
(2014) 04 TP CK 0015
In the Tripura High Court
Case No : W.P. (C) 388 of 2002

**Smti. Selina Aktar alias Khatoon, Shri Jashim Uddin, Shri Nazir Uddin and
Smti. Fariza Khatoon Vs The Union of India Represented by the Secretary
to the Union of India, Ministry of Home Affairs, The Company
Commander, 103 Bn. B.S.F., No. 81003648, N.K. Shib Kumar and The State
of Tripura Represented by the Secretary of Home, Govt. of Tripura**

Date of Decision : 09-04-2014

Acts Referred:

Arms Act, 1959 — Section 27
Constitution of India, 1950 — Article 21, 22, 22(1), 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 307, 332, 34, 353

Citation : (2014) 04 TP CK 0015

Hon'ble Judges : Deepak Gupta, C.J.; S.C. Das, J

Bench : Division Bench

Advocate : S. Deb, Sr. Advocate and Mr. B. Debnath, Advocate for the Appellant; P.K. Biswas, Asstt. S.G., Mr. D.C. Nath, and Mr. P. Majumder, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

S.C. Das, J.—By filing this writ petition, the petitioners prayed for directing the respondents to pay them compensation of Rs. 5,00,000/- (Rupees five lakhs) in the form of damage for the killing of Nanu Mia alias Sdo Mia, aged about 28 years, the husband of petitioner No. 1, father of petitioner Nos. 2 and 3 and son of petitioner No. 4 respectively, due to B.S.F. firing on 05.04.1995 at about 08-30 a.m. It is inter alia alleged by the petitioners that Nanu Mia alias Sdo Mia was killed by the respondent No. 3 under a fake ground that the said Nanu Mia alias Sdo Mia was engaged in smuggling activities and he was chased by the respondent No. 3 and that while under chase said Nanu Mia tried to snatch the rifle from the hand of respondent No. 3 and at that time respondent No. 3, to save his life and weapon fired on the smugglers and as a result Nanu Miah received bullet injuries and died. Thereafter with a view to escape from the misdeeds of respondent No. 3, the Company Commander, E. Coy. B.S.F.,

Kamthana B.O.P. lodged a false FIR before the O.C., Kalamchaura P.S. and that FIR was registered as KLC P.S. Case No. 22 of 1995 dated 05.04.1995 under Sections 307/398 of IPC against 5/6 unknown persons. It is further stated by the petitioners that postmortem was conducted on the dead body of Nanu Miah and it was found that the bullet injury was on the back of the shoulder of Nanu Miah measuring 1/2" X 1/2" and the exit wound was measuring 1" x 1". A copy of the postmortem report annexed as Annexure-2 to the writ petition.

2. Police investigated that case and submitted final report. It is the further case of the petitioners that on the same day i.e. on 05.04.1995 another suo motu FIR was lodged by police of Kalamchaura P.S. which was registered as KLC P.S. Case No. 23 of 1995 u/s 302 of IPC and Section 27 of the Arms Act and that case was also investigated by police and charge-sheet was submitted on 16.12.1996 against the respondent No. 3. A copy of the charge-sheet has been annexed as Annexure-3 to the writ petition.

3. It is contended by the petitioners that the deceased Nanu Mia was aged 28 years and was daily labourer by profession and used to earn Rs. 100/- per day in average and he was the sole bread earner of the family consisting of the petitioners and because of his death the petitioners suffered irreparable loss.

Respondent Nos. 1, 2 and 3 are responsible for the death of deceased Nanu Miah and therefore, they should be directed to pay compensation of Rs. 5,00,000/-.

