
(2003) 09 PAT CK 0042
In the Patna High Court
Case No : C.W.J.C. No. 10329 of 2001

Heera Lal Yadav

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-09-2003

Acts Referred:

Citation : (2003) 09 PAT CK 0042

Judgement

Chandramauli Kr. Prasad, J.—Initially the prayer made by the Petitioner in this writ application filed under Article 226 of the Constitution of India was to direct the Respondents to hand over his tractor bearing registration No. BR-08-0855 along with the thrasher. Further prayer made by the Petitioner was to pay compensation of Rs. 50,000/- for detaining the tractor illegally. However, on account of the development taking place during the pendency of this writ application, prayer of the Petitioner is to compensate him for the loss of the tractor.

2. Facts of the case are very disturbing. It admitted that the tractor and the thrasher of the Petitioner were seized by the District Transport Officer for non-payment of the tax and handed over to Sindhaul Police Station for safe custody. Petitioner deposited the tax and the fine. By order dated 13.6.2001 (Annexure-5) the District Transport Officer endorsed the fact of the Petitioner depositing the amount of tax and fine and directed the officer-in-charge of the Sindhaul Police Station to release the vehicle. It is the stand of the Petitioner that on 12.6.2001 itself he met the officer-in-charge of the police station, showed him the release order and requested for the release of the tractor and the thrasher upon which the officer-in-charge demanded illegal gratification and on his refusal he abused the Petitioner and the Petitioner had to leave the police station without the vehicles. According to the Petitioner he met the officer-in-charge again for release of the vehicles but all the time he was told that the same shall be released only when illegal gratification is paid. Thereafter the Petitioner filed representation before the District Transport Officer informing him that in spite of the order passed by him, instead of vehicle being released, he has been abused

by the officer-in-charge. Ultimately when the Petitioner did not get the vehicle he filed the present writ application. The matter was taken up by this Court on 22.8.2001 when this Court passed the following order:

Grievance of the Petitioner is that in spite of the order of the District Transport Officer, Begusarai (Respondent No. 2) as contained in annexure-5, the officer-in-charge of Sindhaul Police Station, Respondent No. 3 has not released the Tractor and Thrasher which was seized on 29.3.2001.

Learned Counsel for the Petitioner submits that when the Petitioner himself went to the Officer-in-charge along with order of the D.T.O., Begusarai (respt. No. 2), the Officer-in-charge demanded illegal gratification for the same. This averment in paragraph-13 to the writ petition has been verified to be true to the knowledge of the Petitioner.

In the circumstances, I direct the Officer-in-charge, Sindhaul Police Station (Deptt. of Home Police), P. Section Sindhaul (respt. No. 3) to file a counter-affidavit within ten days from today, failing which he will be proceeded in the contempt proceeding.

Put up after ten days in the supplementary list. However, this order will not come in the way of Respondent No. 3 to release the Tractor as well as the Thrasher to the Petitioner after verifying the genuineness of the order of the D.T.O. as contained in annexure-5.

3. Counter affidavit as directed was not filed and the matter came up for consideration before this Court on 20.9.2001. Taking note of the fact that neither the vehicles have been released nor the counter affidavit filed, this Court passed the following order:

Let the officer-in-charge of Sindhaul Police station appear before this Court on 28th September, 2001 and file show cause as to why proceeding for contempt be not initiated against him. Let this order be communicated to him by the Junior Counsel to S.C. 8.

Respondent No. 3 thereafter filed the counter affidavit and one is shocked to go through the contents thereof. The deponent of the said affidavit namely Nirmal Kumar Tiwari has stated that he had joined as the Officer-in-charge of the police station on 23.8.2001 and came to know about the present case from the communication dated 28.8.2001 (Annexure-A to the counter affidavit) of District Transport Officer. He had further stated in the counter affidavit that on enquiry it was found that the vehicles in question were given to Sindhaul police station for safe custody but the tractor has been stolen during the period when Devendra Prasad Singh was the Officer-in-charge of the police station and ultimately Mufassil P.S. Case No. 255 of 2001 was registered u/s 379 of the Indian Penal Code in regard to the theft of the tractor.

