
(2006) 08 GAU CK 0092
In the Gauhati High Court
Case No : Writ Petition (C) No. 1579 of 2002

Osman Ali

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 01-08-2006

Acts Referred:

Arms Act, 1959 — Section 25(1)(A), 27
Constitution of India, 1950 — Article 21, 211, 22, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 357, 438, 439, 46
Evidence Act, 1872 — Section 108, 26, 27
Penal Code, 1860 (IPC) — Section 225, 341, 353, 366, 379

Citation : (2006) 3 GLT 696

Hon'ble Judges : B.S. Reddy, C.J;T.N.K. Singh, J

Bench : Division Bench

Advocate : B. Ahmed, N. Hogue, S. Rahman and H. Borbhuya, for the Appellant;
B. Goyal, for the Respondent

Final Decision : Allowed

Judgement

T.N.K. Singh, J.—The dehumanizing torture, assault and death in the custody which have assumed alarming proportion raise serious question about the credibility to the Rule of Law and administration of criminal systems. No doubt it is true that the cry for justice is so loud that it deafens ear of the peace loving citizens of India that they cannot live in a peaceful atmosphere and they are disturbed with the apprehension that they may be one of the victims of torture and assault in the custody of the law protector in uniform.

2. The Constitution of India is adorned with Articles 20, 21 and 22 which are almost in consonance with the rights contained in the Universal Declaration of Human Rights, 1948 adopted and proclaimed by General Assembly 217A(iii) of 10th December, 1948. Articles 1, 2, 3, 4 and 5 of the Universal Declaration of Human Rights, 1948, read as follows:

Article 1: All human beings are born free and equal in dignity and rights. They

are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex language religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3: Everyone has the right of life, liberty and security of person.

Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

3. The word "life" has been used, prominently in the Universal Declaration of Human Rights, 1948. "Life" is recognized as a basic human right in the Universal Declaration of Human Rights, 1948 and it has to have the same meaning and interpretation as had been placed with that word by the Apex Court its various decisions relating to Article 21 of the Constitution of India. The meaning of words "life" cannot be narrowed down. Lord Diplock in *Salomon v. Commr of Customs & Excise* (1996) 3 All ER 871 states that there is a prima facie presumption that the Parliamentarian does not intend to act in breach of international law. Again, Lord Bridge in *Brind v. Secy of State for Home Department* (1991) 1 All ER 720 observed that it is well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the internal law conventions, the court would presume that parliament intended to legislate in conformity with the conventions and not in conflict with it.

4. Disturbed by the situation of having the difficulty of proving the torture of the citizen of India by the protector of law in uniform in their custody, the Law Commission in its 113th report recommended the amendment to the Indian Evidence Act, 1872 so as to provide that in the prosecution of a police officer for the alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in police custody, the court may presume that the injury was caused by the police officer having the custody of that person during that period unless the officer proved to the contrary. The onus to prove the contrary must be discharged by the police official concerned.

5. Admittedly, the most precious of the precious fundamental right guaranteed to the citizen of India by the Constitution of India is the right of life. The most

precious right to life is guaranteed under Article 21 of the Constitution of India. Justice Bhagwati (as then he was) observed in the popularly known as *Khatri and Others Vs. State of Bihar and Others*, "why courts should not be prepared to forge new tools and device/new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal property". The Apex Court has shown the seed of novel concept of constitutional torts and compensatory jurisprudence in *Devaki Nandan Prasad Vs. State of Bihar and Others*, The constitutional tort denotes the cases in which the compensation or exemplary damages were awarded by the court when a constitutional right was violated. The Apex Court in *Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others*, held that: "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the. Constitution is acknowledged remedy for enforcement and protection of such right and such a claim based on strict liability made by resorting to constitutional remedy provided for the enforcement of fundamental right is distinct form and in addition to the remedy in private law damages for the torts". It is also fairly well settled that the claim in public law for compensation for unconstitutional deprivation of a fundamental right is a claim based on strict liability and in addition to private law remedy.