4. Respondent Nos. 1, 2 and 3 filed a joint counter affidavit inter alia stating that on 05.04.1995 at about 08:30 hours some suspects were carrying goods on their bicycles and were approaching towards Bangladesh border which was observed by the Out Post party of B.O.P., Putia consisting of Nk. Shib Kumar Yadav (respondent No. 3) and constable Ram Khilawan in the border post about 700 yards inside the Indian territory. The Out Post party challenged the suspects but the suspects started running towards Indo-Bangladesh border. Out Post party chased behind them and tried to stop with repeated warning but the suspects did not pay any heed to the warning of the BSF Out Post Party and when they reached near the suspects and were about to apprehend them, Nanu Miah pelted stones on Nk. Shib Kumar Yadav (respondent No. 3) and tried to snatch the personal weapon and finding no other alternative Shib Kr. Yadav opened fire of one round from his weapon in self defence which caused injury to Nanu Miah who subsequently succumbed to the injuries. Hearing the sound of fire, the other miscreants ran away from the spot. After searching, the BSF personnel recovered Bangladesh Taka 1420 from the possession of deceased Nanu Miah and those were handed over to custom authority vide letter dated 30th August, 2002. Dead body of Nanu Mia was handed over to civil police personnel for postmortem and further disposal as per law. An FIR was lodged by the Commandant at Kalamchaura P.S. vide FIR No. 22 of 1995 dated 05.04.1995 and copy of the FIR annexed as Annexure R/1 to the Counter affidavit.

It is also contended by the respondents that respondent No. 3 had no other

alternative and to save his life and weapon he had to open fire in his self defence as a result of which Nanu Mia had died. It is further contended that trial of respondent No. 3 was taken up in General Security Force Court (for short, GSFC) and it has been held by the GSFC that respondent No. 3 had no other alternative but to save his life and as a matter of self defence was compelled to open fire causing injury upon Nanu Mia who was involved in transborder crimes. The entire matter was duly considered by the GSFC of BSF and the Court found that respondent No. 3 was not guilty of the charge and acquitted him of the charge.

5. Respondent No. 4, the State of Tripura also has submitted counter affidavit inter alia stating that on 05.04.1995 at around 08-30 hours Nanu Mia alias Sdo Mia riding a new bicycle was going to his village Rahimpur from Baxanagar and at that time he was intercepted by the BSF patrolling party of 103 Bn. BSF, Ex-Putia BOP and was shot down by a member of the BSF patrolling party resulting his instantaneous death having received bullet injury on the back of the shoulder below occipital region. After the incident case and counter cases were registered at Kalamchaura P.S. and police has investigated both the cases and submitted report before the SDJM, Sonamura.

Case No. 22 of 1995 dated 05.04.95 u/s 307/398 IPC was registered on the written complaint of Sri Satish Kumar, Coy Commander, Kamthana BOP, E. Coy, 103 Bn BSF against 5/6 unknown persons alleging that they were riding on a new double frame bicycle along with other smuggled goods were proceeding towards Indo-Bangladesh border near Putia BOP. They were challenged by a patrol party of two BSF, Ex-Putia BOP. Being challenged, the smugglers started ran away towards the border and the BSF personnel also chased behind them who were ultimately surrounded by the smugglers and attempted to snatch away rifle from the hand of NK. Shib Kumar Yadav following with pelting of stones etc. and on self-defence said Shib Kr. Yadav fired one round from the SLR which resulted death of Nanu Mia. The complainant also stated that they recovered one bicycle from the spot and Bangladesh currency amounting to Taka 1420 from the possession of the dead body.

On the other hand, Kalamchaura P.S. Case No. 23/95 u/s 302 of IPC was registered on 05.04.95 on the written complaint of Abdul Hasem of Rahimpur against Nk. Shib Kr. Yadav and one unknown BSF constable of Putia BOP for murdering deceased Nanu Mia who was returning his village Rahimpur from Baxanagar after purchasing a new bicycle for presenting the same on the marriage ceremony of his nephew and being intercepted near Rukhia ONGC Chowmohani on 05.04.95 at about 8-30 hours.

