

(2004) 10 DEL CK 0157
In the Delhi High Court
Case No : Writ Petition (C) 668 of 1997

B.L. Wali and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 21, 226

Ranbir Penal Code, 1989 — Section 436

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3

Citation : AIR 2005 Delhi 110 : (2004) 115 DLT 639

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : B.L. Wali, on behalf of petitioners Nos. 2-5 and Party in Person for Petitioner No, for the Appellant; Kailash Gambhir and R.K. Tiwari, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The disturbed conditions in Kashmir resulted in mass migration starting from the year 1989. Residents of the Valley had to leave their home and hearth for the sake of safety and move to unfamiliar surroundings and adverse conditions without any monetary support. For them, it was a paradise lost.

2. The present petition sets forth the tale of one such family which has borne the brunt of displacement from Kashmir. Their sufferings have been aggravated by the unsympathetic and unresponsive attitude of the respondents.

3. The residents, who moved out, hardly got any time and carried their bare belongings. Their homes were left at the mercy of the administration to at least protect them till an environment was created for their return. A large number of houses got burn apart from the loss of life over a period of time. The petitioners also suffered a loss of their homes, which were set on fire. There homes were turned into ashes.

4. The petitioners were residents of Veering from where the river Jhelum

originates. It was a complete transformation from the pictures surroundings to the life as migrants at Delhi, Jammu, Ramban and Nagrota. The economic exigencies also split up the joint family which used to reside in Veering.

5. On the fateful day of 25.11.1992, three residential houses of the petitioners were destroyed in fire. This tragic news reached the petitioners through newspapers and radio. The militancy in the Valley, thus, took its toll of the petitioners. An F.I. bearing No. 76/1992 was registered u/s 436 of the Ranbir Penal Code and Section 3 of the TADA. The Deputy Inspector General of Police, Jammu confirmed to the petitioners that a report had been received from the Superintendent Police, Anantna, Kashmir that the residential houses of the petitioners were gutted and the Joint Director, Fire Services (Jammu) issued a certificate on 09.05.1993 certifying that on 25.11.1992, the residential houses of the petitioners had been gutted. A translated copy of the F.I.R. has been placed on record certifying that all the houses have been reduced to earth on account of their being set of fire by the unidentified militants.

6. The sufferings of the petitioners did not rest at this since the fourth house of petitioner No. 4 was also gutted on 08.12.1992. This was stated to be the consequence of mob furry after the demolition of Babri Masjid. In respect of the same, F.I.R. N . 85 of 2002 was registered.

7. The petitioners visited the office of the State Government on numerous occasions between April, 1993 to December, 1995 for grant of ex-gratia payment on account of burning of their houses. This was stated to be in pursuance to a policy of the State Government. This policy was not placed on record by the respondents for almost seven years in the present proceedings despite repeated directions. It is only on 09.09.2004 that in pursuance to directions of this Court, an affidavit was filed by the Resident Commissioner for the State of Jammu and Kashmir enclosing a copy of the policy dated 10.07.1990 issued vide Order No. 723-GR(GAL) of 1990. This Order issued by the Government of Jammu and Kashmir provided for ex-gratia payment for loss of life and property . Such payment was provided for loss of life of Magistrates and police personnel, personnel of para military forces, Government employees, persons other than Government employees and for damage to immovable property. This office order begins as follows .

""Notwithstanding anything contained in any order or rule or regulation on the subject, following ex-gratia relief shall be payable in respect of the persons killed or permanent/partially disabled directly as a result of violence attributable to the breach of law and order or any other form of Civil commotion.""

8. The aforesaid makes it clear that the payment set out in this office order had to be made as ex-gratia relief notwithstanding anything contained in any order, rule or regulation on this subject. In terms of para 2 of the policy, the expenditure on account of this ex-gratia relief was to be debited to the Account Head ""2235-Social Security and Welfare-II-Other Relief Measures"". Damage to

immovable property was dealt with in para 1(e) as under:

""(e) Damage to immovable property (due to bomb blast or any other kind of sabotage).