6. The deprivation of liberty is different from deprivation of life; an under-trial prisoner in judicial custody though deprived of liberty by virtue of the sovereign function is still entitled to the protection of life. Justice D.A. Desai (as he then was) observed in *Sunil Batra Vs. Delhi Administration and Others etc.*, that it is no more open to debate that convicts are not fully denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed...However liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Justice Chandrachud (as he then was) in *D. Bhuvan Mohan Patnaik and Others Vs. State of Andhra Pradesh and Others*, observed that:

...Likewise even the convict is entitled to the precious right guaranteed by Article 21 of the Constitution of India that he shall not be deprived of his life or personal liberty except according to the procedures prescribed by law.

7. The Supreme Court and High Court being the protector of civil liberties of the citizen have not only power and jurisdiction but also obligation to grant relief in exercise of their jurisdiction under Article 32 and 226 of the Constitution of India to the victims or heirs of the victims whose fundamental rights guaranteed by Article 21 of the Constitution are established to have been flagrantly infringed by calling upon the State to repay the damages done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of civil suit or criminal proceedings.

8. The short factual panorama which would suffice for effective decision of the present case is that:

The writ Petitioner is the elder brother of Shri Siddique Ali and they are the only sons of late Mohammad Ali of Village Kalibari, P.S. Barpeta. On 25.10.1990 one Md. Abdul Karim a villager of nearby village Bamundangra under Baghbar Police Station lodged an ejahar before the Officer-in-Charge, Baghbar PS alleging that Shri Siddique Ali (younger brother of the present Petitioner) and Shri Hasmat Ali had abducted his daughter Smti Asia Khatun while she was returning from school at about 4 pm from a place in front of the house of one Rusian Ali of Jadavpur village for compelling her for marriage with Siddique Ali. A case on the basis of the said ejahar, Baghbar PS registered a case being No. 150/90 (G.R. No. 1513/90) u/s 366 IPC against Shri Siddique Ali and the said Shri Hasmat Ali.

9. The Sub-Inspector of Police of Baghbar P.S., Shri Akhay Kumar Choudhury along with other police personnel proceeded to the house of Shri Hamid Ali at Salimpur village where the girl was stated to have been confined and rescued her after arresting Siddique Ali and the co-accused Hasmat Ali. And another ejahar was also lodged on 26.10.1980 in the Baghbar P.S. by the said Sub Inspector of Police, Shri Akhay Kumar Choudhury who went to rescue the said girl alleging about the illegal possession of arms by the accused person i.e. Siddique Ali and Shri Hasmat Ali and a case being Baghbar PS Case No. 151/ 90 (GR No. 1514/90) u/s 25(1)(A)/27 Arms Act was registered. On 27.10.1990 Shri Siddique Ali and the said Hasmat Ali were produced before the court of Chief Judicial Magistrate, Barpeta with a prayer to remand them to jail hajot up to 9.11.1990 and the learned Chief Judicial Magistrate passed an order in the first case i.e. G.R No. 1513/90 (Baghbar P.S. Case No. 150/90) on 27.10.1990 for remanding them to jail hajot till 10.11.1990. Further the learned Chief Judicial Magistrate, Barpeta by the said order dated 27.10.1990 in view of the injuries sustained by Siddique Ali and Hasmat Ali, the jail doctors were directed for their medical treatment inside the jail hajot. While escorting Siddique Ali and Hasmat Ali by the police personnel led by Shri Satyanath Pathak, ASI, in an escort van having registration No. ASP-679 from Barpeta CJM to District Jail, Barpeta, 8-10 miscreants brandished with fire arms forcibly stopped the escort van at Methakuchi which a lonely place and by the side of the road there was no residential house of any person. The driver of the escort van, Birendranath Das stopped the vehicle and the armed miscreants dragged out Siddique Ali from the escort van and as a result of pulling handcuff slipped out of the said Hasmat Ali's wrist. Shri Hasmat Ali was handcuffed along with Siddique Ali. Thereafter, Siddique Ali was taken away by the miscreants along with the handcuff tied on his wrist. The matter was immediately informed over telephone to the Officer-in-Charge, Barpeta PS, SP, Barpeta and also an ejahar was lodged by ASI, Satyanath Pathak at Barpeta PS in writing to investigate into and a case was registered at Barpeta PS vide Barpeta Case No. 681/90 u/s 341/225/353/379 IPC read with Section 31/4 of TDA (P) Act dated 27.10.1990.