Both the cases were investigated by the officers of Kalamchaura P.S. and after investigation I.O. submitted final report in case No. 22/95 registered on the complaint of BSF as mistake of fact vide FR No. 39/96 dated 31.12.96 and the learned SDJM, Sonamura had accepted the same vide order dated 11.2.97. But the other case vide case No. 23/95 registered on the complaint of civilian was charge-sheeted by police against Nk. Shib Kr. Yadav, E. Coy, 103 Bn. BSF, Ex-

Putia BOP vide charge sheet No. 26/96 dated 16.12.96 u/s 302 IPC to face trial for murdering said Nanu Mia. Learned SDJM, Sonamura by order dated 30.11.99 has transferred the case to the BSF authority for trial in the Court Martial on the request of the BSF authority. Photocopies of both the FIR, order sheets, final reports and the charge sheets were annexed as Annexure R/1, R/2, R/3 and R/4 respectively.

6. Learned Sr. counsel, Mr. Deb appearing on behalf the petitioners submitted that the deceased was a poor daily labourer, a resident of village Rahimpur under P.S. Kalamchaura, a bordering village of Sonamura Sub-Division. He was on way back to his house by riding a new bicycle and at that time he was shot on his back by respondent No. 3 causing his instantaneous death. The postmortem clearly shows that entry wound of the bullet was on the back of the deceased and exit wound of the bullet was in the front which suggests that the story set up by the respondent Nos. 1, 2 and 3 was totally false. Had there was any pelting of stones by the deceased Nanu Mia and the situation was so grave that there was no other option but to fire, respondent No. 3 or his companion constable would sustain at least some injury due to the pelting of stones. It is also submitted that if there was scuffling between Nanu Mia and respondent No. 3 and Nanu Mia was trying to snatch the weapon and at that time respondent No. 3 opened fire on Nanu Mia, the entry wound of the bullet ought to have been in the front of the body of Nanu Mia. The injury itself suggests that respondent No. 3 opened fire on the back of Nanu Mia without any provocation and intentionally with a view to kill him and the story set up by the respondents was not correct.

It is also submitted by Mr. Deb, learned Sr. counsel that indisputably two FIRs were lodged and two police cases i.e. Kalamchaura P.S. Case No. 22 of 1995 pursuant to a FIR lodged by the Commander of BSF and Kalamchaura P.S. Case No. 23 of 1995 pursuant to FIR lodged by Abdul Hasem were registered by police. Both the cases were investigated by Police and after investigation final report was submitted in Case No. 22 of 1995 which makes it clear that a false FIR was lodged by the Commander of BSF with a view to escape from the illegal act of respondent No. 3. It is also an undisputed fact that KLC P.S. Case No. 23 of 1995 was ended in charge-sheet against respondent No. 3 u/s 302 IPC and 27 of Arms Act and the BSF authority took up the trial in GSFC of BSF and the fate of that trial was not known to the petitioners and nothing was communicated to them. Whatever may be the result of GSFC which was not at all communicated to the petitioners, the petitioners cannot be bound by that. If the facts what is apparent on the face of the record is considered, it will be apparent that Nanu Mia was deliberately and desperately killed by respondent No. 3 unprovoked for no valid reason. The poor petitioners suffered irreparably for the death of the sole bread earner and therefore, they are entitled to get compensation.

7. Countering the submission of learned Sr. counsel Mr. Deb, learned Sr. ASG, Mr. P.K. Biswas has submitted that the deceased Nanu Mia and others were involved in smuggling activities. They were found proceeding towards Indo-Bangladesh

border carrying goods and at that time they were chased by respondent No. 3 and his companion constable and at that point of time Nanu Mia and other miscreants attacked the BSF party, pelted stones on them and Nanu Miah tried to snatch the fire arm from the hand of respondent No. 3 and as a result respondent No. 3 had no other alternative but to fire to protect his life and weapon. Unfortunately, Nanu Mia died on the spot for which respondent No. 3 cannot be held responsible. It is emphatically submitted by learned ASG that in such a hot situation it cannot be measured by scale as to how the bullet injury was caused on the back of the deceased. Might be in the midst of scuffling the bullet injury was caused in the back of the deceased and no suspicion on that ground alone can be raised about the action of BSF Out Post party. The GSFC of BSF was legally entitled to take up trial against the respondent No. 3 since the offence as alleged was committed in course of discharge of their duty and GSFC taken into consideration of evidence and materials collected during trial and arrived at a finding that respondent No. 3 acted within his limit and to protect his life and weapon, he had no other alternative but to fire of Nanu Mia which unfortunately caused death of Nanu Mia. In the facts and circumstances of the case, there is nothing to award any compensation to the petitioners since Nanu Miah has died for his own fault and misdeed and the BSF authority cannot be held responsible for the death of Nanu Miah.

