

IN THE HIGH COURT OF DELHI

LPA No. 157 of 1998

Decided On: 27.11.2000

Appellants: **Government of NCT of Delhi**

Vs.

Respondent: **Nasiruddin (Father of deceased Mohd. Yasin)**

Nasiruddin Summary

Letter Patent Appeal - Custodial death--State directed to pay Rs. 2.5 Lacs--Appeal--Liability of State to pay discussed--Rule of Law requires that the wrongs should not remain unredressed--Precious right guaranteed by Article 21 cannot be denied to anyone--Custodial death is one of the worst crimes in a civilized society--Father of deceased entitled for compensation--Appeal disposed of accordingly.

Quantum of compensation--Custodial death--Award made--Appeal--Object of awarding compensation--Compensation cannot renew a physique frame that has been battered and shattered--It should be equal in value although not alike in kind--Deceased was of 21 years leaving behind his parents, one brother and two sisters--Rs. 2 lacs an appropriate amount--Appeal disposed of accordingly.

Hon'ble Judges:

Arijit Pasayat, C.J. and D.K. Jain, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Mukta Gupta, Adv.

For Respondents/Defendant: Sabir Hussain, Adv.

Subject: Criminal

Subject: Constitution

Catch Words:

Accused, Act or Omission, Arrest, Assault, Assessment of Damage, Civil Liberties, Compensation, Compensation for Violation, Confession, Constitution of India, Constitutional Remedy, Contempt, Contravention, Contributory Negligence, Court's Power, Custodial Death, Detaining Authority, Detention, Detenu, Due Compliance, Due

Process of Law, Duration, Emergency, Enforcement of Right, Enforcement of the Right, Exemplary Cost, Fundamental Freedom, Fundamental Right, Government Servant, Guarantee, Habeas Corpus, Human Right, Illegal Detention, Immunity, Issue Writ, Jurisdiction, Liberty, Life and Personal Liberty, Money Claim, Negligence, Onus of Proof, Payment of Compensation, Personal Liberty, Post Mortem Report, Post-Mortem Report, Privy Council, Procedure established by Law, Public Servant, Reasonable Restriction, Remedies, Remedy, Remedy for Enforcement, Res Ipsa Loquitur, Right to Compensation, Right to Life, Right to Personal Liberty, Rule of Evidence, Rule of Law, Sovereign, Sovereign Immunity, Vicarious Liability, Writ of Habeas Corpus

Acts/Rules/Orders:

Constitution of India - Article 21

Cases Referred:

Rudul Shah v. State of Bihar, (1983) 4 SCC 141; Sebastian M. Hongray v. Union of India, (1984) 1 SCC 339, 82; Bhim Singh v. State of J&K, (1984) Supp SCC 504, (1985) 4 SCC 677; A Women's Resources Centre v. Commissioner of Police, Delhi Police Headquarters, (1990) 1 SCC 422; State of Maharashtra v. Ravikant S. Patil, (1991) 2 SCC 373; Smt. Nilabati Behera v. State of Orissa and Ors., (1993) 2 SCC 746; Kasturi Lal Ralia Ram Jain v. State of U.P., AIR 1965 SC 1039; Maharaj v. Attorney-General of Trinidad and Tobago, (No. 2), (1978) 2 All ER 670; Bhagalpur Blinding Cases: Khatri (II) v. State Bihar, (1981) 1 SCC 627; Khatri (IV) v. State of Bihar, (1981) 2 SCC 493; Union Carbide Corporation v. Union of India, (1991) 4 SCC 584; People's Union for Civil Liberties v. Union of India Anr., 1997 (1) SCALE 706; D.K. Basil v. State of West Bengal, 1996 (9) SCALE 298; Lord Ruttan J in Ball v. Kraft, 1967 ACJ 230 SC; West v. Shephard, (1964) AC 326; Charter House Credit v. Tolly, (1963) 2 QB 683

JUDGMENT

Arijit Pasayat, C.J.