(i) Ex-gratia relief, to the extent of 50% loss subject to an upper ceiling of Rs.2.00 (two) lakhs, shall be paid to the owner of the damaged immovable property on the basis of assessment made by the Executive Engineer (RandB) of the area concerned.

(ii)The Divisional Commissioner concerned shall sanction the ex-gratia relief for an assessed damage not exceeding Rs.1.00 lakh. Ex-gratia relief for damage assessed in excess of Rs.1.00 lakh shall be sanctioned by the Government in the Home Department.""

9. The ex-gratia relief by its very nature was not a very large amount. It was limited to the extent of 50% of the loss and that too subject to the upper ceiling limit of Rs.2 lakhs. This would mean that the upper value pre-supposed was of Rs.4 lakhs for a house. It is well known that the construction made in the Valley is largely of wood and stones. How could a proper house be built which could be assessed at Rs. 4 lakhs? Be that as it may, the purpose was to provide for some minimum succour to the persons affected.

10. The State Government, however, issued an office order No. 710-GAD of 1991 dated 30.07.1991 in partial modification of the earlier order in respect of the quantum of relief to be granted to immovable property reducing the amount from Rs.2 lakhs to Rs.1 lakh, but not affecting the cases where the amount already stood disbursed.

11. In the year, 1995, the historical monument of Charari Sharief, Kashmir was damaged and losses were directed to be determined for ex-gratia relief on the basis of 50% of the loss assessed or Rs.1 lakh, whichever is less, as per the existing norms. This was further modified by the Government Order No. REV (ER) 94 of 1995 dated 31.05.1995 stating that the relief from the Prime Minister Relief Fund for the residential structure in respect of Charari Sharief incident was to be a lump sum of Rs.1 lakh and the total relief including the ex-gratia relief from the Prime Minister Relief Fund and the State Government should not exceed Rs.2 lakhs per gutted residential structure.

12. As stated above, nothing materialised for the petitioners and in the year 1996 legal notices were sent through counsel to the State of Jammu and Kashmir and to the Ministry of Home Affairs, Government of India. The Under Secretary to the Government of Jammu and Kashmir issued a letter dated 07.03.1996 asking the D.C., Anantnag to consider the matter on top priority.

13. The petitioners residential houses were also insured with the United India Insurance Company, but even this insurance claim was not paid and the petitioners had to approach the National Consumer Disputes Redressed Commission. The Commission allowed the claim, but the same was challenged

before the Hon"ble Supreme Court, which petition is now stated to be dismissed.

14. The petitioners approached this Court seeking directions for production of various orders / instructions issued from time to time for ex-gratia relief to the militancy-affected victims of the State of Jammu and Kashmir and for settlement of the claim of the petitioners.

15. The petitioners have also pleaded discrimination on the ground that when damage to properties in the incident of Charari Sharief occurred, there was disbursement by the Central Government and by the State Government expeditiously, while the petitioner " claim has been languishing. Thus, different yardsticks were being adopted between members belonging to different communities.

16. In the counter affidavit filed on behalf of the State of Jammu and Kashmir, it has been admitted that the houses of the petitioners were completely burnt in the militancy related activities. It is also accepted that the petitioners were permanent residents of the Kashmir Valley hailing from Veering and were migrants. It was, however, stated that the claim for ex-gratia stood sanctioned in favor of the father of petitioners No. 1 to 3, Shri N.L. Wali, and petitioner No. 4 herein in respect of their co mon residential house belonging to the said respondents of Rs.64,800/-, while the amount of Rs.59,374/- stood sanctioned in favor of Shri D.N. Wali, i.e., petitioner No.5 herein. The house of petitioners No. 1 to 3 alone was assessed of Rs.55,500/- and the Kuthhar at Rs.10,000/- in favor of the father of the petitioners No. 1 to 3, Shri N.L. Wali vide Deputy Commissioners" order dated 09.09.1997. Thus, it is only after filing of the present writ petition that the claims were sanctioned. The only pay ent made is, however, of Rs.59,374/- to petitioner No. 5. There is no discussion of the house subsequently burnt of petitioner No. 5.

