
(1994) 11 GAU CK 0002
In the Gauhati High Court
Case No : Civil Rule No. 1759 of 1991

Jay Ram Das

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-11-1994

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32

Citation : (1995) ACJ 1134

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : B.C. Pathak, N.M. Lahiri, for the Appellant; B.L. Singh and B. Sarma, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This application under Article 226 of the Constitution of India has been filed praying for the following relief:

(i) to quash the impugned order dated 8.2.1991 (Annexure "G") to the writ application and for a further direction not to give effect to the aforesaid impugned order.

(ii) for a direction to pay ex gratia grant of Rs. 1,00,000/- to the petitioner.

Annexure "G" to the writ application as quoted below:

Reference to the above subject, I am directed to say that late Gopendra Kalita, L.D.A. in your establishment died in an accident caused by bomb blast planted by extremists while coming to the office. It is seen that he was not killed directly by extremists and there is no document to prove that he was the aim of the extremists. The claim of Jay Ram Das, father of late Gopendra Kalita, for ex gratia grant, therefore, does not come within the purview of Finance Deptt's O.M. dated 14.6.1985 and 9.8.1989. In view of this Government regrets its inability to agree to the prayer of Das.

2. The brief facts are as follows: The eldest son of the petitioner, Gopendra Kalita, was a permanent employee (L.D.A.) of the Chief Judicial Magistrate Court, Barpeta, and he was a science graduate (B.Sc.). That while Gopendra Kalita was coming to his office at Barpeta from Bhabanipur on 29.8.1989, a bomb was planted in the bus No. ASZ 4095 wherein he was travelling and the bomb exploded and as a result of that Gopendra Kalita, the eldest son of the petitioner, was killed. The explosion occurred at about 9.45 a.m. just near Barpeta and 5 persons were killed on the spot and 5 others succumbed to injuries later on. Gopendra Kalita used to attend office coming from Bhabanipur which is at a distance of about 10 km. from Barpeta. There is an Office Memorandum dated 9.8.1989, issued by the Joint Secretary to the Government of Assam, Finance Department. That circular is Annexure "E" to the writ application and that is quoted below:

In partial modification of this Deptt. O.M. No. FMP 13/85/6 of 14.6.1985 the Governor of Assam is pleased to order that the families of Government servants killed while on duty or in connection with discharge of duties as a result of attack by extremists, antisocial elements, etc., or during action against dacoits, smugglers, hostiles or other antisocial elements will, irrespective of the rank of such Government servant, be paid an ex gratia grant of Rs. 1,00,000/- (Rupees one lakh) each.

The Governor of Assam is further pleased to order that the families of drivers/handyman or other employees of vehicles requisitioned by the police authorities for law and order duty, if killed while performing such duty, by extremists or antisocial elements will also be paid an ex gratia grant of Rs. 50,000/- each. Similarly, families of Home Guards deployed by Government along with the police personnel for law and order duty, if killed in the like manner will also be paid an ex gratia grant of Rs. 1,00,000/- each.

Such ex gratia grant shall be paid to one of the following family members in order of preference on receipt of a claim/obtaining a claim in the enclosed form:

- (1) Widow/Widower.
- (2) Son/Unmarried daughter.
- (3) Father/Mother.
- (4) Brother/Unmarried sister.

All such sanctions shall be communicated by the Administrative Department with the concurrence of Finance (B.C. II) Department.

The expenditure on account of ex gratia grants will be debitable to the head of account "2235-Social Security & Welfare-200-Other Schemes (b) Other Miscellaneous expenditure-9-grants-in-aid-Non-Plan".

This will come into force with immediate effect.

3. That in pursuance of this circular the petitioner filed an application before the Law Secretary (Judicial), Guwahati, Dispur (Assam), through the Chief Judicial Magistrate, Barpeta, for payment of Rs. 1,00,000/- as envisaged by the circular (Annexure "E" to the writ application) quoted above. But that was turned down vide Annexure "G". Hence, this writ application with the prayers as indicated above.

4. I have heard Mr. B.C. Pathak, learned counsel for the petitioner and B.L. Singh, learned Government Advocate. As desired by this court, Mr. N.M. Lahiri, the Senior Advocate, has appeared as *amicus curiae*. He was requested to appear as *amicus curiae* to throw light on the controversial question involved in this case and he placed the cases mentioned below. The question involved in this case is as to whether Annexure "E" covers the case of a death in bomb blast in a bus wherein an employee was travelling to attend his duty and whether this can be deemed to be a killing "on duty" or in connection with the "discharge of duties" as a result of attack by the extremists.