8. The alleged incident occurred on 05.04.1995 at about 08-30 a.m. The first FIR was lodged by Mr. Satish Kumar, Coy. Commander, Kamthana B.O.P., E. Coy of 103 Bn. BSF on the same day at 10-15 a.m. Let us have a glimpse to the facts alleged in the FIR lodged by Satish Kumar. The contents of that FIR read as follows:-

To

The O.C. Police, P.S. Kalam Choura.

Sub: FIR

It is submitted that on 5-4-95 at about 0830 hrs. one patrolling consisting of 2 laid by No-81003648 N.K. Shiv Kumar Yadav along with one Ct. BSF BOP Putia was patrolling at Bordering areas of Putia and observed about 5, 6 person ridding one new double frame bicycle and others smuggling goods and was proceeding towards international border near BOP, Putia. On being challenged by patrolling party on persons with their smuggling items started running towards Border, patrol party chased and when reached near the smugglers surrounded one member of patrol party namely no-81003648 N.K. Shiv Kumar Yadav and tried to snatch his rifle butt No. 426. At the same time pelted stone. On seeing threat to his life and security of his weapon fired one round from his SLR is right of private defence. All smugglers fled away towards Bangladesh leaving behind one injured smugglers of their party who succumbed to his injuries on the spot. During search of the area one new bicycle with double frame with reg. no. J8-738 Hero Jet. On search of the dead body of smuggler B.D. taka of amounting to B.D. taka

1420 (one thousand four hundred twenty) was recovered.

You are requested to lodge one FIR against the smugglers for snatching rifle of BSF. Patrol party while on active duty on international Borders as well as attaching with stones the seizure memo is also enclosed.

S/d Satish Kumar A/C COY Commander, E. COY, 103 Bn BSF. 5.4.95

9. Admittedly police submitted final report after investigation of that FIR. As already stated on the basis of FIR lodged by Abdul Hasem, Kalamchaura P.S. Case No. 23 of 1995 u/s 302 of IPC and 27 of Arms Act was registered for the death of Nanu Mia and that case was ended in Charge-sheet. The copy of the Charge-sheet annexed as Annexure-3 to the writ petition. In the charge-sheet I.O. of the case has stated thus:-

Sir,

The fact of the case in brief is that on 5.4.95 at 16.25 hours one Sri Abul Husen lodged a written complaint to the effect that on 5.4.95 at about 08.30 hours when his nephew Nanu Miah was going towards Rahimpur from Boxanagar by a new bi-cycle through Putia Road, N.K. Shiv Kumar Yadav of Putia BSF BOP, killed him by fire from his rifle. Another BSF constable was at the spot with said N.K.

On this complaint S.I. Balin Beb of KLC P.S. took up its investigation at the spot and then registered KLC P.S. Case No. 23/95 u/s. 302 IPC and 27 Arms Act. It is regret to state that on his expiry SI Ranjit Deb took up its investigation. On his transfer self S.I. Debabrata Bhattacharjee of KLC P.S. took up its investigation.

During investigation the previous I/O S.I. Balin Deb visited the P.O., prepared surathal report and dead body challan and arranged P.M. examination from Sonamura Hospital. After P.M. examination the dead body of Nanu Miah was handed over to his relative. Examined the available witnesses and recorded their statements u/s. 161 Cr.P.C., seized the alams, talked with some members of public and BSF authority. Given written requisition to the BSF authority for production of AP, concerned SLR, empty cartridges and Guard Book of Putia BOP. But BSF authority produced nothing. After expiry of the IO, SI Ranjit Deb also took all necessary steps in the case.