17. The petitioners" claim is that there was inconsistency in the stand of the State Government in view of the letter dated 20.10.1997 which had earlier stated that the ex-gratia relief was sanctioned for the residential houses of Rs.14,784/- and a Kuthha for Rs.10,000/- and payments were not disbursed.

18. The petitioners have claimed discrimination on religious grounds by referring to different circulars and their comparison in respect of ex-gratia relief granted for destruction of properties. The details are as under:

Kashmiri Muslims

Loss Assessed Ex-gratia Relief

Govt. (Rs.) (Rs.)

Order No. 52,603/- 2,43,463/- + Plot

DCM/Relief/CHAR/09 55,746/- 1,81,729/- + - do-

31-07-1995

1,18,271/- 2,58,620/- + - do-

Kashmiri Hindus

Loss Assessed Ex-gratia Relief

Govt. (Rs.) (Rs.)

Order No. 4,00,000/- 1,00,000/-

OCC-R/MG-4 2,95,000/- 1,00,000/-

30-08-1995 1,70,000/- 85,000/-

19. The details of disbursement for the loss of property to different persons in Budgam District has also been filed showing the total ex-gratia payments. These are cases where there is an assessment of cost of structure, ex-gratia relief sanctioned out of State fund, ex-gratia relief sanctioned out of the Prime Minister Relief Fund, further incentives sanctioned and the plots earmarked for allotment. The list is detailed running into almost 21 pages. However, it would suffice to just extract the first page to show the quantum of reliefs granted and this is illustrative of the complete details of 21 pages filed by the State of Jammu and Kashmir in pursuance to directions of this Court: TO SET OUT FIRST PAGE

20. Respondent No. 1, Union of India, has also filed an affidavit under the signatures of Mr. K.M. Kuti, Under Secretary in the said Ministry dealing with the Department of Jammu and Kashmir affairs. Respondent No. 1 / UOI by way of the said affidavit effectively washes its hands off the matter. It is stated that relief and rehabilitation are State Subjects. Para 2 of the affidavit reply may be reproduced to show the stand of the Union of India:

"" 2. That the averments made in para 2 of the petition that UOI is invested with the responsibility to rehabilitate and provide relief to the citizens who suffer as a result of failure of state to protect their life and property is misconceived, incorrect and is denied. The answering respondent respectfully submits that Law and Order as well as Relief and Rehabilitation are State Subjects. Ministry of Home Affairs has the responsibility of providing Relief and Rehabilitation to refugees from West Pakistan (now Pakistan), East Pakistan (now Bangladesh), Sri Lanka, Tibet and to the repatriated Indian Nationals. Therefore, the present writ petition qua the answering respondent is not maintainable.""

21. The Government of India, thus, considered its responsibility for providing relief and rehabilitation to refugees, who are not citizens of this country, but not to citizens of the country who are refugees in their own country. The apathy is writ large on its face.

22. There is a vast para Pharnacia of military and para military personnel in the State of Jammu and Kashmir of the Central Government. The boundaries of the country are to be protected. The condition in the State was so serious that it has been taken as priority issue. The dislocation of persons from the Valley is a well-

known undisputed fact. How can the Government of India wash its hands of the whole matter and absolve itself of the responsibility for providing a safe living to the citizens of the country?

23. Article 21 of the Constitution of India provides for the Fundamental Right of Protection of Life and Personal Liberty. Life cannot be bare existence. Persons who are displaced and suffered injury to life and property as a result of terrorism cannot be left without remedy. It is the duty and responsibility of the State to protect its citizens. Citizens like the petitioners are victims of environment, which is not their own creation. The State owes a responsibility to create an environment for safe and dignified existence of the citizens.

24. The Union of India has chosen to give ex-gratia payments out of the Prime Minister Relief Fund to a certain section of the population in the Valley. The idea was to provide succour to the persons, who have suffered as a consequence of the violence. There cannot be two standards in this and uniformity must be maintained.