4. Thereafter the matter came up for consideration on 3.10.2001 and taking note of the plea taken in the counter affidavit of Respondent No. 3, this Court passed

the following order:

Anything and everything is possible in the State of Bihar and the facts indicated herein will amply prove the point.

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Counter affidavit has been filed on behalf of Respondent No. 3 and I am shocked to go through the contents thereof. In the counter affidavit, it has been stated that although the tractor and the thrasher in question were lying for safe custody in the police station but the tractor is missing since 8.4.2001. It is unfortunate that in this State, one can dare to commit the offence of theft in the police station. It is further unfortunate that although according to the first information report, the tractor is missing since 8.4.2001 but the first information report was lodged on 25.9.2001.

For the present, I will refrain from commenting on the conduct of the then Officer-in-charge of Sindhaul police station and the senior officers of the district but I would like to direct the Superintendent of Police, Begusarai to hold a detailed inquiry and submit a report to this Court within four weeks from today.

As directed a counter affidavit has been filed on behalf of the Superintendent of Police in which his supervision note (Annexure-G) has been placed on record. In the said report he had directed for submission of the police report treating the case to be true but no clue. In the supervision note he had further observed that Sub Inspector of police Devendra Prasad Singh has been found guilty of gross dereliction of duty and accordingly his two increments have been withheld which shall be equivalent to three black marks.

5. It is relevant here to state that, Devendra Prasad Singh had filed an application (I.A. 5187 of 2003) for intervention, inter alia, contending that he is not at all responsible for the theft of the vehicle from the police station and he is sought to be made scapegoat in the case. Mr. Navin Sinha appears in support of this application.

6. Fact of the matter is that the tractor was handed over to the police station for safe custody and the same has been stolen from the police station. The scope of this proceeding is not to fix the responsibility on individual officer and this is an issue which is solely within the domain of the State Government. Any observation made by me in regard thereto shall have bearing on the decision, which the State Government may desire to take, hence I am not going into the question of responsibility of individual person. However, I hasten to add that anybody found guilty of dereliction of duty, ultimately leading to theft of an object like tractor from the police station shatters the credibility of the police force and withholding of two increments equivalent to three black marks is grossly inadequate. If the Respondents desire to enforce discipline in the police force, they must have the courage to award punishment proportionate to the gravity of the allegation. One is sad to note that the Superintendent of Police at

one point of time observed that the dereliction of duty is of grave nature still chose to inflict the penalty of withholding of two increments equivalent to three black marks. Even at the cost of repetition I may state that this order may not be construed to mean that I had endorsed the view of the Superintendent of Police that Devendra Prasad Singh, the then officer-in-charge is guilty. He can take recourse to the remedy available to him in law.

7. Undisputed the tractor and thrasher of the Petitioner were seized, handed over to the police station for safe custody and from where tractor has been stolen. In the circumstances the prayer of the Petitioner is to grant him compensation.

8. Respondents, instead of sympathising with the Petitioner, an agriculturist had taken a shameless stand, through its Standing Counsel No. 8 Mr. Amar Nath Singh, that the vehicles in question were seized in exercise of the sovereign power and therefore they cannot be compelled to pay compensation. In support of his submission he has placed reliance on a judgment of the Supreme Court in the case of *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, and my attention has been drawn to paragraph 29 of the judgment, which reads as follows:

In the present case, the act of negligence was committed by the police officers while dealing with property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by its employee of the Respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained; and so, we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable.

9. Mr. A.K. Keshri appearing on behalf of the Petitioner however contends that sovereign immunity is not available to the Respondents and entrustment of the tractor to the police station for safe custody is not a sovereign function.