5. The next question is as to whether for a bomb blast the State of Assam can be held to be responsible by applying the principle of tort. If the principle of tort is applicable, the question of negligence of the State will be relevant inasmuch as no compensation can be granted by following the principle of tort without negligence on the part of the State or its employees. The other question is whether the State has an absolute duty to protect the life, liberty or property of its citizen. If a person loses his life, liberty or property not for the negligence of the State but for some other reasons whether the State would be liable. Article 21 of the Constitution of India shall not apply to the facts and circumstances of such a case. Now let us have a look at some decisions cited in order to decide the controversies.

(1) *Smt. Kumari Vs. State of Tamil Nadu and others*, . That was a case where a 6-year-old son of the appellant died as a result of falling in a ten feet deep sewerage tank in the city of Madras. The tank was not covered with a lid and was left open. The appellant filed a petition under Article 226 of the Constitution of India before the Madras High Court seeking a writ in the nature of *mandamus* directing respondents to pay Rs. 50,000/- as compensation to the appellant. The High Court dismissed the writ petition on the ground that in writ jurisdiction it was not possible to determine as to which of the respondents was negligent in leaving the sewerage tank uncovered.

In appeal, the Supreme Court granted a sum of Rs. 50,000/- with a direction to the State of Tamil Nadu to take appropriate proceedings to claim the said amount or any part thereof from any of the respondents or any other authority which might be responsible for keeping the tank open. So, this case also turned down on the question of negligence and it was found that there was negligence on the part of the authority in keeping the tank open.

(2) *Kishen Pattnayak and Another Vs. State of Orissa*, . That was a case

regarding starvation deaths due to poverty and a prayer was made therein that the State Government should be directed to take immediate steps for the purpose of ameliorating the misery of the people of the district of Kalahandi. The Government of Orissa was made responsible for utter failure to protect the lives of the people of the two districts. The Supreme Court in that case pointed out that the State has a duty to take measures to protect the lives of the people and accordingly certain directions were given. It was found that the State has a basic duty to provide the minimum to its citizens.

(3) Peoples' Union for Democratic Rights Vs. State of Bihar and Others, . That was a case filed before the Supreme Court under Article 32 of the Constitution of India. On 19.4.1986, 600 to 700 poor peasants and landless people mostly belonging to the backward classes collected for holding a peaceful meeting within the compound of Gandhi Library in Arwal, a place within the District of Gaya in the State of Bihar. Without any previous warning by the police or any provocation on the part of the people who had so collected, police surrounded the gathering and opened fire as a result of which several people were injured and at least 21 persons including children died. The Supreme Court in the facts and circumstances of the case had directed that Rs. 20,000/- be paid to every person in case of death and Rs. 5,000/- in case of injury giving further liberty to the persons to pursue appropriate remedy for more compensation.

(4) Bhim Singh v. State of J&K 1986 ACJ 867 (SC). That was a case where Bhim Singh was arrested and imprisoned with mischievous or malicious intent. It was alleged that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free later on. It was further pointed out by the Supreme Court that the police officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to bizarre acts of lawlessness. The Supreme Court further pointed out that in appropriate cases the court has jurisdiction to compensate the victim by awarding suitable monetary compensation. In the facts and circumstances of that case the State of J&K was directed to pay Rs. 50,000/-. The Supreme Court further pointed out that the duty of the police is to protect a person and not to abduct a person.

(5) Rudul Sah Vs. State of Bihar and Another, . That was a case where a person was released from the jail on 16.10.1982, that is to say, more than 14 years after he was acquitted. The Supreme Court pointed out as follows:

...If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that respect for the right of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers.

The Supreme Court granted compensation in the facts and circumstances of that

case leaving it to the petitioner for bringing the suit to recover appropriate damages from the State and its erring officials.

(6) *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, The question which arose in that case was whether the respondent, that is, State of Uttar Pradesh is liable to compensate the appellant Kasturi Lal Ralia Ram Jain for the loss caused to it by the negligence of the police officers employed by the respondent. On 29.9.1947, Ralia Ram was arrested and his belongings were searched and he was taken to the Kotwali Police Station. Some gold and silver were seized from him. The silver was returned to him but the gold was not returned. Then the suit was filed for claiming that the gold seized from him either should be returned or in the alternative its value should be paid to him. The suit was resisted and one of the grounds on which it was resisted is that there was no negligence on the part of the police officers and it was also urged that even if negligence was proved the respondent State could not be said to be liable for the loss resulting from such negligence. The Supreme Court came to the finding that the police officers were negligent in dealing with property after it was seized. The Supreme Court in para 21 of the judgment laid down the law as follows:

If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State to such public servant?

