
(1997) 01 KL CK 0020
In the High Court Of Kerala
Case No : O.P. No. 12532 of 1993

Thankappan

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 27-01-1997

Acts Referred:

Constitution of India, 1950 — Article 22, 226, 32
Penal Code, 1860 (IPC) — Section 380, 454, 457, 461

Citation : (1997) CriLJ 1538 : (1997) 3 ILR (Ker) 523

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : Shaji Thomas Porkkattil, for the Appellant;

Final Decision : Allowed

Judgement

K.A. Abdul Gafoor, J.—The petitioner is the father of deceased Gopi. Admittedly he died while in police custody on 6.10.1988. The petitioner has approached this Court seeking a direction to investigate his death through the Central Bureau of Investigation and also for a direction seeking a compensation of Rs. 5,00,000/- to the petitioner and his wife, parents of Gopi who died while in police custody.

2. The petitioner submits that his son was a member of the Democratic Youth Federation of India. He had due to some difference of opinion dissociated from that organisation. He was also good kabaddi player and his remarkable performance in the game had resulted in some unhappy relationship between him and some police personnel. On 4.10.1988, three police constables attached to the Sherthala Circle Inspector's Office came to the petitioner's house in search of his son Gopi. They told the petitioner that Gopi was wanted by the Circle Inspector to be questioned in connection with some stolen articles. On the next morning, the petitioner and Gopi with their neighbour Madhavan went to the Circle Inspector's Office. Gopi had no knowledge about the theft nor had he received any stolen articles. Gopi was detained in the police station and the petitioner and Madhavan were sent back. They were told that Gopi would be

released soon. Gopi did not return home. The next day, he went to the police station with some food for Gopi. But he was not allowed to meet Gopi. He was told that Gopi would be released after producing him in a Magistrate Court. But he was never produced in the Magistrate Court, though he had engaged lawyers to get his son Gopi released through court. While so, the petitioner got a telegram, Exh. P1, asking him to collect the dead body of his son which was kept in the mortuary of the Alleppey Medical College Hospital. This was on 7.10.1988. On inquiry, he was told that Gopi had committed suicide by thrusting a piece of broken tube light into his abdominal part. The case was investigated by Crime Branch. Dissatisfied with the investigation the petitioner and another person named Mobi, who was detained in police station at the time when Gopi was detained, filed O.P. No. 9388 of 1989 seeking direction for investigation of the case through CBI. This court in Exh. P2 judgment issued certain directions to the Director General of Police to enquire into the matter and ascertain:

(a) Whether Gopi died of torture or committed suicide?

(b) If it was a case of suicide, what were the circumstances under which he committed suicide?

(c) How he could have committed suicide in a police station during day when police personnel are expected to be present, without their knowing of it or making an attempt to prevent it?

3. In terms of this the Director General of Police was bound to conduct an enquiry. The petitioner also should have been given a notice. But the petitioner did not get any notice. He was issued with Exh. P3 stating that a report had been sent to this Court pursuant to the direction in Exh. P2. Thereupon, the petitioner applied for a copy of the report before this Court. It was endorsed on the copy application as seen from Exh. P4 that "Report not received in the seat (P). Hence, C.A. may be rejected." Thus, when the petitioner was informed that report had been sent to this Court, actually no report had been filed. It was in the above circumstances the petitioner again approached this Court with this writ petition seeking investigation through CBI and also seeking compensation.

4. A statement was filed on 29.10.1993 by the Director General of Police stating that he conducted an enquiry pursuant to Exh. P2 judgment and that the petitioner was questioned on 17.10.1990. He produced Annexure A I report. But nothing is stated about giving notice to the petitioner or about his statement. What is stated in Annexure A 1 is as follows:

My predecessor Rajagopal Narayan has visited Sherthala on 5.2.1991 and made enquiries. He also questioned the key witnesses including the father of the deceased Gopi and arrived at the conclusion stated above, i.e., Gopi had committed suicide. Thereupon, he filed a reply affidavit stating that the averment in the statement of the Director General of Police that he had been questioned on 17.10.1990 was false and the court shall direct him to produce the relevant records of the proceedings of such enquiry in the court. This court on 19.2.1996

passed an order in C.M.P. referring to Annexure AI report as follows:

The report is virtually a summary of the findings that the Investigating Officer had already come to. There is hardly anything refreshing new in the approach to the matters he was called upon to enquire. There are several grey areas in the case, which have not been cleared. There is a case for a fresh look into the entire matter.

So, this Court directed the Director General of Police to go into the entire matter afresh and submit a detailed report.