1. This appeal under Clause 10 of Letters Patent is directed against the judgment and order dated 16.12.1997 passed by learned Single Judge in Writ Petition (Criminal) No. 585 of 1996 directing the State to pay compensation of Rs. 2.5 lacs to the respondent for the custodial death of his son Mohd. Yasin (hereinafter referred to as the 'deceased'). Grievance of the appellant is that the conclusions about custodial death are erroneous, contrary to materials and facts on record and, in any event, the compensation as directed to be paid is extremely high and unreasonable.

2. Petition under Article 226 of the Constitution of India, 1950 (in short, 'the Constitution') was filed by the respondent with the following prayers:-

(i) to direct the respondents to produce the relevant documents relating to the case and to register the case against the accused persons,

- (ii) to direct the respondents to produce the accused persons before this Hon'ble Court,
- (iii) to grant compensation to the parents of the deceased,
- (iv) to pass such other or further orders as deemed fit and appropriate on the facts and in the interest of justice.

According to the respondent, his son was picked up by police officials on 15.04.1996 and was lodged in Tihar Jail. He died while in custody on 13.07.1996 and 15 injuries were noticed on his body as per post-mortem report. The doctor, who performed the post mortem opined that injuries were ante mortem. In order to have the second opinion about the cause of the death, a Board of doctors was appointed by the Government of National Capital Territory (in short, 'NCT') of Delhi. According to its report, though most of the injuries could have been self-inflicted, it was not so in the case of injury Nos. 11 and 13 to 15. Accepting the writ petitioner's plea that the death was custodial in nature, the State was held to be liable to pay compensation and accordingly compensation was fixed at Rs. 2.5 lacs to be given by the State to the writ petitioner. It was further directed that responsibility should be fixed on the persons, responsible for the beatings administered to the deceased leading to his death and for taking action against those erring official/officers. Both the directions are assailed in the present appeal.

3. Learned counsel for the State submitted that the factual position, brought on record, clearly indicates that the deceased was a criminal and very violent person. He was given treatment at the jail Hospital and other Hospitals for psychiatric disorder. It is on record that he assaulted co-prisoners and officials violently. There is no material to show that the deceased was beaten by any person, which resulted in injuries. Therefore, the conclusions of learned Single Judge that the death was custodial are erroneous. In any event, it is stated that the compensation as fixed is arbitrary. Learned counsel for the respondent, on the other hand, submitted that learned Single Judge has analysed the factual position in great detail and has held that compensation was payable. Considering the age of the deceased, the compensation as fixed is reasonable.

4. In order to appreciate rival submissions, it is necessary to take note of few facts, which are referred in great detail by learned Single Judge. As per post-mortem report, 15 injuries were there, which are as follows-

1. Crusted abrasions over knuckles of all four fingers of (R) hand, distal portion of proximal phalanx.

Little finger - on dorsal aspect 0.4 cm x 0.3 cm medial side 2.0 cms x 0.5 cm.

Ring finger	0.5 cm x 0.5 cm }	all of about 2-3 days duration
Middle finger	0.6. cm x 0.6 cm }	
Index finger	0.4 cm x 0.4 cm }	

2. Superficial wound o peeling of skin, imposing pinkish granulation tissue seen over tip of (L) Great toe, 1.8 cm x 0.5 cm (about 5 to 7 days old).

3. Abrasion 3.0 cm x 1.00 cm, oval shaped over forehead in middle portion 2 cms above nasal bridge (2-3 days old).

4. Abrasion over forehead near hair line 2.5 cms x 0.5 cm (about 2-3 days).

5. Bruise bluish green over (L) frontal eminence 2 cms x 0.5 cm of about 2-3 days.

6. Bruise below (L) eye 1/2" x 1/2" about 2 days old.

7. Scab fallen linear abrasion, transversely placed across (L) cubital fossa ant, 6cms x 0.5 cm.

8. Scab fallen oblique abrasion 5 cms x 1.0 cm over (R) cubital fossa and ant. lat.

9. Abrasion 1/4" x 1/4" sen over post. lat. Aspect of (R) elbow joint, surrounded by erythematous zone of 1.0 cm x 0.5 cm.