The Supreme Court held that on the principle of sovereign immunity he can make no claim against the State.

(7) *State of Maharashtra and Others Vs. Ravikant S. Patil*, That was a case regarding handcuffing of an under trial prisoner and taken through the streets in a procession by police during investigation and the Supreme Court held that Article 21 of the Constitution was violated by this action. But it was further held that police officer responsible for the act acted only as an official and even assuming that he exceeded his limits, still he cannot be made personally liable to pay compensation to the victim under trial. The compensation of Rs. 10,000/- awarded by the High Court was directed to be paid by the State.

(8) *Secretary of State for India in Council v. A. Cockcroft* ILR 39 Madras 351. This was a case where 2 plaintiffs drove in a carriage on a road which was alleged in the plaint to be a military road being maintained by the Public Works Department of the Government. When the carriage was passing along the road, one of its wheels ran over a heap of gravel carelessly stacked on side of the road and the carriage capsized. The plaintiffs sustained thereby severe bodily injuries. The accident was alleged to be entirely due to the gross negligence and carelessness displayed by the servants of the Public Works Department and the plaintiffs claimed different amounts as damages against the authority. The authority admitted the accident but pleaded that the accident was not due to the

gross negligence of its servants and it was alleged that the work was done by an individual contractor under the Public Works Department. The District Judge held that the defendants were liable for the damages caused due to the accident and awarded some damages. Against the decree, the defendants preferred separate appeals to the High Court. Wallis, C.J. held as follows:

In respect of acts done by the East India Company in the exercise of its sovereign powers, it could not have been made liable for the negligence of its servants in the course of their employment.

The liability of the Secretary of State for India in Council is similar to that of the East India Company.

The provision and maintenance of roads, especially a military road, is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been earned on by private persons.

Seshagiri Ayyab, J. held as follows:

The analogy of the Crown in England has no application to the Secretary of State for India in Council.

The principle that the Crown can be sued only for remedies contemplated by the petition of right is confined in its operation to the United Kingdom and a general liability for torts is dependent upon the law of the particular dominion wherein the action is instituted.

Under 21 & 22 Vict. Cap. 106, the Secretary of State for India in Council is under the same liability as the East India Company was subject to.

The East India Company had two distinctive functions which are even today exercised by the Government of India, namely, (1) the exercise of sovereign rights, and (2) the carrying on of transactions which could have been carried on by private individuals or trading corporations. In the former case the East India Company was generally exempt from liability.

The distinction between sovereign power and powers exercisable by private individuals is that in the former case no question of consideration comes in, whereas the essence of the latter is that some profit is secured or some special injury is inflicted in the exercise of the individual rights.

The making and maintenance of road is a Government or sovereign function.

(9) Aeltemesh Rein, Advocate, Supreme Court of India Vs. Union of India (UOI) and Others, That was a case regarding handcuffing of an accused who was an advocate of the Supreme Court in connection with a criminal case. The Supreme Court relying in the case of Prem Shankar Shukla Vs. Delhi Administration, laid down the law as follows:

We accordingly direct the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused would be resorted to in

conformity with the judgment of this court referred to above and to circulate them amongst all the State Governments and the Governments of Union Territories. This part of the order shall be complied with within three months.

(10) *Sunil Batra Vs. Delhi Administration and Others etc.*, . The Supreme Court in that case pointed out that when a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The court also deprecated the "hands-off attitude of the court. It was further held that courts cannot abdicate their constitutional responsibility to delineate and protect fundamental liberties. Further discussion of the case is not necessary to decide the controversy in the present matter.

(11) *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, . That was a case where a person, namely, Suman Behera aged about 22 years died in police custody and the mother of the person filed an application claiming compensation consequent upon the death of her son in police custody. The Supreme Court in para 10 held that the liability of the State of Orissa to pay the compensation cannot be doubted. The Supreme Court further held that award of compensation in a proceeding under Article 32 by this court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. The Supreme Court considered the large number of cases and held that the court should be prepared "to forge new tools and devise new remedies" for doing complete justice and envisage the fundamental rights guaranteed in the Constitution which will enable the award of monetary compensation in appropriate cases. In the concurring judgment of Dr. Anand, J. in para 33 it was pointed out as follows:

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations.

In para 35 it was pointed out as follows:

This court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings...It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ

jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly, particularly where the fundamental right of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this court in the cases referred to by brother Verma, J.