10. The Prosecution SI, Barpeta also filed a petition on 27.10.1990 about the snatching of Siddique Ali from the escort party led by SI, Satyanath Pathak by the miscreants brandished with fire arms from the place near Metuakuchi at gun point before the CJM, Barpeta. The said petition reads as follows:

Ref. :Case No. 1514 GR 90 State v. Accd.: Siddique Ali and Ors. u/s 251(A)/27 Arms Act.

To,

The Chief Judicial Magistrate, Barpeta Dated Barpeta, the 27th Oct./90 Sub : Kidnap of U.T.P. accused Siddique Ali of Baghbar P.S. Case No. 151 /90 u/s 25(1) (A)/27 Arms Act from escorting van.

Sir,

I have the honour to report that today after Court's hours the U.T.P. were escorted from court to jail on van No. ASP 679 by A.S.I. Satya Pathak with staff. But as soon as they arrived at Metuakuchi the escort van were stopped forcibly by blocking the road by some unknown armed extremist and kidnapped Siddique Ali from the escort vehicle at the gun point with handcuff No. 23 at about 3.45 P.M. The extremists used Maruti van, motor cycle etc. The matter was immediately informed over phone to the O/C. Barpeta P.S., S.P., Barpeta and also an ejahar was lodged at Barpeta P.S. in written to investigate into and a case was registered at Barpeta P.S. vide case No. 681/90 u/s 341/225/353/379 I.P.C. R/W Section 31/4 TDA (P) Act dtd. 27.10.1990.

This is for your kind perusal and information for necessary order.

Yours faithfully, Sd/-Illegible P.S.I., 27.10.1990 P.S.I., Barpeta.

11. The Petitioner had approached the Superintendent of Police and other concerned officials of Barpeta Police Station time and again to find out the whereabouts of his brother Siddique Ali and also about the stage of the investigation of the said case which was registered on the snatching of his brother from the police escort party, but none cared to help him. The Petitioner also approached the learned, Chief Judicial Magistrate, Barpeta for taking up necessary actions for finding out the whereabouts of his brother Siddique Ali but no action was taken. Having no other ways and means to find out the whereabouts of his brother, Siddique Ali, Petitioner had approached this Court by filing a writ petition for issuing writ in the nature of habeas corpus, which was registered as W.P. (Cril.) No. 35 of 1999 against the present Respondents directing to produce Siddique Ali before the Court. The Superintendent of Police, Barpeta (Respondent No. 2) appeared in person before this Court and had submitted Affidavit-in-opposition stating that Siddique Ali was kidnapped from the custody of the police when he was being taken from the court of the Chief Judicial Magistrate Barpeta to the Jail hajot and also stated that Siddique Ali could not be traced out. This Court, having not satisfied with the steps taken up by the present Respondents had passed an order dated 5.9.2000 in WP (Cril.)

No. 35 of 1998 with the observation and direction that:

...Till now the State police did not furnish any clue on this matter. The matter is of utmost public importance. The UTP was allegedly kidnapped from the police custody and till now the custodian of law could not furnish any clue of whatsoever manner as to the whereabouts or any other information as to the person kidnapped from their custody. In the affidavit submitted by the police authority as well as their actions and the casual manner in which the investigation was going on has impelled on us a doubt as to whether any fruitful result would come out from the investigation by the Respondents.

We have given our anxious consideration on the matter. Upon considering all the aspects we are of the opinion that the matter requires thorough proof for that purpose and the same should be made by a professional body like the Central Bureau of Investigation. Accordingly we request the Central Bureau of Investigation to investigate into the matter and submit its report preferably within three months from today.