25. The Constitution of India guarantees the equality before law and equal protection of law by Article 14. Article 15 of the Constitution provides that the State shall not discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them. Thus, while fixing the quantum of ex-gratia payment to be given for loss of property, a uniformity is bound to be maintained. It has to be appreciated that this ex-gratia payment is de hors the amount which may be recovered on any other account including insurance as is provided for in the circular itself and is in the nature of a succour to the displaced persons who lose their property. There is no reason given why the methodology of payment of this ex-gratia amount and the quantification thereof should be different in cases of property damaged in the Charari Sharief incident and other incidents in the Valley. It is not a case where the houses were of a superior quality in Charari Sharief. All the persons have suffered on a count of the militancy activities in the Valley. The payments whether made by the State Government or the Central Government are both in the nature of ex-gratia payments. For the beneficiary, it is immaterial as to from which pocket the money comes from. There is, thus, no ostensible reason why the ex-gratia payment should not be made of the same value in the case of the petitioners as in the case of the victims of Charari Sharief incident. It is also to be appreciated that there are further additional benefits of plots, etc. which have been given to the victims of Charari Sharief incident, but in the present case, one is only concerned with the ex-gratia payment. The least the petitioners can expect is uniformity in the payment of this ex-gratia amount. It is not open to the Central Government to wash its hands of its responsibility. In fact, in the Charari Sharief incident, ex-gratia payments have been disbursed from the Prime Minister Relief Fund. Thus, the Central Government recognises the concept of aid from the Central Government to victims of militancy and terrorism in the Valley.

26. The ambit and scope of the Article 21 of the Constitution has been widened

and compensations have been held payable to victims of State for loss of life and injury. This has further been widened to include the incident of loss of life in a terrorist incident in WP (C) No. 173/1992 titled `Smt. Kamla Devi v. Govt. of NCT of Delhi and Anr.'" decided by learned Single Judge of this Court on 10.09.2004 It would be useful to refer to observations of the learned Single Judge of this Court in the said judgment:

""5.Let us see who are the persons responsible for the wrong. Primarily it is the terrorist who was assembling the bomb. Next, it is the State as it failed in living up to its guarantee that ""no person shall be deprived of his life .. except according to procedure established by law"". The State failed to prevent the terrorist from harming innocent citizens like Uday Singh. Terrorism itself is an indicia of the inability of the State to curb resentment and to quell fissiparous activities. Social malaise in itself is a reflection of the State's inefficiency in dealing with the situation in a proper manner. Apart from the general inability to tackle the volatile situation, in this case, the State agencies failed in their duty to prevent terrorists from entering Delhi. It was their responsibility to see that dangerous explosives such as RDX were not available to criminals and terrorists. The incident occurred as there was a failure on the part of state to prevent it. There was failure of intelligence as they did not pick up the movement of this known and dangerous terrorist. So, it would be extremely difficult even to suggest that the State did not fail in its duty towards the late Uday Singh and his family.

6. A crime has been committed. A wrong has been done and a citizen has lost his life because the State was not vigilant enough. A fundamental right has been violated. But, mere declarations such as these will not provide any succour to the petitioner. She needs to be compensated. It is too late in the day to now suggest, that in a situation such as this, the petitioner should be relegated to the ordinary civil courts to seek her tort law remedy. In D.K. Basu Vs. State of West Bengal, , the Supreme Court held that --

""The Court, where the infringement of the fundamental right is established, Therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience."" The Supreme Court cleared the ground for the grant of compensation under article 226 in situations where there was a dereliction of public duty on the part of the State.""

27. The Supreme Court had the occasion to further comment on the judicial approach in respect of award of damages in M.S. Grewal and Another Vs. Deep Chand Sood and Others, in the following terms :- ""28. Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affectation of the people has been taken note of rather

seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact the decision in D.K. Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of "justice-oriented approach". Law courts will lose their efficacy if they cannot possibly respond to the need of the society - technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

28. What holds true for loss of life and limb would also hold true for loss of property occasioned by failure of the State to protect the same. It is not deprivation of property in accordance with law as in the case of acquisition proceedings, but a direct result of the failure to curtail crime. Even if the perpetrator of the incidents were apprehended, it would offer no succour to the victims. The punishment to the criminal would not reconstruct the houses turned to ashes. The ad hoc compensation is small measure taken by the circular issued by the State Government itself to provide relief in such cases. The succour has, however, remained on paper in the present case and the petitioners driven away from their homes had to approach this Court for redress of their grievances.