(12) *Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others*, That was a case regarding claim of compensation under Article 32 of the Constitution arising out of police atrocities where a 9-year-old child was killed because of beating and assault by police officer. The Supreme Court came to the finding that the child died on account of beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The Supreme Court also pointed out that in the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for tortious acts committed by its employees in the course of their employment. The Supreme Court also reiterated the earlier law in the *State of Rajasthan v. Vidhyawati* 1958 ACJ 296 (SC), that 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. In the facts and circumstances of the case an amount of Rs. 75,000/- was awarded as against the Delhi Administration.

(13) *Bhagwan Singh and another Vs. State of Punjab*, The Supreme Court in this case relied on its earlier decision in *Dagdu and Others Vs. State of Maharashtra*, and in para 8 pointed out as follows:

It is a pity that some of the police officers, as it has happened in this case, have not shed such methods even in the modern age. They must adopt some scientific methods than resorting to physical torture. If the custodians of law themselves indulge in committing crimes then no member of the society is safe and secure. If police officers who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more heinous than a game-keeper becoming a poacher.

(14) *Geeta Sangma Vs. State of Nagaland and Others*, That was also a case which relates to custodial death. The husband of the petitioner was beaten to death in lock-up by the police personnel on duty and the single Judge of this court held that as the death was due to the negligence of the authority the court is entitled to grant damage and accordingly the Government of Nagaland was

directed to pay a sum of Rs. 1,50,000/- as damage in the nature of palliative.

(15) Niloy Dutta v. State of Assam (1994) 1 GLR 199 . That was also a case regarding violation of the fundamental rights under Article 21 of the Constitution by handcuffing the person and keeping him in lock-up in inhuman and unhygienic condition. The court held that the only effective method open to the judiciary to prevent such violation of fundamental rights is to direct the authority to payment of monetary compensation. But in awarding the compensation its resource limits are to be considered as has been stated in para 24 of Dr. P. Nalla Thampy Thera Vs. Union of India (UOI) and Others,

6. So, what appears from the facts and circumstances of the cases is that the court has the power under Article 226 of, the Constitution to grant compensation/ damages. But it must be shown that there was violation of the fundamental rights of the petitioner and/or there was negligence on the part of the authority or its employees. In the instant case that is not the position. So, this court cannot issue a mandamus to the authority to grant the compensation because of death in a bomb blast. But let us see whether the petitioner is entitled to compensation on the strength of Annexure E quoted above. Annexure E made provisions for payment of ex gratia grants of Rs. 1,00,000/- to an employee killed while on duty or in connection with discharge of duties as a result of attack by extremists or antisocial elements, etc. There is no denying of the fact that this Office Memorandum dated 9.8.1989 was issued to give a boost to the morale of its employees so that the employees may discharge their duties even in the face of odds, difficulties created by the extremists or antisocial elements, etc. In the instant case, it is the case of the petitioner that his son Gopendra Kalita was travelling by the bus to attend his office and there was an explosion in the bus and as a result of that the son of the petitioner was killed. The question is whether Gopendra Kalita can be said to be "on duty" or he can be said to be discharging his duties". The Dictionary meaning of the word "duty" is assignment/ burden/commitment that one is obliged to do by law or by calling of one's business. So, travelling by the bus to attend the office must be deemed to be a part of the duty by the son of the petitioner. Interpretation by the Deputy Secretary to the Government of Assam, Judicial Department, to the effect that "it is seen that he was not killed directly by extremists and there is no document to prove that he was the aim of the extremists" is absolutely a perverse one and not in conformity with the Office Memorandum (Annexure E). That Office Memorandum requires that a person should be killed while on duty or in connection with discharging of duties as a result of attack by the extremists or antisocial elements, etc. There is no denying of the fact that the bomb blast was by the extremists or by the antisocial elements. There is also no denying of the fact that the son of the petitioner died as a result of this bomb blast while travelling to do duty and not for business of his own. So, the case of the petitioner shall squarely be covered within the bounds of the Office Memorandum and accordingly he is entitled to the ex gratia grant of Rs. 1,00,000.

7. In that view of the matter, Annexure G to the writ application stands quashed and the respondents are directed to pay an amount of Rs. 1,00,000/- as envisaged in the Office Memorandum dated 9.8.1989 (Annexure E) to the writ application. This writ application is accordingly allowed as indicated above. The payment shall be made by the authority within a period of 3 (three) months from today. The amount shall be deposited with the Registry of this court and on such deposit being made, the Registry shall pay the amount to the father of the petitioner on being duly identified by an advocate of this court by crossed cheque.