12. In pursuance of the said order of this Court dated 5.9.2000 passed in WP (Cril.) No. 35 of 1999 the Central Bureau of Investigation made a thorough inquiry and submitted a report dated 15.10.2001 to this Court confirming that Siddique Ali was snatched away by the miscreants from the custody of the police personnel on 27.10.1990 from a place called Metuakuchi at about 1545 hrs. But as the incident of abduction is a very old dating back to 1990 there is no clue regarding the whereabouts of Siddique Ali.

13. After receiving the said report of the CBI, this Court passed judgment and order dated 28.1.2002 for closing WP (Cril) No. 35 of 1999 for the reason that the writ of habeas corpus directing the Respondents to produce Siddique Ali before this Court cannot be granted. Copy of the said judgment and order of this Court dated 28.1.2002 in WP (Cril) No. 35 of 1999 is at Annexure-9 to the present writ petition. As such, whereabouts of Siddique AH could not be traced out for the last more than seven years and as per Section 108 of the Evidence Act, a person who has not been heard of for 7 (seven) years there is a presumption of law that he is dead. Hence, the present writ petition for the reliefs:

(A) A Writ of Mandamus should not be issued, directing the Respondents to give adequate compensation for death of the brother of the Petitioner namely Sri Siddique Ali who was arrested in connection with G.R. No. 1513/90 and 1514/90 and produced before the Chief Judicial Magistrate, Barpeta on 27.10.1990 and was kidnapped on the same day by some unknown miscreants from the police vehicle at gun point while returning from the Court as it amounted to custodial death;

(B) A Writ in the Mandamus and/or any other or further direction, order or orders should not be passed as to this Hon"ble Court may deem fit and proper in the peculiar facts and circumstances of this case.

14. This Court passed order dated 29.3.2005 in the present writ petition that; by the present writ petition, the writ Petitioner has claimed compensation for the death of his brother, namely, Siddique Ali who was claimed to be arrested in connection with the Baghbar P.S. Case No. 150/90 (G.R. Case No. 1513/90) and Baghbar P.S. Case No. 151/90 (GR Case No. 1514/90) and kidnapped on the same date by some unknown miscreant from the police custody. The learned District Judge, Barpeta is directed to make an inquiry regarding the allegations made in the writ petition by the Petitioner and further, both the parties shall be at liberty to adduce evidence and to cross-examine the witness produced by the respective parties.

15. The learned District Judge, Barpeta submitted his reported dated 24.5.2006 with the finding that:

Thus from the above evidence, it reveals to me however the occasion was, it is evident that some miscreants forcibly took away Siddique Ali an U.T.R from the police van while he was taken to the Dist. Jail, Barpeta from the Dist. Court. Further it may be stated here with based on ejahar of W. No. 2 for the O.R Barpeta Police registered Barpeta P.S. Case No. 681/90 U/S 341/225/353/379 IPC/R.W. Section 3/4 T.D.P. Act and during investigation Barpeta Police did not find any clue for which final report was submitted reference RR. No. 239/97. From the statement of the witnesses, it also reveals that subsequently, they were examined by the C.B.I. also.

16. The core question in the present writ petition is that; was Shri Siddique Ali in the custody of police at the time of kidnapping him from the escort van under the protection of the police party led by ASI, Satyanath Pathak, by the miscreants from a place near Metuakuchi on 27.10.1990 and if so, whether the presumed death of Siddique Ali is the death in the police custody in the light of the fact discussed above?