29. The present case really does not require computation to be done in view of the ceiling prescribed by the State Government itself in the circulars. Thus, so long as a house is valued at Rs.4 lakhs and above, a person would be entitled to Rs.2 lakhs being 50% of the loss as per the circular. The very nature of the houses existing would show that they should not have been valued at less than Rs.4 lakhs and the respondents have failed to give details as to how a complete house of wood and stone could have been valued for the pittance it was so sought to be valued. Obviously, the determination was arbitrary and irrational, which could not have been defended on facts.

30. The office memorandums of the State of Jammu and Kashmir show that a decision was taken by the office order dated 10.07.1990 to limit the maximum claim to Rs.2 lakhs or 50% of the assessed value, whichever was lower. It is not understood how and for what reason this amount could have been reduced to half the figure by the office order of 30.07.1991. Be that as it may, simultaneously by the office orders of 18.05.1995 and 31.05.1995, the total payment of ex-gratia relief has been specified as the maximum amount of Rs.2 lakhs. This itself is not a large amount taking into consideration the loss, which is suffered by the residents of the Valley, who have lost their property. There cannot be different yardsticks for assessment of loss in different parts of the Valley. No details have been given as to how the respondents came to the meagre figures of a few thousands of rupees for loss of three properties. What can be built in fifty thousand rupees odd? Not a house and that too of wood and bricks. It is hardly

be supposed that the houses would have value of less than Rs.4 lakhs specially in the absence of any disclosure on the part of respondent No. 2 about the details of the assessment of damages. Thus, the petitioners would have been entitled to a least Rs.2 lakhs for each of the houses they have lost and Rs.10,000/-, as assessed, for the Kuthhar. The petitioners are not asking for the actual loss, but the ex-gratia payment to the maximum amount keeping in mind the structures which they owned, which they are entitled to.

31. The Government of India cannot also absolve itself of the responsibility and is liable to ensure that the State Government remits the amount. A large amount of funds flow to the State of Jammu and Kashmir from the Central Government keeping into consideration the disturbed conditions and, thus, the Central Government cannot say that it has no role to play. The State of Jammu and Kashmir is an integral part of our country and the writ of the Central Government runs. In the cases of victims of Charari Sharief incident, funds have been disbursed out of the Prime Minister Relief Fund to make a package of Rs.2 lakhs of ex-gratia compensation apart from other benefits.

32. The amounts have not been paid over a long period of time. the claim should have been processed expeditiously and not later than 30.06.1993 since on 08.05.1993 the report of the damage to the residential houses of the petitioners was confirmed by the Deputy Inspector General of Police, Jammu. The petitioners are, thus, entitled to interest from the said date till the date of payment and this interest would apply on both to paid and unpaid amounts. To the extent, the amount has been paid, the interest would be only payable till the date of payment.

33. In view of the aforesaid, I consider it appropriate to grant simple interest @ 7% per annum. This rate is based on the extracts of the Economic Survey, 2003-2004 at page 85, which shows that the inflation rate of 7% has been taken for the period 1996-2004 being 9.5% during 1990-1999 and 4% during 2000-2003. This is the very basis for grant of interest in the case of death of an innocent citizen in terrorist incident in Smt. Kamla Devi's case (supra).

34. A writ of mandamus is issued directing respondent No. 2, State of Jammu and Kashmir to make payment to the petitioners as aforesaid within a maximum period of two months from today, failing which the Central Government should make the payment and debit the amount from the grants payable to the State of Jammu and Kashmir or any other appropriate account.

35. The writ petition is allowed in the aforesaid terms and the petitioners shall also be entitled to cost of the present proceedings quantified at Rs.10,000/- to be borne by Respondent No. 2.