(1993) 2 Supreme Court Cases 746

(Before J.S.Verma, Dr. A.S. Anand and N.Venkatachala,j.)

Nilabati Behera (smt) Alias Lalita Behera
(Through the Supreme Court Legal Aid Committee) Petitioner

Versus

State of Orissa and Others Respondent

Writ Petition (Civil) No. 488 of 1988, Decided on March 24,1993

The Judgments of the Court were delivered by

VERMA, J.— A letter dated September 14, 1988 sent to this Court by Smt Nilabati Behera alias Lalita Behera, was treated as a writ petition under Article 32 of the Constitution for determining the claim of compensation made therein consequent upon the death of petitioner's son Suman Behera, aged about 22 years, in police custody. The said Suman Behera was taken from his home in police custody at about 8 a.m. on December 1, 1987 by respondent 6, Sarat Chandra Barik, Assistant Sub-Inspector of Police of Jeraikela Police Outpost under police station Bisra, District Sundergarh in Orissa, in connection with the investigation of an offence of theft and detained at the Police Outpost. At about 2 p.m. the next day on December 2, 1987, the petitioner came to know that the dead body of her son Suman Behera was found on the railway track near a bridge at some distance from the Jeraikela railway station. There were multiple injuries on the body of Suman Behera when it was found and obviously his death was unnatural, caused by those injuries. The allegation made is that it is a case of custodial death since Suman Behera died as a result of the multiple injuries inflicted to him while he was in police custody; and thereafter his dead body was thrown on the railway track. The prayer made in the petition is for award of compensation to the petitioner, the mother of Suman Behera, for contravention of the fundamental right to life guaranteed under Article 21 of the Constitution.

2. The State of Orissa and its police officers, including Sarat Chandra Barik, Assistant Sub-Inspector of Police and Constable No. 127, Chhabil Kujur of Police Outpost Jeraikela, Police Station Bisra, are impleaded as respondents in this petition. The defence of the respondents is that Suman Behera managed to escape from police custody at about 3 a.m. on the night between the 1st and 2nd December, 1987 from the Police Outpost Jeraikela, where he was detained and guarded by Police Constable Chhabil Kujur; he could not be apprehended thereafter in spite of a search; and the dead body of Suman Behera was found on the railway track the next day with multiple injuries which indicated that he was run over by a

passing train after he had escaped from police custody. In short, on this basis the allegation of custodial death was denied and consequently the respondents' responsibility for the unnatural death of Suman Behera.

3. In view of the controversy relating to the cause of death of Suman Behera, a direction was given by this Court on March 4, 1991 to the District Judge, Sundergarh in Orissa, to hold an inquiry into the matter and submit a report. The parties were directed to appear before the District Judge and lead the evidence on which they rely. Accordingly, evidence was led by the parties and the District Judge has submitted the inquiry report dated September 4, 1991 containing his finding based on that evidence that Suman Behera had died on account of multiple injuries inflicted to him while he was in police custody at the Police Outpost Jeraikela. The correctness of this finding and report of the District Judge, being disputed by the respondents, the matter was examined afresh by us in the light of the objections raised in the inquiry report.

4. The admitted facts are, that Suman Behera was taken in police custody on December 1, 1987 at 8 a.m. and he was found dead the next day on the railway track near the Police Outpost Jeraikela, without being released from custody, and his death was unnatural, caused by multiple injuries sustained by him. The burden is, therefore, clearly on the respondents to explain how Suman Behera sustained those injuries which caused his death. Unless a plausible explanation is given by the respondents which is consistent with their innocence, the obvious inference is that the fatal injuries were inflicted on Suman Behera in police custody resulting in his death, for which the respondents are responsible and liable.

5. To avoid this obvious and logical inference of custodial death, the learned Additional Solicitor General relied on the respondents' defence that Suman Behera had managed to escape from police custody at about 3 a.m. on the night between the 1st and 2nd December, 1987 and it was likely that he was run over by a passing train when he sustained the fatal injuries. The evidence adduced by the respondents is relied on by the learned Additional Solicitor General to support this defence and to contend that the responsibility of the respondents for the safety of Suman Behera came to an end the moment Suman Behera escaped from police custody. The learned Additional Solicitor General, however, rightly does not dispute the liability of the State for payment of compensation in this proceeding for violation of the fundamental right to life under Article 21, in case it is found to be a custodial death. The argument is that the factual foundation for such a liability of the State is absent. Shri M.S. Ganesh, who appeared as amicus curiae for the petitioner, however, contended that the evidence adduced during the inquiry does not support the defence of respondents and there is no reason to reject the finding of the learned District Judge that Suman Behera died in police custody as a result of injuries inflicted on him.

