some of whom may not be acting above board. It may happen that a person may have to be protected from himself also as one may harm his own self out of frustration etc. Video recording can show the truth. If the State fails to make provision to make such scientific evidence available, the State cannot escape the liability whenever such death occurs while the person is in the custody or in the prison. There is a tendency between jail officials to protect each other when one of them is responsible. The other inmates in the prison can be intimidated or for various reasons, their silence can be procured when prison officials are involved in atrocities on any inmate. In the present matter, the victim appeared to be an undertrial prisoner, who had been sent to prison by the Magistrate having secured his custody on warrant. It is unfortunate that, while in magisterial custody, he suffered such unnatural death, which, looking to the post mortem report, is homicidal death.

13. The present remedy resorted to by the petitioners under Article 226 of the Constitution of India is available to them in public law. The State is liable for contravention of the fundamental rights of the victim. No sovereign immunity can be claimed by the respondents.

14. Coming to the question of compensation, leading case on the subject is the matter of Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others, (1993) ACJ 787 : AIR 1993 SC 1960 : (1993) 76 CLT 98 : (1993) CriLJ 2899 : (1993) 2 JT 503 : (1993) 2 SCALE 309 : (1993) 2 SCC 746 : (1993) 2 SCR 581 , Para 16 of which reads as under:-

"16. 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 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 Arts. 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah Vs. State of Bihar and Another*, AIR 1983 SC 1086 : (1983) CriLJ 1644 : (1983) 2 SCALE 103 : (1983) 4 SCC 141 : (1983) 3 SCR 508 and is the basis of the subsequent decisions in which compensation was awarded under Arts. 32 and 226 of the Constitution, for contravention of fundamental rights."

In para 22, the Hon"ble Supreme Court observed as follows:-

"22. The question now, is of the quantum of compensation. The deceased Suman Behera was aged about 22 years and had a monthly income between Rs. 1,200/- to Rs. 1,500/-. This is the finding based on evidence recorded by the District Judge, and there is no reason to doubt its correctness. In our opinion, a total amount of Rs. 1,50,000/- would be appropriate as compensation, to be awarded to the petitioner in the present case. We may, however, observe that the award of compensation in this proceeding would be taken into account for adjustment, in the event of any other proceeding taken by the petitioner for recovery of compensation on the same ground, so that the amount of this extent is not recovered by the petitioner twice over. Apart from the fact that such an order is just, it is also in consonance with the statutory recognition of this principle of adjustment provided in S. 357(5), Cr.P.C. And S. 141(3) of the Motor Vehicles Act, 1988."

Thus, in that matter Hon"ble Supreme Court granted compensation for the death of victim who was 22 years old with monthly income of Rs. 1,200/- to Rs. 1,500/- and gave compensation of Rs. 1,50,000/- in 1993.

In the matter of " *Gopichand Patil, Seetabai Patil, Menka Patil and Amit Patil Vs. State of Maharashtra and Another* also there was custodial death, and it was considered as to what would have been minimum wages and taking note of dependent family and applying multiplier of 18, the compensation of Rs. 2,57,160/- was given. Another Bench of this Court has, in the matter of "*Smt. Rekha Janardhan Kale Vs. State of Maharashtra & Ors.*" reported in 2013 All M.R. (Cri) 683, noticed (in para 39) that there was no reliable data available to determine what was the income of the deceased in that matter. Court considered the age of petitioner shown as 26 years and fact that the petitioner had four daughters in the age group of 5 to 9 years. It was then observed:-

"Even if we take minimum income of Rs. 3000/- per month, deducting 1/4th for

the personal expenditure of the deceased, the dependency can be fixed at Rs. 27000/-. The age of the deceased must be in between 30 to 35 years. Adopting the test laid down under the Motor Vehicles Act, 1988, by applying multiplier of 16, the amount payable will be Rs. 4,32,000/-. Some more amount will have to be added towards the mental pain and sufferings. Thus, the amount can be taken at Rs. 4,50,000/-. On the said amount, interest will be payable from 16th June 2009 at the rate of 8% per annum till the date of payment."

The Court awarded this compensation along with costs of Rs. 25,000/-.

15. In the matter of " Rohtash Kumar Vs. State of Haryana and Others, (2013) ACJ 1033 : (2013) 2 AD 530 : (2013) CriLJ 1518 : (2013) 2 JCC 1359 : (2013) 2 JT 620 : (2013) 2 RCR(Criminal) 321 : (2013) 2 SCALE 482 : (2013) 14 SCC 290 " the Hon"ble Supreme Court gave compensation of Rs. 20,00,000/-. A copy of the judgment produced shows that Hon"ble Supreme Court relied upon the matter of Nilabati Behera (supra) and in the circumstances of the matter gave compensation of Rs. 20,00,000/- to the appellant.