10. Neither on principle nor on precedent I am persuaded to accept the submission of Mr. Singh. India claims and is the largest democracy in the world and in the land of Budha, Mahavir and Guru Govind Singh, known for their compassion, the State Government instead of showing sympathy and concern for the victim had chosen to take the plea of sovereign immunity. In such circumstance, the only hope of a citizen is the Court. There is no denying the fact that I am associated with the administration of justice by the Court and one may feel elated to hear this but to be candid, I do not enjoy it. To be honest I feel sad that an issue, which ought to have been solved by the State Government and its functionary comes to this Court for adjudication. I do not want to say any thing more in this regard.

11. The question of sovereign immunity came up for consideration before the Constitution Bench of the Supreme Court in the case of *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, in which it has been held as follows:

15. Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorizing or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of *The State of Bihar Vs. Abdul Majid*, this Court has recognised the right of a government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the clause of action in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognizing the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But so long as the Legislature has not expressed its intention to the contrary it must be held that the law is what it has been ever since the days of the East India Company.

12. The decision of the Supreme Court in the case of *Kasturi Lal (supra)* came up for consideration before it in the case of *State of Bombay (Now Gujarat) Vs. Memon Mahomed Haji Hasam*, and while considering the contention that the vehicle was seized by a competent officer, same being lawful and utmost it could be alleged in the circumstances that one or the other servant of the State Government was guilty of negligence, the State Government was not liable for any tortious act of any of its Servant, the Supreme Court observed in Paragraph 7 as follows:

7. On the facts of the present case, the State Government no doubt seized the said vehicles pursuant to the power under the Customs Act. But the power to seize and confiscate was dependent upon a customs offence having been

committed or a suspicion that such offence had been committed. The order of the Customs officer was not final as it was subject to an appeal and if the appellate authority found that there was no good ground for the exercise of that power, the property could no longer be Retained and had under the Act to be returned to the owner. That being the position and the property being liable to be returned there was not only a statutory obligation to return but until the order of confiscation became final and implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like circumstances is expected to take. Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Custom officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. This was precisely the cause of action on which the Respondent's suit was grounded. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it. The order of disposal in any event was obtained on a false representation that the property was an unclaimed property. Even if the Government cannot be said to be in the position of a bailee, it was in any case bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by any act of its agents and servants. In these circumstances, it is difficult to appreciate how the contention that the State Government is not liable for any tortious act of its servants can possibly arise. The decisions in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, and *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, to which Mr. Dhebar drew our attention have no relevance in view of the pleadings of the parties and the cause of action on which the Respondent's suit was based.

13. The question of sovereign immunity fell for consideration before the Supreme Court in the case of *Shyam Sunder and Others Vs. The State of Rajasthan*, and after referring to its earlier judgment in the case of *Kasturi Lal*, the Supreme Court observed as follows:

20. It was, however, argued on behalf of the Respondent that the State was engaged in performing a function appertaining to its character as sovereign as the driver was acting in the course of his employment in connection with famine relief work and therefore, even if the driver was negligent, the State would not be liable for damages. Reliance was placed on the ruling of this Court in

Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, where this Court said that the liability of the State for a tort committed by its servant in the course of his employment would depend upon the question whether the employment was of the category which could claim the special characteristic of sovereign power. We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today. Its historic and jurisprudential support lies in the oft-quoted words of Blackstone. Blackstone Commentaries (10th ed. 1887):

The king can do no wrong... The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing : in him is no folly or weakness.

In modern times, the chief proponent of the sovereign immunity doctrine has been Mr. Justice Holmes who, in 1907, declared for a unanimous Supreme Court: *Kawanankea v. Polybank* (1906) 205 U.S. 349, 353.

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be legal right as against the authority that makes the law on which the right depends.

Today, hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so called sovereign and proprietary or commercial functions for determining the liability of the State.

21. We are of the view that, as the law stands today, it is not possible to say that famine relief work is a sovereign function of the State as it has been traditionally understood. It is a work which can be and is being undertaken, by private individuals. There is nothing peculiar about it so that it might be predicted that the State alone can legitimately undertake the work.