6. The first question is: Whether it is a case of custodial death as alleged by the petitioner? The admitted facts are: Suman Behera was taken in police custody at about 8 a.m. on December 1, 1987 by Sarat Chandra Barik, Asstt. Sub-Inspector of Police, during investigation of an offence of theft in the village and was detained at Police Outpost Jeraikela; Suman Behera and Mahi Sethi, another accused, were handcuffed, tied together and kept in custody at the police station; Suman Behera's mother, the petitioner, and grandmother went to the Police Outpost at about 8 p.m. with food for Suman Behera which he ate and thereafter these women came away while Suman Behera continued to remain in police custody; Police Constable Chhabil Kujur and some other persons were present at the Police Outpost that night; and the dead body of Suman Behera with a handcuff and multiple injuries was found lying on the railway track at Kilometre No. 385/29 between Jeraikela and Bhalulata railway stations on the morning of December 2, 1987. It is significant that there is no cogent independent evidence of any search made by the police to apprehend Suman Behera, if the defence of his escape from police custody be true. On the contrary, after discovery of the dead body on the railway track in the morning by some railwaymen, it was much later in the day that the police reached the spot to take charge of the dead body. This conduct of the concerned police officers is also a significant circumstance to assess credibility of the defence version.

7. Before discussing the other evidence adduced by the parties during the inquiry, reference may be made to the injuries found on the dead body of Suman Behera during post-mortem. These injuries were the following:

> "*External injuries*:
>
> (1) Laceration over with margin of damaged face.
>
> (2) Laceration of size — 3" x 2" over the left temporal region up to bone.
>
> (3) Laceration 2" above mastoid process on the right side of size 1½" x ¼" bone exposed.
>
> (4) Laceration on the forehead left side of size 1½" x ¼" up to bone in the midline on the forehead½" x ¼" bone deep on the left lateral to it, 1" x ¼" bone exposed.
>
> (5) Laceration 1" x ½" on the anterior aspect of middle of left arm, fractured bone protruding.
>
> (6) Laceration 1" x ½" on medial aspect of left thigh 4" above the knee joint.
>
> (7) Laceration½" x ½" x ½" over left knee-joint.
>
> (8) Laceration 1" x ½" x ½" on the medial aspect of right knee-joint.
>
> (9) Laceration 1" x ½" x ½" on the posterior aspect of left leg, 4" below knee-joint.

(10) Laceration 1" x ¼" x ½" on the plantar aspect of 3rd and 4th toe of right side.

(11) Laceration of 1" x ¼" x ½" on the dorsum of left foot.

Injuries on the neck :

(1) Bruises of size 3" x 1" obliquely along with sternocleidomastoid muscle 1" above the clavical left side.

(2) Lateral to this 2" x 1" bruise.

(3) 1" x 1" above the clavical left side.

(4) Posterial aspect of the neck 1" x 1" obliquely placed right to midline.

Right shoulder :

(*a*) Bruise 2" x 2", 1" above the right scapula.

(*b*) Bruise 1" x 1" on the tip of right shoulder.

(*c*) Bruise on the dorsum of right palm 2" x 1".

(*d*) Bruise extenses (sic) surface of forearm left side 4" x 1".

(*e*) Bruise on right elbow 4" x 1".

(*f*) Bruise on the dorsum of left palm 2" x 1".

(*g*) Bruise over left patella 2" x 1".

(*h*) Bruise 1" above left patella 1" x 1".

(*i*) Bruise on the right iliac spine 1" x ½".

(*j*) Bruise over left scapula 4" x 1".

(*k*) Bruise 1" below right scapula 5" x 1".

(*l*) Bruise 3" medial to inferior angle of right scapula 2" x 1".

(*m*) Bruise 2" below left scapula of size 4" x 2".

(*n*) Bruise 2" x 6" below 12th rib left side.

(*o*) Bruise 4" x 2" on the left lumbar region.

(*p*) Bruise on the buttock of left side 3" x 2".

(*q*) On dissection found—

(1) Fracture of skull on right side parietal and occipital bones 6" length.

(2) Fracture of frontal bone below laceration 2" depressed fracture.

(3) Fracture of left temporal bone 2" in length below external injury No. 2 i.e. laceration 2" above left mastoid process.

(4) Membrane ruptured below depressed fracture, brain matter protruding through the membrane.

