

(2000) 06 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : H.C. Petition No. 197 of 1992

Mohammad Sultan Mir

APPELLANT

Vs

State of Jammu and Kashmir and Others

RESPONDENT

Date of Decision : 27-06-2000

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 226, 32
Penal Code, 1860 (IPC) — Section 330
Ranbir Penal Code, 1989 — Section 149, 302

Citation : (2001) CriLJ 301

Hon'ble Judges : Syed Bashir Uddin, J

Bench : Single Bench

Advocate : M.A. Wani, for the Appellant; Anil Bhan, Sr. C.G.S.C. and M. Amin, Government Advocate, for the Respondent

Judgement

Syed Bashir Uddin, J.—One Ali Mohammad Mir S/o Saif-ullah Mir R/o Dardpora Kupwara, was arrested by BSF on 9-8-1990 from

Kralapora Market, Kupwara. The petitioner and relatives of said Ali Mohammad Mir approached BSF and S.P. Executive State Police at

Kupwara and D.I.G. Baramulla. The detainee was not released. To secure liberty and freedom of said Ali Mohammad Mir, unless cause shown,

Habeas Corpus Petition No. 546/91 was filed. High Court directed respondents to produce the said detainee in Court. Respondents failed to file

objections and show cause. This petition was disposed of with the direction :-

I, therefore, command the respondents to release the detainee, Ali Mohd Mir son of Saif-ullah Mir R/o Dardapora, Kupwara forthwith, if he is not

required to be detained in connection with some other offence or case....

2. The detainee was not set free. Then instant Habeas Corpus Petition (197/92) was filed. Inter alia following reliefs are prayed for :-

... With a further prayer to constitute Magisterial Inquiry under the provision of Cr.P.C. and respondents be prosecuted u/s 302 read with 149

RPC.

Further commanding Respondents to pay compensation of Rs. 1 crore to the family of the detainee.

In support of the petition, besides the above Court order dated 27-8-1991 in Habeas Corpus Petition No. 546/90 (Annexure P2), affidavits of

four persons were filed. The Court on examination of the case, referred matter to Chief Judicial Magistrate District Kupwara (CJM)

headquartered at Handwara, for enquiry with direction to District Magistrate Kupwara and S.P. Kupwara to co-operate with the CJM in the said

inquiry. Further the CJM was directed that in case he notices commission of an offence, then a case shall be registered with the concerned police.

The Enquiry Officer was directed to furnish the report within stipulated time period. This direction was kept subject to objections. However, no

objection/counter either to the main writ petition or to this interim direction was ever taken or filed.

3. The report of CJM Handwara, was received in December, 1998. The writ petitioner as also the Respondents 1 to 4. State of Jammu and

Kashmir and its police officials have not filed any objection to the report. Respondents 5 and 6 have filed objections to the report through Mr. Anil

Bhan, Sr. Standing counsel for Union of India.

4. From record and enquiry report dated 28-10-1998 of CJM, Handwara, it is found that the CJM has conducted an enquiry, wherein the

witnesses have been examined. The Commandant of the named concerned Battalion too appeared before CJM and produced nominal roll and

apprehension register of the relevant period before the Inquiry Officer. The SHO Police Station Trehgam too has been examined. On enquiry the

CJM has found :-

The witnesses examined during the enquiry have stated that the said Suraj Singh was a known figure in the area as he was operating in the area for

many years. From the evidence which has been produced by the petitioner it is established that Ali Mohd Mir brother of the petitioner was

arrested while he was going to his place of posting on 9-8-1990 by the BSF men of 66 BN then stationed at Trehgam and after his arrest the said

Ali Mohd Mir was not heard of.