During investigation of the case, from the statement of witnesses and other circumstances it is well established that on 5.4.95 at about 08-30 hours NK. Shiv Kumar Yadav and Constable Ram Kohali were on duty at Putia Road. Then the said BSF personnel seen on Nanu Miah alias SDO Miah, S/O. Wasuddin of Rahimpur, riding on a new bicycle going towards Rahimpur. The BSF personnel as mentioned asked him to stop, but Nanu Miah did not stop. Thereafter NK. Shiv Kumar Yadav fired two rounds from his SLR aiming Nanu Miah of which one round hit Nanu Miah at his back and he fell on the ground. After some time Nanu Miah died at the spot. In regard to the possession of B/Desh currency by the deceased is doubtful. It is strongly suspected that the B/Desh currency was posed with the deceased by the BSF personnel. So a prima facie case has been

well established against N.K. Shiv Kumar Yadav u/s. 302 IPC and 27 of Arms Act for committing murder of deceased Nanu Miah.

Hence, I do submit C/S No. 28/96 u/s. 302 IPC and 27 Arms Act dt. 16.12.96 against N.K. Shiv Kumar Yadav of (Putia BOP) "E Coy"-103 Bn. BSF showing absconding N.K. for his trial in the open court of law. Witnesses may kindly be summoned during the trial who will prove the case. The original seizure lists, copy of surathal report, dead body challan along with all other relevant papers are sent herewith for ends of justice.

10. It is an undisputed fact that Nanu Miah died due to bullet injuries fired by respondent No. 3. Post-mortem examination was done over the dead body of Nanu Mia. A copy of which is annexed as Annexure-2 to the writ petition. In the post-mortem report, the Autopsy Surgeon has mentioned that he found entry wound over the back of the shoulder inverted in shape 1/2" X 1/2" size with no blackening, burning and tattooing and one exit wound over right middle of intercostals space 1" X 1" in size evolved in shape with injury of first intercostals space and laceration of intercostals middle and lower part of 1st rib and (illegible) cervical vertebrae with injury of first upper part of lungs and pleurae.

11. There is no dispute raised on behalf of the respondents regarding the observation made by the Autopsy Surgeon in the Post-mortem report which clearly suggests that the deceased was fired on his back and it also suggests that the firing was made from a reasonable distance since there was no blackening, burning or tattooing round the entry wound.

12. In the FIR lodged by the Company Commander immediately after the occurrence, it is alleged that about 5/6 persons riding one new double frame bicycle and others smuggling goods and was proceeding towards Bangladesh border near BOP, Putia. The patrol party challenged them but defying the challenge the smugglers were running towards border. When the patrol party reached near the smugglers, the smugglers surrounded respondent No. 3 and tried to snatch his rifle and at that time some also pelted stones and respondent No. 3 opened fire and thereby killed one person.

In their counter affidavit respondent Nos. 1, 2 and 3 stated that when the Out Post Party reached near the suspects and was in the process of apprehending them one Nanu Mia pelted stone on respondent No. 3 and tried to snatch the weapon and at that time having no other alternative respondent No. 3 opened fire of one round in self-defence and Nanu Mia received the injury and died. Others fled away towards Bangladesh leaving behind injured Nanu Mia. Bangladesh taka 1420 was recovered from Nanu Mia and the dead body was handed over to civil police. Serious inconsistency is found in the story narrated in the FIR and in the counter affidavit. If goods were smuggled by the deceased and other smugglers as alleged, in that case at least the goods which the deceased Nanu Mia was carrying would have been seized by the BSF when Nanu Mia fell with bullet injury. It is also quite unnatural that other smugglers even