(5) Intracranial haemorrhage present.

(6) Brain lacerated below external injury No. 3, 1" x ½" x ½".

(7) Bone chips present on temporal surface of both sides.

(8) Fracture of left humerus 3" above elbow.

(9) Fracture of left femur 3" above knee-joint.

(10) Fracture of mandible at the angle mandible both sides.

(11) Fracture of maxilla.

The face was completely damaged, eyeball present, nose, lips, cheeks absent. Maxilla and a portion of mandible absent.
No injury was present on the front side of body trunk. There is rupture and laceration of brain."

8. The doctor deposed that all the injuries were caused by hard and blunt object(s); the injuries on the face and left temporal region were post-mortem while the rest were ante-mortem. The doctor excluded the possibility of the injuries resulting from dragging of the body by a running train and stated that all the ante-mortem injuries could be caused by lathi blows. It was further stated by the doctor that while all the injuries could not be caused in a train accident, it was possible to cause all the injuries by lathi blows. Thus, the medical evidence comprising the testimony of the doctor, who conducted the post-mortem, excludes the possibility of all the injuries to Suman Behera being caused in a train accident while indicating that all of them could result from the merciless beating given to him. The learned Additional Solicitor General placed strong reliance on the written opinion of Dr K.K. Mishra, Professor & Head of the Department of Forensic Medicine, Medical College, Cuttack, given on February 15, 1988 on a reference made to him wherein he stated on the basis of the documents that the injuries found on the dead body of Suman Behera could have been caused by rolling on the railway track in-between the rail and by coming into forceful contact with the projecting part of the moving train/engine. While adding that it did not appear to be a case of suicide, he indicated that there was more likelihood of accidental fall on the railway track followed by the running engine/train. In our view, the opinion of Dr K.K. Mishra, not examined as a witness, is not of much assistance and does not reduce the weight of the testimony of the doctor who conducted the post-mortem and deposed as a witness during the inquiry. The opinion of Dr K.K. Mishra is cryptic, based on conjectures for which there is no basis, and says nothing about the injuries being both ante-mortem and post-mortem. We have no hesitation in reaching this conclusion and preferring the testimony of the doctor who conducted the post-mortem.

9. We may also refer to the report dated December 19, 1988 containing the findings in a joint inquiry conducted by the Executive Magistrate and the Circle Inspector of Police. This report is stated to have been made under Section 176 CrPC and was strongly relied on by the learned Additional Solicitor General as a statutory report relating to the cause of death. In the first place, an inquiry under Section 176 CrPC is contemplated independently by a Magistrate and not jointly with a police officer when the role of the police officers itself is a matter of inquiry. The joint finding recorded is that Suman Behera escaped from police custody at about 3 a.m. on December 2, 1987 and died in a train accident as a result of injuries sustained therein. There was hand-cuff on the hands of the deceased when his body was found on the railway track with rope around it. It is significant that the report dated March 11, 1988 of the

Regional Forensic Science Laboratory (Annexure 'R-8', at p. 108 of the paper-book) mentions that the two cut ends of the two pieces of rope which were sent for examination do not match with each other in respect of physical appearance. This finding about the rope negatives the respondents' suggestion that Suman Behera managed to escape from police custody by chewing off the rope with which he was tied. It is not necessary for us to refer to the other evidence including the oral evidence adduced during the inquiry, from which the learned District Judge reached the conclusion that it is a case of custodial death and Suman Behera died as a result of the injuries inflicted upon him voluntarily while he was in police custody at the Police Outpost Jeraikela. We have reached the same conclusion on a reappraisal of the evidence adduced at the inquiry taking into account the circumstances, which also support that conclusion. This was done in view of the vehemence with which the learned Additional Solicitor General urged that it is not a case of custodial death but of death of Suman Behera caused by injuries sustained by him in a train accident, after he had managed to escape from police custody by chewing off the rope with which he had been tied for being detained at the Police Outpost. On this conclusion, the question now is of the liability of the respondents for compensation to Suman Behera's mother, the petitioner, for Suman Behera's custodial death.

10. In view of the decisions of this Court in *Rudul Sah* v. *State of Bihar, Sebastian M. Hongray* v. *Union of India, Sebastian M. Hongray* v. *Union of India, Bhim Singh* v. *State of J & K, Bhim Singh* v. *State of J & K, Saheli: A Women's Resources Centre* v. *Commissioner of Police, Delhi Police Headquarters* and *State of Maharashtra* v. *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. We shall now refer to the earlier decisions of this Court as well as some other decisions before further discussion of this principle.