Based on the evidence of two brothers of Ali Mohd Mir and three other witnesses, Commandant of the Battalion and SHO, Police Station

Trehgam, Enquiry Officer has recorded a finding of fact that Ali Mohd Mir, a Teacher was arrested by BSF men of 66 BN stationed at Trehgam

at Kupwara while on his way to his place of posting on duty on 9-8-1990. Thereafter, he was not heard of. He was last seen when picked up and

incarcerated by the BSF. A case FIR 11/92 of custodial disappearance of Ali Mohd Mir stands registered with Police Station Trehgam. The SHO

police station Trehgam has testified that, on investigation, it was found that Ali Mohd Mir was arrested by BSF men of 66 BN, then stationed at

Trehgam. The Enquiry Officer has not returned any finding on allegation that Ali Mohd Mir was picked up and whisked away by Surjit Singh alias

Jagjit Singh, allegedly an I.B. Officer. Though this man is generally spoken of by witnesses, but no definite finding is returned thereto. On reading

the report between the lines and on perusal of record, it cannot be said that the named officer Surjit Singh Alias Jagjit Singh, if at all so, was

instrumental in picking up/detaining said Ali Mohd. Mir.

5. In these circumstances, the arrest and custodial disappearance of detainee Ali Mohd Mir at the hands of BSF man of 66 Bn. stationed at

Trehgam during relevant period is a positive finding of fact returned by the Enquiry Officer, the then CJM Handwara (Shri Abdul Rashid Bhat-II).

The objections taken to this report and facts as found by the Enquiry Officer, do not in any way displace the Enquiry Officer's findings. The

objections speak in omnibus terms of non-involvement of the BSF personnel and general denial of their role in arresting the said Ali Mohd Mir and

his disappearance thereafter. These objections are unsupported by any material on record. It is not accompanied by any document (s) or affidavit.

The respondent 5, does not seem to have taken any objection and contested the arrest and disappearance of Ali Mohd Mir by the personnel of 66

BSF located at Trehgam during the relevant period before the Enquiry Officer. The Commandant of the concerned Battalion appeared before the

Enquiry Officer along with other witnesses including the SHO Police Station Trehgam. The proceedings of the Enquiry Officer are in order and

broadly conform to the fundamental procedure required for such an enquiry.

6. In the fact and circumstances, now looking to the relief sought in the petition, it would be seen that a case stands already registered with Police

Station where investigations are on and the concerned investigating agency is under a statutory obligation to pursue the investigation to its logical

end. The other part of the prayer regarding compensation claimed by the family of the detainee, requires examination and consideration.

7. Petitioner's counsel canvasses that being a case of arrest and custodial disappearance, the respondents, Union of India and the BSF personnel

are under legal obligation to compensate the family for the pain and sufferings occasioned by loss of liberty and disappearance of their bread earner

Ali Mohd. Mir. The Union and its instrumentality (ies) is under legal duty to safeguard the life and liberty of the individuals and protect its citizens

from its wrong doings which may occasionally result in death of the citizen. Additionally for the tortious liability for damages in general law., the

State is under legal duty to compensate the wife and children of the deceased, the only bread earner of the family, under public law.

8. Senior standing counsel for Union of India, Mr. Anil Bhan, submits that the respondents are not liable to pay any compensation as part of

constitutional liability for violation of fundamental right guaranteed under Articles 21 and 22 of the Constitution. The remedy for the dependents of

the said Ali Mohd Mir is under general law in tort for damages or criminal law. The family members of the said disappeared person cannot activate

the Writ jurisdiction of the Court as substitute forum to pursue the remedy available under General law before a Civil Court.

9. In D.K. Basu Vs. State of West Bengal, His Lordship Dr. A.S. Anand, J. (as his Lordship then was) speaking for the Court pointed out at page

750) :-

Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of law. The rights inherent in Articles 21 and 22(1)

of the Constitution require to be callously and scrupulously protected. We cannot whisk away the problem. Any form of torture or cruel, inhuman

or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or

otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness

and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen.

Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his

arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed has to be an emphatic 'No'...Section 330,

therefore directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are

however inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the

victim of crime needs to be compensated monetarily also. 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.