14. The Supreme Court had considered the plea of sovereign immunity in somewhat detail in the case of *N. Nagendra Rao and Co. Vs. State of Andhra Pradesh*, in which the Supreme Court had answered this question in the following manner:

10...The doctrine or the defence by the "act of State", is not the same as sovereign immunity. The former flows from the nature of power exercised by the State for which no action lies in court whereas the latter was developed on the divine right of kings.

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14. That apart, the doctrine of sovereign immunity has no relevance in the present day context when the concept of sovereignty itself has undergone drastic change. Further, whether there was any sovereign in the traditional sense during

British rule of our country was not examined by the Bench in *Kasturi Lal* (supra) though it seems it was imperative to do so, as the Bench in *Vidhyavati* (supra) had not only examined the scope of Article 300 of the Constitution, but after examining the legislative history had observed:

It will thus be seen that by the chain of enactments beginning with the, Act of 1858 and ending with the Constitution the words "shall and may have and take the same suits, remedies and proceedings" in Section 65 above, by incorporation, apply to the Government of a State to the same extent as they applied to the East India Company.

24. ...In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marked ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officers personally was not doubted even in *Viscount Canterbury* (supra). But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.

26. ... Maintenance of law and order or repression of crime may be inalienable function, for proper exercise of which the State may enact a law and may delegate its functions, the violation of which may not be suitable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense.

15. The Supreme Court considered the question of sovereign immunity and the effect of its decision in *Common Cause, A Registered Society Vs. Union of India and Others*, and went to the extent of saying that the course of justice insofar as the tortious liability of a State is concerned was disturbed by its decision in *Kasturi Lal* (supra) and such of its efficacy has been eroded as the same was not followed by the Supreme Court itself in subsequent decision. The Supreme Court in the said case observed as follows:

76. The course of justice, insofar as the tortious liability of the State is concerned, was disturbed by the decision of this Court in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, in which a partner of Kasturilal Ralia Ram Jain, a firm of jewellers or Amritsar, had gone to Meerut for selling gold and silver, but was taken into custody by the police on the suspicion of possessing stolen property. He was released the next day, but the property which was recovered from his possession could not be returned to him in its entirety inasmuch as the silver was returned but the gold could not be returned as Head Constable in charge of the Malkhana misappropriated it and fled to Pakistan. The firm filed a suit against the State of U.P. for the return of the ornaments and in the alternative for compensation. This Court, speaking through Gajendragadkhar, CJ, observed as under:

The act of negligence was committed by police officers while dealing with the property of Ralia Ram which they had seized in the exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers, and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employees of the Respondent during the course of their employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained.

77. The earlier decision of this Court in *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, was distinguished on the ground that it was based on a tortious liability not arising from the exercise of Sovereign power. The decision in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, (supra) has apart from being criticised (See *Constitutional Law of India* by Seervai), not been followed by this Court in subsequent decision and, therefore, much of its efficacy as a binding precedent has been eroded. Reference in this connection may be made to the decisions of this Court in *State of Bombay (Now Gujarat) Vs. Memon Mahomed Haji Hasam*, and *Smt. Basava Kom Dyamogouda Patil Vs. State of Mysore and Another*, and a number of other cases, including those dealt with under Article 32 of the Constitution by this Court in all of which compensation and damages were awarded to the Petitioner for tortious liability of the servants of the State. These cases, namely. *Rudul Sah Vs. State of Bihar and Another*, *Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others*, *Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others*, ; *Peoples' Union For Democratic Rights Through Its Secretary and Another Vs. Police Commissioner, Delhi Police Headquarters and Another*, and *Sebastian M. Hongray Vs. Union of India (UOI)*, do not refer to the decision of this Court in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, It may be mentioned that in *Kasturilal's* case, the Court did not consider the State liability for violation for Fundamental Rights of a citizen relating to Life and Personal Liberty. It will be seen that where on account of tortious act of the