11. In *Rudul Sah*[1] it was held that in a petition under Article 32 of the Constitution, this Court can grant compensation for deprivation of a fundamental right. That was a case of violation of the petitioner's right to personal liberty under Article 21 of the Constitution. Chandrachud, CJ.,

dealing with this aspect, stated as under: (SCC pp. 147-48, paras 9 and 10)

> *"It is true 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*. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. *But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right.* The instant case is illustrative of such cases ....
>
> ... The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. 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 to 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."
>
> (emphasis supplied) (SCR pp. 513-14)

12. It does appear from the above extract that even though it was held that compensation could be awarded under Article 32 for contravention of a fundamental right, yet it was also stated that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was actually controversial" and "Article 32 cannot be used

as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes". This observation may tend to raise a doubt that the remedy under Article 32 could be denied "if the claim to compensation was factually controversial" and, therefore, optional, not being a distinct remedy available to the petitioner in addition to the ordinary processes. The later decisions of this Court proceed on the assumption that monetary compensation can be awarded for violation of constitutional rights under Article 32 or Article 226 of the Constitution, but this aspect has not been adverted to. It is, therefore, necessary to clear this doubt and to indicate the precise nature of this remedy which is distinct and in addition to the available ordinary processes, in case of violation of the fundamental rights.

13. Reference may also be made to the other decisions of this Court after *Rudul Sah*. In *Sebastian M. Hongray* v. *Union of India* it was indicated that in a petition for writ of *habeas corpus*, the burden was obviously on the respondents to make good the positive stand of the respondents in response to the notice issued by the court by offering proof of the stand taken, when it is shown that the person detained was last seen alive under the surveillance, control, and command of the detaining authority. In *Sebastian M. Hongray* v. *Union of India (II)* in such a writ petition, exemplary costs were awarded on failure of the detaining authority to produce the missing persons, on the conclusion that they were not alive and had met an unnatural death. The award was made in *Sebastian M. Hongray-(II)* apparently following *Rudul Sah*, but without indicating anything more. In *Bhim Singh* v. *State of J & K*, illegal detention in police custody of the petitioner Bhim Singh was held to constitute violation of his rights under Articles 21 and 22(2) and this Court exercising its power to award compensation under Article 32 directed the State to pay monetary compensation to the petitioner for violation of his constitutional right by way of exemplary costs or otherwise, taking this power to be settled by the decisions in *Rudul Sah* and *Sebastian M. Hongray*. In *Saheli* the State was held liable to pay compensation payable to the mother of the deceased who died as a result of beating and assault by the police. However, the principle indicated therein was that the State is responsible for the tortious acts of its employees. In *State of Maharashtra* v. *Ravikant S. Patil* the award of compensation by the High Court for violation of the fundamental right under Article 21 of an undertrial prisoner, who was handcuffed and taken through the streets in a procession by the police during investigation, was upheld. However, in none of these cases, except *Rudul Sah* anything more was said. In *Saheli* reference was made to the State's liability for tortious acts of its servants without any reference being made to the decision of this Court in *Kasturilal Ralia Ram Jain* v. *State of U.P.* wherein sovereign immunity was upheld in the case of vicarious liability of the State for the tort of its employees. The decision in *Saheli* is, therefore, more in accord with the principle indicated in *Rudul Sah.*

14. In this context, it is sufficient to say that the decision of this Court in *Kasturilal* upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in *Rudul Sah* and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, *Kasturilal* related to value of goods seized and not returned to the owner due to the fault of Government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. *Kasturilal* is, therefore, inapplicable in this context and distinguishable.

15. The decision of Privy Council in *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)* is useful in this context. That case related to Section 6 of the Constitution of Trinidad and Tobago 1962, in the chapter pertaining to human rights and fundamental freedoms, wherein Section 6 provided for an application to the High Court for redress. The question was, whether the provision permitted an order for monetary compensation. The contention of the Attorney General therein, that an order for payment of compensation did not amount to the enforcement of the rights that had been contravened, was expressly rejected. It was held, that an order for payment of compensation, when a right protected had been contravened, is clearly a form of 'redress' which a person is entitled to claim under Section 6, and may well be 'the only practicable form of redress'. Lord Diplock who delivered the majority opinion, at page 679, stated:

> "It was argued on behalf of the Attorney General that Section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in *Jaundoo* v. *Attorney General of Guyana*. Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections' as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the *enforcement* of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (*a*) of Section 6(2), viz. jurisdiction 'to hear and determine any application made by any person in pursuance of sub-section (1) of

this section'. The very wide powers to make orders, issue writs and give directions are ancillary to this."