17. This Court (incidentally one of us is the party--Justice T.N.K. Singh) in Smt. Ningthemcha Ongbi Shakhnbi Devi Vs. State of Manipur and Others, had discussed the meaning of "police custody" in the fact and circumstances similar with the present case. The fact in that case is that late Shri R.K. Laksana Singh was arrested by the police commando on 15.12.1999 and after arresting him it was said that he disclosed that 4 (four) PLA members equipped with sophisticated weapons like AK 47 and AK 56 rifles were camping at Loitangkunou. On getting the said information, instead of taking late R.K. Laksana Singh to the police station or/police lockup, he was taken straight by the police commando in the police gypsy to Loitangkunou for arresting the said four PLA members. On the way to Loitangkunou all of a sudden some unknown miscreants fired to the police commando gypsy and in the exchange of firing late R.K. Laksana Singh was killed by the extremists. This Court held that late Shri R.K. Laksana Singh, in the fact stated above was in the custody of the police and his death would be death in the custody of the police. Accordingly, the Respondents were directed to pay compensation of Rs. 3 lacs to the mother of

late R.K. Laksana Singh. Para Nos. 13, 14 and 15 (Page No. 1902-1903 of the Cril Law Journal in Smti Ningthemcha Ongbi Shakhenbi Devi v. State of Manipur and Ors. (supra) reads as follows:

13. From the report dated 15.2.1999 made by the Respondent No. 6 which has been quoted in entirety it is clear that late R.K. Laksana was arrested by the Respondents 6, 7, 8, 9 and 10 and was taken to their custody. Meaning of "custody" had been discussed by the Andhra Pradesh High Court (D/B) after considering the case of Nabachandra v. Manipur Administration AIR 1964 Man 39 : 1964 (2) Cri.L.J. 307 in Iqbal Kaur Kwatra Vs. The Director General of Police, Rajasthan State, Jaipur and Others, and held that "it is well settled that police custody" does not necessarily mean custody after formal arrest. It also includes "some form of police surveillance and restriction on the movements of the person concerned by the police. The word "custody" does not necessarily meant detention or confinement. A person is in custody as soon as he comes into the hands of a police officer." Division Bench of the Orissa High Court in Paramhansa Jadab v. State of Orissa AIR 1964 Cri. 144 : 1964 (1) Cri.L.J. 680, had discussed the meaning of "police custody" in the light of Sections 26 and 27 of Evidence Act and was of the view that:

13. It is now well settled that "police custody" for the purpose of Section 26 of the Evidence Act does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance. In Lay Maung v. Emperor AIR 1924 Rang 173 : 1924 (25) Cri.L.J. 381, the learned Judge pointed out the danger of construing the expression "police custody" in Section 26 of the Evidence Act in a more narrow technical sense as commencing from the time when the accused is formally arrested. The learned Judge observed that if such a view be taken it will be very easy for the police to evade that section and that the correct interpretation would be that:

As soon as an accused or suspected person comes into the hands of a police officer he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in "custody" within the meaning of Sections 26 and 27 of Evidence Act." In Haroon v. Emperor AIR 1932 Sind 1490 : 1933 (34) Cri.L.J. 129 and Pharho Shahli v. Emperor AIR 1932 Sind 201 : 1933 (34) Cri.L.J. 147 it was pointed out that even indirect control over the movements of suspects by the police would amount to "police custody" within the meaning of that Section. In AIR 1932 609 (Lahore) and in In Re: Mannem Edukondalu, also the same principles were emphasized and it was observed that there may be police custody without formal arrest. In this connection some of the observations of the Supreme Court in State of U.P. Vs. Deoman Upadhyaya, may also be noticed: The majority of Judges observed:

Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word of mouth or action by a person is sufficient. A person directly giving a

police officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the officer within the meaning of Section 27 of the Indian Evidence Act.

14. u/s 439 of the Code of Criminal Procedure a person accused of an offence and in custody can move for bail before the High Court or Sessions Judge. The Apex Court considered the meaning of the terms "in custody" employed in Section 439 of the Code of Criminal Procedure in *Niranjan Singh v. Prabhakar Rajaram Kharote* 1980 Cril. L.J. 426, (supra) and held:

7. When is a person in custody, within the meaning of Section 439, Code of Criminal Procedure? When he is in duress either because he is held by the investigation Officer or other police or allied authority or is under the control of the Court having been remanded by judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor presidential profusion is needed to come to the realistic conclusion that the who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of S.439. This word is of elastic semantics but its core meaning is that the law has been control of the person. The equivocatory quibbling and hide-and seeks niceties sometimes heard in Court that the police have taken a man into formal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminology dubieties are unfair evasions of the straightforwardness of the law. We need no dilate on this shady facet here because we are satisfied that the accused did physically submit before Sessions Judge and the jurisdiction to grant bail thus arose.