16. Keeping in view the above judgments, it can be said that as regards the amount of compensation to be granted, Hon"ble Supreme Court considered age and income of the victim and fixed the amount depending on the facts of the matter instead of applying any multiplier as such. This is clear from the matter of Nilabati Behera (supra). The petitioners would be further at liberty to resort to appropriate proceedings for recovery of compensation due to custodial death. The present compensation to be awarded is remedy in public law to make amount readily available to the persons like the petitioners, who have claimed in the Petition that they have lost sole earning member of the family and family is facing starvation. Grant of compensation would assist the petitioner No. 1 to some extent to take care of the family and also have the capacity to resort to private law remedies, if she so thinks it fit.

17. The record shows that the victim was about 30 years old. The petitioner No. 1 is 25 years old with occupation shown as Labour. Petitioners No. 2 to 4 are infants, who have lost their father. Considering the age of the deceased, appropriate compensation needs to be granted to the petitioners. Hon"ble Supreme Court, in the matter of Nilabati Behera (supra) took note of the fact that, in that matter the deceased Suman Behera was aged about 22 years. In present matter, the victim was about 30 years old. The Hon"ble Supreme Court granted compensation of Rs. 1,50,000/- in 1993. Looking to the overall rise in the cost of living, judging from the way salaries have increased in various pay commission reports and the value of rupee at present compared to the value in the year 1993, on basis of reasonability and without going into niceties, it would be appropriate to fix the compensation at Rs. 5,00,000/-. The petitioners have also claimed this amount, which needs to be termed as "reasonable" and "appropriate".

18. Government has issued Government Resolutions regarding payment of

compensation to the victims in matters like the present one as can be seen from the judgment of this Court (Coram: Naresh H. Patil & A.I.S. Cheema, JJ.) reported in Kewalbai Vs. The State of Maharashtra, Superintendent of Police, Superintendent of Jail, Central Jail and Superintendent of Jail, Sub Jail, (2013) 5 ABR 375 : (2013) ALLMR(Cri) 3038 : (2013) 3 BomCR(Cri) 601 . In spite of Government Resolutions, when in the present matter it became evident that the victim suffered homicidal death for which the employees of the jail have been even prosecuted, the Government failed to extend any compensation to the petitioners. They have been left to fend for themselves. Looking to these aspects, there is no reason why the State should not be saddled with interest as well as costs of this petition.

19. We make it clear that the State is duty bound to take action against its employees who perpetuated atrocities on the victim causing his death and also employees who tried to cover up the incident to suppress truth. The officials who used criminal force against the prisoner are responsible. Similarly, officials who may have been present when criminal force is used but who do not take preventive action to protect the prisoner or who do not report the incident must all be said to be liable and responsible for the criminal acts perpetuated against the prisoner.

20. For above reasons:-

(A) We direct that respondents No. 1 to 4 shall pay jointly or severally compensation of Rs. 5,00,000/- (Rupees Five Lakhs) to the petitioners with interest at the rate of 9% p.a. from 28.3.2009 till payment along with costs of this petition, quantified at Rs. 25,000/- (Rupees twenty five thousand).

(B) The compensation amount with interest and costs shall be deposited within two months from the date of this judgment, in the office of Principal District & Sessions Judge, Beed.

(C) The Principal District & Sessions Judge, Beed shall keep the amount of Rs. 1,25,000/- in long term Fixed Deposit in any nationalised Bank in the name of each of the petitioners No. 2, 3 and 4 (thus Rs. 1,25,000/- X 3 = Rs. 3,75,000/-), with instructions of auto renewal till petitioners No. 2, 3 and 4 attain majority, whereafter the petitioners No. 2, 3 and 4 shall be entitled to withdraw the respective amounts. The periodical interest accruing on these amounts kept in Fixed Deposits in the names of petitioners No. 2, 3 and 4 shall be permitted to be withdrawn by petitioner No. 1, so that she can take care of these minor children till they attain majority.

(D) The balance amount of compensation with interest and costs, (after depositing Rs. 3,75,000/- as above in Fixed Deposits equally between petitioners No. 2, 3 and 4) shall be deposited in Fixed Deposit in any nationalised Bank in the name of petitioner No. 1 for a period of one year with liberty to her to periodically withdraw the amount of interest. At the end of the term of one year, this Fixed Deposit may be allowed to be encashed at the discretion of petitioner

No. 1 to her Saving Account.

(E) We direct the Secretary, Home Department for respondent No. 1 - State of Maharashtra, and respondents No. 2 to 4 to ensure deposit of the complete amounts as directed above in compliance of the orders of this Court and report within two months. The State is at liberty to recover the amount of compensation, interest and costs as directed to be paid above, from respondents No. 5 to 7 or such other officials as it may find to be responsible.

Criminal Writ Petition stands disposed of accordingly.