Lord Diplock further stated at page 680, as under:

"Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. *The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone.*"
(emphasis supplied)

16. Lord Hailsham while dissenting from the majority regarding the liability for compensation in that case, concurred with the majority opinion on this principle and stated at page 687, thus:

"... I am simply saying that, on the view I take, the expression 'redress' in sub-section (1) of Section 6 and the expression 'enforcement' in sub-section (2), 'although capable of embracing damages where damages are available as part of the legal consequences of contravention, do not confer and are not in the context capable of being construed so as to confer a right of damages where they have not hitherto been available, in this case against the State for the judicial errors of a judge."

Thus, on this principle, the view was unanimous, that enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.

17. It follows 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 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*[1] 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.

18. A useful discussion on this topic which brings out the distinction between the remedy in public law based on strict liability for violation of a fundamental right enabling award of compensation, to which the defence of sovereign immunity is inapplicable, and the private law remedy, wherein vicarious liability of the State in tort may arise, is to be found in Ratanlal & Dhirajlal's Law of Torts, 22nd Edition, 1992, by Justice G.P. Singh, at pages 44 to 48.

19. This view finds support from the decisions of this Court in the *Bhagalpur Blinding cases*: *Khatri (II)* v. *State of Bihar* and *Khatri (IV)* v. *State of Bihar* wherein it was said that the court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "to forge new tools and devise new remedies" for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain the necessary facts, for granting the relief, as the available mode of redress, for enforcement of the guaranteed fundamental rights. More recently in *Union Carbide Corpn.* v. *Union of India* Misra, CJ. stated that "we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future ... there is no reason why we should hesitate to evolve such principle of liability ...''. To the same effect are the observations of Venkatachaliah, J. (as he then was), who rendered the leading judgment in the *Bhopal gas case*[13] with regard to the court's power to grant relief.

20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-

nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

21. We may also refer to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as under:

> "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

22. The above discussion indicates the principle on which the court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in *Rudul Sah* and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in *Rudul Sah* and others in that line have to be understood and *Kasturilal* distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son.

23. The question now, is of the quantum of compensation. The deceased Suman Behera was aged about 22 years and had a monthly income between Rs 1200 to Rs 1500. This is the finding based on evidence recorded by the District Judge, and there is no reason to doubt its correctness. In our opinion, a total amount of Rs 1,50,000 would be appropriate as compensation, to be awarded to the petitioner in the present case. We may, however, observe that the award of compensation in this proceeding would be taken into account for adjustment, in the event of any other proceeding taken by the petitioner for recovery of compensation on the same ground, so that the amount to this extent is not recovered by the petitioner twice over. Apart from the fact that such an order is just, it is also in consonance with the statutory recognition of this principle of adjustment provided in Section 357(5) CrPC and Section 141(3) of the Motor Vehicles Act, 1988.

24. Accordingly, we direct the respondent State of Orissa to pay the sum of Rs 1,50,000 to the petitioner and a further sum of Rs 10,000 as costs to be paid to the Supreme Court Legal Aid Committee. The mode of payment of Rs 1,50,000 to the petitioner would be, by making a term deposit of that amount in a scheduled bank in the petitioner's name for a period of three years, during which she would receive only the interest payable thereon, the principal amount being payable to her on expiry of

the term. The Collector of the District will take the necessary steps in this behalf, and report compliance to the Registrar (Judicial) of this Court within three months.

25. We clarify that the award of this compensation, apart from the direction for adjustment of the amount as indicated, will not affect any other liability of the respondents or any other person flowing from the custodial death of petitioner's son Suman Behera. We also expect that the State of Orissa would take the necessary further action in this behalf, to ascertain and fix the responsibility of the individuals responsible for the custodial death of Suman Behera, and also take all available appropriate actions against each of them, including their prosecution for the offence committed thereby.

26. The writ petition is allowed in these terms.

DR ANAND, J. (*concurring*)— The lucid and elaborate judgment recorded by my learned Brother Verma, J. obviates the necessity of noticing facts or reviewing the case-law referred to by him. I would, however, like to record a few observations of my own while concurring with His Lordship's judgment.