8. Custody, in the context of Section 439 (we are not, be it noted dealing with anticipatory bail u/s 438) is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court.

15. Keeping in view of the meaning of custody, according to different High Courts and Apex Court in the above cases, this Court is of the considered view that late R.K. Laksana was very much in the custody of the Respondents 6, 7, 8, 9 and 10 at the time of killing him as he was under their control and also he was physically in their hold at the time of the incidence on 15.2.1999.

18. The Apex Court in *Sebastian M. Hongray Vs. Union of India (UOI) and Others*, held:

In a writ petition under Article 32 rarely, if ever, pleadings are meticulously extracted and reproduced in the judgment. It however became a compelling necessity in this case for the obvious reason that certain inferences were drawn and submitted for the consideration of this Court by both sides after referring to facts admitted and/or not controverted. We would, therefore be justified in deducing the indisputable fact situation that emerges from the rival affidavits and then proceed to draw necessary permissible inferences that flow from them.

19. Redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental right of its citizen had been discussed by the Apex Court in a catena of cases and held that the award of compensation for established infringement of indefeasible right guaranteed to a citizen under denotes the case in which compensation or exemplary damages were awarded by the court while a constitutional right was violated. Such constitutional remedy was made to partake the character of civil actions. The award of compensation was made only in additions to the normal civil remedies. In the case of *Devaki Nandan Prasad Vs. State of Bihar and Others*, the Apex Court laid down the concept of constitutional tort and compensatory jurisdiction and awarded Rs. 25,000/- (Rupees twenty five thousand) as exemplary costs for harassing the Petitioner. This concept of awarding exemplary costs had been also considered in *Rudul Sah Vs. State of Bihar and Another*, In that case, the Petitioner filed the Habeas Corpus before the Court for his immediate relief and prayed for rehabilitation costs, medical charges and compensation for illegal detention. After his release in 1982, the question before the court was whether in exercise of jurisdiction under Article 32, the court can pass an order for payment of money, if such order is in the nature of compensation consequential upon the deprivation of fundamental right and decided in the affirmative. Therefore, the State must repair the damage done by its officers to the Petitioner's right. It may have recourse against those officers. The two important points decided in *Rudul Shah* (supra) are that (1) violation of constitutional right gives raise a right to a civil liability enforceable in Article 21 of the Constitution of India is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system whereunder their right and interests shall be protected and preserved. The grant of compensation in proceeding under Article 32 or Article 226 of the Constitution of India for the established violation of fundamental right guaranteed under Article 21 is an exercise of the Court under the Public Law jurisdiction for penalizing the wrong doer and fixing the liability for the public wrong on the State which failed in discharge of its public duty to protect fundamental right of the citizens.

20. The Apex Court had considered the requirements of protection of right to life and liberty of the citizen against the lawlessness of the State in *Sant Bir Vs. State of Bihar*, and *Mrs. Veena Sethi Vs. State of Bihar and Others*, Ultimately it had been settled that the most precious of the precious fundamental rights of the citizen is right to life guaranteed by Article 21 of the Constitution of India. It is the bounden duty of the State under the constitution to protect the life and personal liberty of a citizen and it shall not be deprived of except according to procedure established by law. The State is liable for the constitutional tort and the constitutional tort civil court and (2) it formulates basis for a theory of liability under which a violation of right to the personal liberty can give raise to civil liability with the extreme concern to protect and preserve the fundamental rights of a citizen. The Apex Court awarded compensation to the UTP for violations of his fundamental right and also for the failure of the State to

discharge its constitutional obligations to the citizen.