Further in the context of balancing the safety of the people and the safety of the State while extending protection of fundamental rights qua duties of

police, it was observed :-

...The latin maxim *salus populi est suprema, lex* (the safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the

State is the Supreme law) co exist and are not only important and relevant but lie at the heart of; the doctrine that the welfare of an individual must

yield to that of the community. The action of the State, however, must be "right just and fair". Using any form of torture for extracting any kind of

information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect

must be interrogated indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot be

however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge

about his accomplices, weapons etc. His constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of

things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of law, The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

In Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, the Apex Court observed (at page 2912 of Cri LJ) :-

34. 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....

The question then is what is the just quantum of compensation in the facts and circumstances of this case.

10. In Lalitha v. Director General of Police Madras 1989 Cri LJ 1732 the Madras High Court awarded compensation of Rs. 50,000/- on 7-12-

88 to the wife of a person who was arrested by Police on charge of murder, but during custody was killed on the ground that his wife has been deprived of her life partner and bread earner of the family. Besides the children were minor and the person was earning 1500/- per month.

11. In Bhuvneshwar Singh Vs. Union of India (UOI) and Others, compensation of Rs. 30,000/- was granted for violating fundamental right of

personal liberty of the person as far as he was being held illegally at pre-trial

stage.

12. In Sebastian M. Hongray Vs. Union of India (UOI), where the Government submission of detenu having left the camp and thereafter

remained untraceable was found incorrect, compensation in the sum of Rs. One lakh was awarded.

13. In Peoples' Union For Democratic Rights Through Its Secretary and Another Vs. Police Commissioner, Delhi Police Headquarters and

Another, where a labourer succumbed to injuries on receiving severe beating at the hands of the police, deceased labourer's family was awarded

compensation of Rs. 75000/-.

14. In the case of Neelabati Behera alias Lalita Behera (supra), where the deceased petitioner's son aged 22 died in Police custody due to police

torture, the compensation awarded was Rs. 1,50,000/-, on the premise that the deceased Suman Behera earned monthly income in the range of

Rs. 1200/- to 1500/-.

15. In the instant case, though details about family strength and other relevant facts having a bearing on the question of award of compensation are

quite sketchy, but the fact remains, as disclosed by the witnesses in evidence in support of the main petition and as found by the Enquiry Officer,

(CJM, Kupwara) said, Ali Mohd Mir was a teacher in the Education department posted at the relevant time in Govt. Higher Secondary School

Kralapora, Kupwara and while on way to attend his duty in the school, he was arrested by the BSF people and thereafter not heard of. His

custodial disappearance has taken place on way to attend his duties. The award of appropriate compensation has to reckon with the pain in body

and mind distress impoverishment, indigence, loss of life and death. Contextually adequate monetary compensation has to be an effective remedy

for redressal of the serious infringement of fundamental right to life of the citizen in question by the B.S.F. personnel for which State is vicariously

responsible. Award of the appropriate amount of compensation is to off set the wrong done while giving fillip to indemnification by the wrong doer.

Defence of 'sovereignty' is quite alien to such a situation.

16. In the matter of assessment of compensation it would be apt to notice following observations of their Lordships in D.K. Basu's case (supra) :-

...In the assessment of compensation the emphasis has to be on the

compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or to offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. The relief to address the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them....

17. On a conspectus of the above decisions and in the totality of the facts and circumstances of this case, the amount of Rs. One lakh is awarded as just and proper compensation to be paid by the Union of India and BSF, Respondent No. 4 and 5, to the children and wife/dependents of the deceased. The compensation shall be paid within a period of two months, unless time is extended on sufficient cause shown, by the Court. It is left to the Union of India whether to recover this amount of compensation or part thereof from the officer (s) or personnel actually responsible for the wrong done. It is however made clear and recorded that the award of compensation hereto would be taken into account for adjustment in the eventuality of award of compensation in any other proceeding(s) being taken for recovery of compensation on the very grounds subject of instant Writ proceedings, in order that the amount of awarded compensation is not recovered by petitioner over again. Any observations made to justify and sustain this order shall not affect or have any bearing in any proceedings or on criminal prosecution pending or initiated against the concerned BSF personnel/officers in connection with the death of Ali Mohammad Mir.

18. Disposed of.