after BSF firing fled away with the goods towards Bangladesh and no goods could be seized by the BSF. If Nanu Mia and other smugglers pelted stone towards BSF and the situation was so aggravated that there was no other alternative but to open fire by the BSF personnel, in that event respondent No. 3 and his companion constable definitely would sustain some injury because of stone pelting. But there is not even an allegation that any injury was sustained by either of them. If the story that Nanu Mia tried to snatch the weapon of respondent No. 3 and there was any such serious attempt, in that case both Nanu Mia and respondent No. 3 were likely to suffer injuries before Nanu Mia was shot dead by respondent No. 3. The story that respondent No. 3 fired at the time of scuffling with fire weapon does not appear to be true. At least such story does not convince judicial conscience since the entry wound of the bullet was on the back of the deceased and there was no blackening, burning or tattooing which suggests that it was not a firing within a very close range but it was from a considerable distance. Even if there was any such incident, the Out Post Party would fire in non vital organ of the person and thereby precious life of a person would not have been taken away.

13. At the time of hearing of the writ petition, learned ASG produced a file of GSFC but on examination of the same no head and tail could be ascertained. Extract copies of the GSFC is found kept in that record but what is the ultimate finding and the reasons thereof is very difficult to discern. As it appears, the witnesses who were listed in the charge-sheet submitted by police were not examined by the GSFC.

Be that as it may, the decision of GSFC is not binding on this Court while this Court is exercising jurisdiction under Article 226 of the Constitution of India in respect of compensation as a public law remedy. May be the GSFC has found the accused-respondent No. 3 not guilty of any criminal offence but it is amply clear from the records placed before us that the circumstances was not as such to fire on a person in his vital organ of the body killing him on the spot. For remedy in public law actions, this Court can invoke new tools and would remedy to provide redressal in the case of deprivation of fundamental right like that under Article 21 of the Constitution and also may award compensation in proceedings for enforcement of fundamental rights.

14. The Supreme Court in the case of Rudul Sah Vs. State of Bihar and Another, , had considered the important question as to whether the Apex Court in exercise of its jurisdiction under Article 32 can pass an order for payment of money as compensation for deprivation of fundamental rights; and answer the question, thus, awarding compensation in a proceeding under Article 32 by the Supreme 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.

15. The principle laid down in Rudul Sah (supra) was also followed in Bhim

Singh, MLA Vs. State of Jammu & Kashmir and Others,

16. In the case of Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, , the Supreme Court had 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 an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct form, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution.

17. Further, I would like to gainfully refer here the observation of the Apex Court in para 33 of the judgment which reads thus:-

The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. 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 which aims to protect their interests and preserve their rights. Therefore, when the court molds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, 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 citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making "monetary amends" under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of exemplary damages" awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and persecute the offender under the penal law.

It has well been settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21 of the Constitution of India.

18. The Supreme Court in the case of D.K. Basu Vs. State of West Bengal, has held thus:-

9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty, of the Court, as custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

22. 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 jealously and scrupulously protected. We cannot wish 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". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

19. In the case of Sube Singh Vs. State of Haryana and Others, the Supreme Court in para 31, 32, 33 and 34 has held thus:-

31. Though illegal detention and custodial torture were recognized as violations of the fundamental rights of life and liberty guaranteed under Article 21, to begin with, only the following reliefs were being granted in writ petitions under Article

32 or 226:

- a) direction to set at liberty the person detained, if the complaint was one of illegal detention.
- b) direction to the Government concerned to hold an inquiry and take action against the officers responsible for the violation.
- c) If the enquiry or action taken by the department concerned was found to be not satisfactory, to direct an inquiry by an independent agency, usually the Central Bureau of Investigation.

Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the Law of Torts, was evolved in the last two and half decades.