servant of a State, a person's Fundamental Right to Life and Liberty was violated, the Court granted damages and compensation to that person. The liability is based on the provisions of the Constitution and is a new liability which is not hedged in by any limitations including the doctrine of Sovereign immunity. Reference may also be made to the decision of the Privy Council in *Maharaj v. Attorney General of Trinidad and Tobago* (No. 2) (1978) 2 All ER 670 in which the Appellant, who was a Barrister, was sentenced to 7 days imprisonment by a Judge of the High Court, which was set aside by the Privy Council in appeal. The Appellant, in the meantime applied for redress u/s 6 of the Constitution of Trinidad and Tobago on the ground that he was deprived of his liberty without due process of law as guaranteed to him u/s 1 of that Constitution. The detail was dismissed by the High Court, but was upheld by the Privy Council appeal. The Privy Council held that Section 6 of the Constitution impliedly allowed the High Court to award compensation as compensation may be the only practicable form of redress in some cases.

16. The king can do no wrong, he is not only incapable of doing wrong but even of thinking wrong and sovereign is exempt from action as there can be no right against the authority that makes the law on which right depends, are notions, whether worthy of acceptance to-day? In my opinion certainly not. The immunity of the Crown in United Kingdom was based on the old feudalistic notion of justice that King is incapable of doing any wrong. This rule of immunity in favour of the Crown has disappeared from the land of its birth, therefore it is ridiculous to hold that it has any validity in India, a republic and governed by the Constitution. The demarcating line between sovereign and non-sovereign functions has largely vanished as no rational basis exists for that. One may not ignore the need of the State to have extra ordinary powers but no legal or political system today can place the State above law as it is abhorrent to hear that a citizen shall be deprived of his property illegally by negligence of officers of the State without any remedy. Today the emphasis is more on liberty, equality and the rule of law and it is high time to do away with the archaic theory State protection and to place the State or the Government at par with any other juristic entity. In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of the people in almost every sphere of life, in my opinion, needs of the State, duty of its official and rights of the citizens are required to be balanced so that peoples, faith in rule of law in a welfare State is not shaken. I am of the considered opinion that barring function such as administration of justice, maintenance of law and order and repression of crime which are amongst the primarily inalienable function of the State and besides that the State cannot claim immunity. It is high time that we must shed the concept that the king cannot be guilty of personal negligence or misconduct and consequently cannot be responsible for negligence or misconduct of its servant. King is incapable of doing a wrong is too difficult to swallow. The doctrine of sovereign immunity has become out dated and has undergone a

cystic change, hence it has no relevance in the present day context. It is widely accepted that in republic it is the people of the country who are sovereign.

17. From the discussions aforesaid I have no manner of doubt that defence of sovereign immunity is limited only to primary and inalienable function of constitutional Government and an action by citizen for negligence of the officer of the State in discharge of statutory duty under a law, not referable to primary State function can not be rejected on the plea of sovereign immunity. While considering the decision of the Supreme Court in *Kasturi Lal (supra)* Mr. H.M. Seervai in his book *Constitutional Law of India (Third Edition) Volume II* at page 1796 observed that "Supreme Court can restate in nineteen seventies what Sir Barnes Peacock had said over a hundred years ago that the maxim of the English law that "the king can do no wrong" had no application to the Union of India or to the State". The wisdom of Seervai has been taken note of by the Supreme Court in its later judgments referred to above and thus the theory of sovereign immunity to a large extent has been exploded.

18. In the present case, the District Transport Officer had seized the vehicle purportedly for the non-payment of the tax. Thus seizure of vehicle is in exercise of statutory power. Further entrustment of the tractor to the police station for safe-custody, in my opinion, cannot be any stretch of imagination be said to be a sovereign function. Petitioner is not complaining about the seizure of the vehicle but his complaint is its non-release on account of the fact that the same has been stolen from the police station where, it was given for safe custody. It is on account of the failure, negligence and dereliction of duty of the employees of the State posted in the police station that the theft had taken place. Thus in the facts of the present case sovereign immunity is not available to the Respondent-State.