21. The Apex Court in the case of D.K. Basu Vs. State of West Bengal, held that the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and property, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortuous acts of the public servants. Public proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of indefeasible right guaranteed under Article 21 of the Constitution of India is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interest shall be protected and preserved. Grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction for penalizing the wrongdoer and fixing the liability for the public wrong on the state which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

22. It is the bounden duty of the State under the Constitution to protect life and personal liberty of the citizen. The State is liable to the constitutional tort. The matter regarding the tortuous liability of the States had been arisen and discussed in jurisdic circle beginning from the case of Devaki Nandan Prasad v. State of Bihar (supra) The Apex Court in the case of Sebastian M. Hongray Vs. Union of India (UOI) and Others, awarded exemplary cost of Rs. 1 lakh each to the wife of the missing persons. The Apex Court awarded compensation under the writ jurisdiction for the constitutional torts against the citizens. This concept of awarding compensation under the writ jurisdiction for violation of fundamental right had been followed in a number of cases. The Constitutional Bench in M.C. Mehta and another Vs. Union of India and others, held that Article 32 is not only injunctive in ambit but also peremptory in scope. It is not powerless to redress a person while his fundamental right has been violated, it includes the power to award compensation.

23. In Naosam Ningol Chandam Ongbi Nungshitombi Devi v. Rishang Keishing, Chief Minister of Manipur: (1988) 1 GLR 109 this Court held that the Respondents are liable to pay compensation for their failure to do their duty to protect the Petitioner's husband who was said to have been taken away by the security forces and shot dead. It may be worth to mention that the Apex Court in Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others, held that:

Monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts.

24. The Apex Court (3 Judges) in its decision rendered on 3.2.2006 in Sube Singh and Ors. v. State of Haryana and Ors.: Writ petition (Criminal) No. 237 of 1998, also reiterated that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of fundamental right under Article 21 by a public servant, the quantum of compensation will, however, depend upon the fact and circumstances of each case. An award of such compensation (by way of public law remedy) will not come in the way of the aggrieved persons claiming the additional compensation in civil court, in enforcement of private law remedy in Torts nor come in the way of Criminal Court ordering compensation u/s 357 of the Code of Criminal Procedure.

25. From consideration of the cases of both the sides, keeping in view of the decisions of the Apex Court and this Court, we are of the considered view that indisputable finding that emerge in the present writ petition are that Shri Siddique Ali was in the custody of the police and his presumed death would be in the custody of the police.

26. This Court in a number of writ petitions had entertained claim under public law for compensation for deprivation of fundamental right to life and awarded compensation for the established infringement of indefeasible fundamental right guaranteed under Article 21 and 22 of the Constitution of India in addition to the private law remedy. Some of the cases are: (1) Shri Ranjan Gogoi v. Union of India and Ors. 1995 2 GLT 384 (2) Smt. Kangujam Ongbi Thoibi Devi Vs. State of Manipur and Others, (3) Terarongsen and Ors. v. Union of India and Ors. 2003 (1) GLT 218 Tarulata Devi Vs. State of Assam and Others, (5) Th. Kaisi Liangmai Vs. Union of India (UOI) and Others, (6) Smt. Ningthemcha Ongbi Shakhenbi Devi Vs. State of Manipur and Others,

27. Conclusion:

Keeping in view of the peculiar facts and circumstances of the present case we are of the considered view that awarding compensation of Rs. 2 lacs (Rupees two lacs) for the death of Shri Siddique Ali in the custody of the police in exercise of the public law jurisdiction in addition to other remedies available in the ordinary course of law i.e. Civil Suit and also the remedies in the criminal proceedings against the wrong doer shall substantially meet the ends of justice.

Accordingly, the Respondents shall pay compensation of Rs. 2 lacs (Rupees two lacs) to the Petitioner within 8 (eight) weeks from the date of receipt of this judgment and order. Further, Respondents have to pay a sum of Rs. 5,000/- (Rupees five thousand) as cost of fee to the learned Counsel for the Petitioner within 8 (eight) weeks. Writ petition is allowed accordingly. Parties are to bear their own costs.