5. A detailed report was filed on 12.6.1996. Before that a counter affidavit had been filed on behalf of respondent No. 2, State of Kerala. It is stated in that counter affidavit that "the Sub-Inspector and party had gone to the petitioner's house and directed the petitioner to direct his son Gopi to meet Circle Inspector of Police, Sherthala in his office the next day morning, on 5.10.1988. The petitioner went to Circle Inspector's Office along with his son Gopi. As per the directions of the Circle Inspector, Gopi was taken to Sherthala Police Station by petitioner. The Sub-Inspector questioned Gopi about his involvement in Crime Nos. 319 and 329 of 1988 of Sherthala Police Station. Gopi denied his involvement. In order to verify the version of Gopi, Sub-Inspector directed him to be in the police station and informed the petitioner that Gopi will be released next day. The allegation that Gopi was detained at Sherthala Police Station on 5.10.1988 is not correct." If he was not detained as stated in the counter affidavit why the petitioner was told that his son would be released on the next day? It is further averred in the same counter affidavit that "It is true that Gopi was kept under surveillance in Sherthala Police Station on 5.10.1988 and 6.10.1988 F.N. He was kept there for verifying the version given by him regarding his non-involvement in Crime Nos. 319 and 329 of 1988 of Sherthala Police Station." The person has to be kept in the police station if he was involved in a criminal case and not to verify the non-involvement in a case. It is to be noted that as per the counter affidavit of the State he was kept in the police station only "up to 6.10.1988 F.N.". As ordinarily understood F.N. means time up to 12.00 noon. But the counter affidavit again says "at about 1.30 p.m. when the Sub-Inspector and other staff had gone out for meals Gopi suddenly went to station writer's room and took one electric tube kept in the corner of that room. Within a short time, he broke the tube and stabbed the broken piece into his stomach. Seeing this, the station watch police constable and other persons who were sitting in the corridor rushed to the writer's room. Gopi was immediately taken to the hospital. On the way, he succumbed to the injuries." This averment in the very same counter affidavit shows that Gopi was in the police custody and in the police station even beyond the forenoon of 6.10.1988, because admittedly the incident took place only at 1.30 p.m. The report filed by the Director General of Police on 12.6.1996 shows that Gopi had gone to the Circle Inspector at about 9 a.m. on 5.10.1988. Therefore, he was in the police custody till he succumbed to the injuries on 6.10.1988 after 1.30 p.m. This means the petitioner's son was

kept in police custody for more than 24 hours which was totally illegal and unlawful. Para 17 of the report further shows as follows:

From the case records, no material evidence is seen collected by the ASI, Sub-Inspector and Circle Inspector of Police, Sherthala who have investigated Crime No. 329 of 1988 u/s 457 and 380, Indian Penal Code and Crime No. 319 of 1988 u/s 454 or 457, 461 and 380, Indian Penal Code, in which Gopi the deceased was put in the array of accused from 6.10.1988.

It is further stated in the report in para 23 that "But though as per case diary, the accused concerned in these cases were "Not known" till 5.10.1988. Deceased Gopi (son of the petitioner) along with four others were brought into the array of accused surprisingly on 6.10.1988." This makes clear that the petitioner's son Gopi was taken into police custody at 9 a.m. on 5.10.1988 and till he was alleged to have committed suicide at 1.30 p.m. on 6.10.88, he has never been accused in any case pending investigation in Sherthala Police Station. Admittedly, he was asked to appear only in connection with transaction of a stolen article. At the best, he would be only a receiver of stolen article; there was no reason for detaining him for more than 24 hours in police custody. It is proved that he was in police custody for more than 24 hours and he succumbed to injuries in such police custody. He was implicated in the case, even according to the report of the Director General of Police, on 6.10.88 "surprisingly", according to him. So, this would have been done only after the incident took place. The body is still kept by the petitioner without burying. It is to be noted that one testicle of the body is missing. That is not borne out by the postmortem report. Both the palms are also removed. It is not yet returned to the petitioner. The body is still kept without both the palms.

6. As already mentioned above it is stated in the counter affidavit that the Sub-Inspector and party had gone to the petitioner's house in search of petitioner's son Gopi on 4.10.1988. The report of the Director General of Police is that on 4.10.1988 "police constable Surendran and Ponnappan of Sherthala Police Station who is known to the petitioner and his son Gopi along with two other police constables came to the petitioner's house and informed the petitioner that Sub-Inspector of Police Sherthala wanted to question his son in a case of theft investigated by the police." Both these cannot go together. It is stated further that the petitioner and his son appeared at 9 a.m. in the Office of the Circle Inspector. Therefore, the report of the Director General of Police itself is contradictory. The Director General in his report has not gone into the aspect that the petitioner's son was detained in the police custody for more than 24 hours. Even, Mobi, petitioner in Exh. P1 O.P. has come up with an affidavit, stating that his version produced along with the report is not true.