32. In the Bhagalpur Blinding case, [Khatri and Others Vs. State of Bihar and Others, Bhagwati J., (as he then was), speaking for the Bench, posed the following question while considering the relief that could be given by a court for violation of constitutional rights guaranteed in Article 21 of the Constitution:-

[B]ut if life or personal liberty is violated otherwise than in accordance with such procedure, is the Court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty." The question was expanded in a subsequent order in Khatri and Others Vs. State of Bihar and Others, thus:-

If an officer of the State acting in his official capacity threatens to deprive a person of his life or personal liberty without the authority of law, can such person not approach the court for injuncting the State from acting through such officer in violation of his fundamental right under Article 21? Can the State urge in defence in such a case that it is not infringing the fundamental right of the petitioner under Article 21, because the officer who is threatening to do so is acting outside the law and therefore beyond the scope of his authority and hence the State is not responsible for his action? Would this not make a mockery of Article 21 and reduce it to nullity, a mere rope of sand, for, on this view, if the officer is acting according to law there would be no breach of Article 21 and if he is acting without the authority of law, the State would be able to contend that it is not responsible for his action and therefore there is no violation of Article 21. So also if there is any threatened invasion by the State of the fundamental right guaranteed under Article 21, the petitioner who is aggrieved can move the court under Article 32 for a writ injuncting such threatened invasion and if there is any continuing action of the State which is violative of the fundamental right under Article 21, the petitioner can approach the court under Article 32 and ask for a writ striking down the continuance of such action, but where the action taken by the State has already resulted in

breach of the fundamental right under Article 21 by deprivation of some limb of the petitioner, would the petitioner have no remedy under Article 32 for breach of the fundamental right guaranteed to him? Would the court permit itself to become helpless spectator of the violation of the fundamental right of the petitioner by the State and tell the petitioner that though the Constitution has guaranteed the fundamental right to him and has also given him the fundamental right of moving the court for enforcement of his fundamental right, the court cannot give him any relief.

33. Answering the said questions, it was held that when a court trying the writ petition proceeds to inquire into the violation of any right to life or personal liberty, while in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioners under Article 21 has been violated and the State is liable to pay compensation to them for such violation. This Court clarified that the nature and object of the inquiry is altogether different from that in a criminal case and any decision arrived at in the writ petition on this issue cannot have any relevance much less any binding effect, in any criminal proceeding which may be taken against a particular police officer. This Court further clarified that in a given case, if the investigation is still proceeding, the Court may even defer the inquiry before it until the investigation is completed or if the Court considered it necessary in the interests of Justice, it may postpone its inquiry until after the prosecution was terminated, but that is a matter entirely for the exercise of the discretion of the Court and there is no bar precluding the Court from proceeding with the inquiry before it, even if the investigation or prosecution is pending.

34. In *Rudul Sah Vs. State of Bihar and Another*, the petitioner therein approached this Court under Article 32 of the Constitution alleging that though he was acquitted by the Sessions Court on 3.6.1968, he was released from jail only on 6.10.1982, after 14 years, and sought compensation for his illegal detention. This Court while recognizing that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal, raised for consideration the important question as to whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for payment of money, as compensation for the deprivation of a fundamental right. This Court answered the question thus while awarding compensation:-

Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the

judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. 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 rights 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.

Rudul Sah was followed in *Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others*, and *Peoples' Union For Democratic Rights Through Its Secretary and Another Vs. Police Commissioner, Delhi Police Headquarters and Another*,

20. In the case of *Rohtash Kumar Vs. State of Haryana and Others*, the Supreme Court considered the fact of almost a similar case as that of the case at hand. In that case one Sunil, son of the petitioner Rohtash Kumar was having with several criminal cases and was wanted by police. Based on some information that Sunil might be crossing the road at a certain place, police ambushed and at mid night when they found that a motor bike was proceeding they tried to stop the motor bike and could identify Sunil sitting as a pillion rider and another person driving the motor cycle. Police vehicle chased them and Sunil brandished fire arms in both hands and opened fire to the police. Police also fired on them and chased them with vehicle and the motor bike was dashed by the vehicle and both Sunil and the rider of the motor bike fell down and Sunil received bullet injuries and died. It was the case of the police party that in self-defence police had to fire but the injury report was showing that the injuries were on the chest and there was blackening around the edges of the entry wound which was suggestive that the firing was from a distance of 3 to 8 ft. The Supreme Court considered the post-mortem report and held that the allegation that Sunil the aggressor, demolishes in the facts and circumstances of the case.