19. Mr. Singh then contends that relief of compensation on application filed under Article 226 of the Constitution of India can not be granted except in a case of breach of fundamental right, which is not complained of in the present case. Reliance in this connection has been placed on a decision of the Supreme Court in the case of *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, and my attention has been drawn to paragraph 22 of the judgment, which reads as follows:

22. The above discussion indicates the principle on which the court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in *Rudul Sah* and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in *Rudul Sah* and others in that line have to be understood and *Kasturilal* distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding

reached, it is a clear case for award of compensation to the Petitioner for the custodial death of her son.

20. Another decision on which Mr. Singh has placed reliance is the judgment of the Supreme Court in the case of Rabintra Nath Ghosal Vs. University of Calcutta and Others, and my attention has been drawn to paragraph 9 of the judgment, which reads as follows:

9. The courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in public law proceedings. Consequently when the court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, it does so under the public law by way of penalising 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 citizens. But it would not be correct to assume that every minor interaction of public duty by every public officer would commend the court to grant compensation in a petition under Articles 226 and 32 by applying the principle of public law proceeding. The court in exercise of extraordinary power under Articles 226 and 32 of the Constitution, therefore, would not award damages against public authorities merely because they have made some order which turns out to be ultra vires, or there has been some inaction in the performance of the duties unless then is malice or conscious abuse. Before exemplary damages can be awarded must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act.

(underlining mine)

21. Mr. Keshri however submits that this specious plea for denying the relief is fit to be rejected and the grievance of the Petitioner is fit to be remedied in exercise of writ jurisdiction.

22. Having given my most anxious consideration, I am not inclined to decline the relief to the Petitioner on the ground urged by Mr. Singh. Petitioner is an agriculturist and has been deprived of a very important tool of the agricultural operation i.e. tractor. This had not only affected his constitutional right guaranteed under Article 300A of the Constitution of India but in my opinion extends to infringing his right to carry on any occupation guaranteed under Article 19(1)(g) of the Constitution. Thus the Respondents cannot be permitted to take the advantage of their wrong by contending that the Petitioner should be relegated to the remedy of suit. Reference in this connection can be made to a decision of the Supreme Court in the case of Northern Plastics Ltd. (Now Merged With Consolidated Photo and Finvest Ltd.) Vs. Collector of Customs and Central Excise, in which in paragraph 9 it has been observed as follows:

9. ... The Respondent cannot now be permitted to take the advantage of his own wrong and contend that the value of the goods should be determined only at Rs.

48.50 lacs inclusive of its value and the amount of duty payable thereon because they could be sold at that price only. We also cannot accept the contention of the learned Counsel for the Respondents that if the Applicant has suffered any loss as a result of the wrongful act of the Respondent then he should file an action in tort and this Court cannot order payment of any amount in these applications. No doubt it would be open to the Applicant to initiate such an action if it feels that the loss suffered by it is more than Rs. 33.04 lacs. Merely because it is open to the Applicant to initiate such an action it would not be just and proper to refuse the claim made in these applications as in any case the Applicant is entitled to return of the money value of the goods which were illegally confiscated by the Respondent.

23. There is nothing on record to suggest the actual price of the tractor. However, from the certificate of registration it seems that the tractor was "Swaraj" of 1989 model. Same was seized on 29.3.2001. The value of the tractor must have depreciated in these long years. I am of the opinion that a sum of Rs. 75,000/- would be just and proper for the value of the tractor in question. In case the Petitioner feels that he is entitled for more amount as the price of tractor or on account of damages, nothing shall prevent him to bring an appropriate action for the said purpose.

24. Accordingly I direct the Respondents to pay to the Petitioner a sum of Rs. 75,000/- (Rupees seventy five thousand) in the shape of bank draft within eight weeks from the date of receipt/production of a copy of this order.

25. Respondents shall be free to realise this amount from the erring person and for that they are free to initiate any proceeding as permissible in law. Chief Secretary and Director General of Police are directed to ensure compliance of this order.

26. In the result, the application is allowed with the direction aforesaid. Petitioner is also entitled for the cost of this litigation which I assess at Rs. 5,500/- (Rupees five thousand five hundred).