7. Thus, what had taken place is death of a person detained in police custody for more than 24 hours in violation of the law, in that regard and that too a person who was not involved as accused in criminal case when he was in custody or when he succumbed to injuries. Even the investigation proved that he was not

involved in the alleged theft. It is also the case of the police that he was asked to appear before the police in connection with transaction of stolen article. There was absolutely no reason to detain such a person for more than 24 hours in the police station. Thus, this is a clear case of death in police custody due to negligence of the police and which also involved illegal action on the part of the police in taking a person who was not involved in a case, into police custody and detained for more than 24 hours. Naturally the police will have certain intention to cover up their illegalities and illegal action. The investigation so far done can be viewed only so. Therefore, I find that this is a fit case where investigation through CBI has to be conducted. In the nature and circumstances of the entire facts of this case also, investigation through CBI is essential to keep up the image of State police beyond the pale of doubt. The State police need not be shy of that. The first and third respondents shall take immediate steps for such investigation.

8. The admitted facts revealed that the petitioner's son was taken into police custody for no reason; he did not commit any offence. He had not been arrested too. But he was in police custody from 9 a.m. on 5.10.1988 to 1.30 p.m. on 6.10.1988. Such a custody is totally illegal. Even if the allegation of committing suicide is accepted and even if the version in the report of the Director General of Police that he was mentally depressed is accepted, all these can be because of the illegal detention of the petitioner's son Gopi. This is a case where the police had illegally detained a person who was not involved in a crime and that too for more than 24 hours. The death occurred when the custody had exceeded beyond the legal limit, even if custody was permissible in this case. So this is a clear case when the petitioner has to be granted compensation, because atrocity had been committed by the police, against the fundamental freedom and personal liberty of a citizen, in spite of the constitutional guarantee. There was naked violation of the rights guaranteed by Article 22 of the Constitution. That has to be compensated.

9. In this context, the pronouncement of Supreme Court, in Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, supports the claim for compensation. Paras 10 and 17 are worth extracting.

In view of the decisions of this Court in Rudul Sah Vs. State of Bihar and Another, ; Sebastian M. Hongray Vs. Union of India (UOI) and Others, ; Sebastian M. Hongray Vs. Union of India (UOI), ; Bhim Singh Vs. State of Jammu & Kashmir, Bhim Singh v. State of J & K 1986 ACJ 867 Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others, ; and State of Maharashtra and Others Vs. Ravikant S. Patil, ; the liability of the State of Orissa in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General. It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and

the liability in private law for payment of compensation in an action on tort. It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.

It follows that "a claim in public law for compensation" for contravention of human rights and fundamental freedom 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 from 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 Articles 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah Vs. State of Bihar and Another*, and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.

10. That the petitioner's son was taken in police custody, without being involved as an accused in criminal case and that he was in police custody for beyond 24 hours are proved by the enquiry report of the Director General of Police. It is also proved by the averments in the counter affidavit of the State. Thus, there was inroad into the human rights of deceased Gopi. His fundamental rights have been nakedly violated by the police of the State. Therefore, the State shall compensate the petitioner. Gopi was 24 years at the time of his death. He was a skilled worker doing mosaic flooring. In such a case compensation of Rs. 3,00,000/- will necessarily be justified in the situation, also taking note of time lag from 1988 to 1997. Respondent Nos. 2 and 3 shall pay the said amount within three months from today.

11. The enquiry report of the Director General of Police filed in this Court on 6.6.1996 reveals commission of a heinous crime by the police, i.e., detention of a citizen in illegal and unlawful custody for more than 24 hours, from 9 a.m. on 5.10.1988 to at least 1.30 p.m. on 6.10.1988, when he succumbed to injuries.

This crime had been committed by the police themselves. When commission of crime is thus evident, none can close his eyes towards it. So far no crime is registered.

12. Therefore, I direct the District Superintendent of Police, Alappuzha to register a crime regarding unlawful detention of deceased Gopi on 5.10.1988 and 6.10.1988 by the police, as revealed in the report of the Director General of Police, including para 18 thereof, filed in this Court on 6.6.1996. The Director General of Police shall send a copy of the said report duly signed in his hand along with all the evidence and statements collected to the District Superintendent of Police, Alappuzha within two weeks of receipt of copy of this judgment. The District Superintendent of Police, Alappuzha, shall immediately register a crime and conduct an investigation as to who all committed the crime and file a report in the concerned Magistrate Court expeditiously. Send copies of this judgment to the respondents and the District Superintendent of Police, Alappuzha.

Original petition is allowed as above. The petitioner will be entitled to a cost of Rs. 2,500/-.