21. We may gainfully refer here para 8 of the judgment which reads as follows:-

8. After carefully perusing the inquiry report dated 17.11.2008 submitted by Tahsildar, Narnaul and the inquiry report dated 7.1.2011 submitted by the Additional Deputy Commissioner and other relevant record, we are inclined to agree with learned counsel for the appellant and learned amicus curiae that Sunil appears to have died in a fake encounter. Post-mortem notes of Sunil state that the bullets were fired from a distance of about 3-8 ft. from the body. They further state that blackening and tattooing were present around the entry wounds caused by the bullets. This indicates that the shots were fired from a very short distance. There was entry wound on the back. Entry wounds are also seen on the chest. The location and nature of wounds are not consistent with the theory of genuine encounter. If the police party wanted to merely prevent Sunil from running away, they could have fired on the non-vital parts of his body. If the police version that Sunil was aggressive, that he and his companion wanted to kill the policemen to deter them from doing their duty and, therefore, Sunil

fired at the police party was true, at least one member of the police party would have got injured. Significantly, no one from the police party was injured. There is also no formal record of any recovery of firearms from the body of Sunil. It is significant to note that Umesh who was riding the motorcycle at the time of encounter, was arrested and tried for offences under Sections 332, 353, 307 read with Section 34 of the IPC inter alia for using criminal force to deter public servants from discharge of their duty. The Sessions Court acquitted Umesh. Acquittal of Umesh makes a dent in the prosecution case that Sunil fired at the police when the police asked him and Umesh to stop. The police claim to have identified Sunil at the time of encounter on the basis of photographs in their possession. Our attention has been drawn to two photographs of Sunil, shown on the pamphlets announcing reward to anyone who gives any information to the police about him. These two photographs appear to be of two different persons. This is tried to be explained by Head Constable Gulab Singh in his affidavit that one of the two photographs was taken from Haryana School Education Board and the other was given to him by a police informer. It is stated that one photograph shows Sunil as a teenager and the other shows him as a young man. Assuming this to be true, it is not understood how the police could have identified Sunil in the midnight in torch light. It is also not understood as to on the basis of which of the two photographs, at dead of night, they identified him. The assertion that Head Constable-Gulab Singh knew Sunil personally and he identified him in street light does not inspire confidence. Pertinently, there is reference to use of torch in the FIR filed by ASI Ram Sarup.

In that case the Supreme Court has awarded a compensation of Rs. 20,00,000/- (twenty lakhs) to the petitioner.

22. In the present case, we are aware that we are not sitting as an appellate authority over the decision taken by the GSFC. Irrespective of the decision taken by the GSFC, having considered the facts and circumstances placed before us, we are of considered opinion that right to life as guaranteed under Article 21 of the Constitution in respect of Nanu Mia has been violated. There was as such no circumstance to fire on the vital organ of Nanu Mia causing his death. No documents placed before us to justify such firing by respondent No. 3 causing death of the deceased Nanu Mia. Rather, we find from the admitted facts and circumstances that respondent No. 3 opened fire on Nanu Mia while he was away from him and the firing was done on his back which resulted his death. We, therefore, consider it as a fit case to award compensation to the next kin of the deceased.

23. The petitioners simply stated that the deceased was aged about 28 years, a day labourer by profession and used to earn about Rs. 100/- per day in average. It is very difficult to ascertain compensation based on such stray statement. Under such circumstances some hypothesis and some guesswork as well as human consideration are inevitable to determine the quantum of compensation. Considering all aspects, we think that a lump sum amount of Rs. 3,00,000/-

(Rupees three lakhs) will be an appropriate compensation for the death of Nanu Mia to be paid to the petitioners

24. Accordingly, we direct that the respondent Nos. 1 to 3 shall pay a compensation of Rs. 3,00,000/- (Rupees three lakhs) to the petitioners within 3 (three) months from today failing which the amount shall carry interest @ 9% per annum from today. The writ petition accordingly is allowed to the extent indicated above and stands disposed of.