28. This Court was bestirred by the unfortunate mother of deceased Suman Behera through a letter dated September 14, 1988, bringing to the notice of the Court the death of her son while in police custody. The letter was treated as a writ petition under Article 32 of the Constitution. As noticed by Brother Verma, J., an inquiry was got conducted by this Court through the District Judge, Sundergarh who, after recording the evidence, submitted his inquiry report containing the finding that the deceased Suman Behera had died on account of multiple injuries inflicted on him while in police custody. Considering, that it was alleged to be a case of custodial death, at the hands of those who are supposed to protect the life and liberty of the citizen, and which if established was enough to lower the flag of civilization to fly half-mast, the report of the

District Judge was scrutinised and analysed by us with the assistance of Mr M.S. Ganesh, appearing amicus curiae for the Supreme Court Legal Aid Committee and Mr Altaf Ahmad, the learned Additional Solicitor General carefully.

29. Verma, J., while dealing with the first question i.e. whether it was a case of custodial death, has referred to the evidence and the circumstances of the case as also the stand taken by the State about the manner in which injuries were caused and has come to the conclusion that the case put up by the police of the alleged escape of Suman Behera from police custody and his sustaining the injuries in a train accident was not acceptable. I respectfully agree. A strenuous effort was made by the

learned Additional Solicitor General by reference to the injuries on the head and the face of the deceased to urge that those injuries could not be possible by the alleged police torture and the finding recorded by the District Judge in his report to the contrary was erroneous. It was urged on behalf of the State that the medical evidence did establish that the injuries had been caused to the deceased by lathi blows but it was asserted that the nature of injuries on the face and left temporal region could not have been caused by the lathis and, therefore, the death had occurred in the manner suggested by the police in a train accident and that it was not caused by the police while the deceased was in their custody. In this connection, it would suffice to notice that the doctor, who conducted the post-mortem examination, excluded the possibility of the injuries to Suman Behera being caused in a train accident. The injuries on the face and the left temporal region were found to be *post-mortem injuries* while the rest were ante-mortem. This aspect of the medical evidence would go to show that after inflicting other injuries, which resulted in the death of Suman Behera, the police with a view to cover up their crime threw the body on the rail-track and the injuries on the face and left temporal region were received by the deceased *after* he had died. This aspect further exposes not only the barbaric attitude of the police but also its crude attempt to fabricate false clues and create false evidence with a view to screen its offence. The falsity of the claim of escape stands also exposed by the report from the Regional Forensic Science Laboratory dated March 11, 1988 (Annexure R-8) which mentions that the two pieces of rope sent for examination to it, did not tally in respect of physical appearance, thereby belying the police case that the deceased escaped from the police custody by chewing the rope. The theory of escape has, thus, been rightly disbelieved and I agree with the view of Brother Verma, J. that the death of Suman Behera was caused while he was in custody of the police by police torture. A custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. It is not our concern at this stage, however, to determine as to which police officer or officers were responsible for the torture and ultimately the death of Suman Behera. That is a matter which shall have to be decided by the competent court. I respectfully agree with the directions given to the State by Brother Verma, J. in this behalf.

30. On basis of the above conclusion, we have now to examine whether to seek the right of redressal under Article 32 of the Constitution, which is without prejudice to any other action with respect to the same matter which may be lawfully available, extends merely to a declaration that there has been contravention and infringement of the guaranteed fundamental rights and rest content at that by relegating the party to seek relief through civil and criminal proceedings or can it go further and grant redress also by the only practicable form of redress — by awarding monetary damages for the infraction of the right to life.

31. It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law. I agree with Brother Verma, J. that the defence of "sovereign immunity" in such cases is not available to the State and in fairness to Mr Altaf Ahmed it may be recorded that he raised no such defence either.

32. Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "*Freedom under the Law*" Lord Denning in his own style warned:

> "No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence.... This is not the task for Parliament ... the

courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country."

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

34. 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 moulds 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 wrongdoer 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 prosecute the offender under the penal law.

35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be

indemnified by and take such action as may be available to it against the wrongdoer in accordance with law — through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with *Rudul Sah* v. *State of Bihar*[1] granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental right of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J.

36. In the facts of the present case on the findings already recorded, the mode of redress which commends appropriate is to make an order of monetary amends in favour of the petitioner for the custodial death of her son by ordering payment of compensation by way of exemplary damages. For the reasons recorded by Brother Verma, J., I agree that the State of Orissa should pay a sum of Rs 1,50,000 to the petitioner and a sum of Rs 10,000 by way of costs to the Supreme Court Legal Aid Committee. I concur with the view expressed by Brother Verma, J. and the directions given by him in the judgment in all respects.

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