Bruise 1.5 cms x 0.5 cm over (R) forearm 2" below elbow joint part lat. aspect;

Both of about 2-3 days duration.

10. Abrasion just below dorsum of left (wrist) 1/2" x 1/4" o scab formation -about 2-3 days old.

11. Bruise o peeling of skin over an area 3.00 cms x 1.5 cms over (L) thigh post. lat. aspect upper 3rd surrounded by indurated area total of 4.5 cms x 4.00 cms (including peeled area) of 5-7 days old.

12. Two parallel linear abrasions o scab formation, obliquely placed over (L) iliac fossa region 3.2 cms long and placed 2.0 cms apart, intervening skin normal in colour (about 2 - 3 days old).

13. Two parallel linear abrasions o scab formation obliquely placed over back of chest (L) side infrascapular region 6 cms long, placed 2.0 cms apart, intervening area light pink of about 2-3 days duration.

14. Fine linear scratch over (L) limber region vertically placed 5.0 cms long, o scab formation, 2-3 days old.

15. Faint bruise with two parallel light pink border seen, obliquely placed over (R) infrascapular region 5 cms long and placed 1.5 cms apart (about 2-3 days old).

There is no other mark of any external injury/violence seen on the body including external genetalia.

5. As noted above, in order to have second-opinion about the cause of the death, a Board of doctors was appointed. The said Board comprised of Dr. S.K. Aggarwal, Head of Department, Medicines, Dr. K. Uma Chaturvedi, Head of Department, Pathology and Dr. P.C. Dikshit, Head of Department Forensic Science. The Board submitted its report on 27.10.1997. Relevant details are as follows:-"Terms of the references

a) To give second opinion about the cause of death of Shri Yasin.

b) to opine whether the injuries could be self inflicted. Source material

The photocopies of the records made available to committee. No interviews or statements from any quarter were recorded.

Analysis of the records

Analysis of the records made available to the committee revealed the following:-

1) Shri Yasin was having some psychotic problem for which he was treated at AIIMS for the past two years as quoted by the visiting psychiatrist from IHBAS.

2) On 8.7.96, Shri Yasin is reported to have stated to the Doctor on duty in Tihar Jail that he was beaten. Physical examination has revealed that he was febrile and agitated. However, there is no mention of any external injury.

Ever since, his mental status kept deteriorating in spite of treatment in the Jail and in DDU Hospital and finally he died on 13.7.96 at 11.30 p.m. in RML Hospital.

3) The recorded statements of the doctors at Tihar Jail do not mention any signs of external injury.

4) Medical records from DDU Hospital reveal that Shri Yasin was admitted to DDU Hospital, on 13.7.96 at 1.00 p.m. On admission, he was not conscious, nor responding to painful stimuli, X-ray chest revealed right pleural effusion. C.S.F, was within normal limits. B.P. was 80/60. Provisional diagnosis of? head injury? unknown poisoning, was made and C.T. scan was advised for which he was referred to RML Hospital.

Records from RML Hospital revealed that he was received at Surgical emergency in gasping, pulseless and B.P. less state. Resuscitation was attempted. However, patient died at 11.20 p.m. C.T. scanning was not done.

5) Post-Mortem report clearly specifies a number of ante-mortem external injuries on the body of Shri Yasin, of 2-7 days duration.

6) S.D.O. has also mentioned of the above external injuries.

7) While ante-mortem x-ray chest was reported to have right pleural effusion, a major finding on post mortem was collapse of the left lung without any underlying disease. Also, free blood (50-100 ml) was noted on diaphragmatic surface of left lung but no internal corresponding injury was recorded to account for these findings. Comments on referred queries:-

a) With the date made available to the Committee, it is difficult to make an ante-mortem diagnosis of the cause of death. Although he had taken treatment for psychiatric illness for two years it does not seem to be the immediate cause of death.

Collapse of one lung, which is otherwise healthy, in the presence of normal opposite lung, is unlikely to cause asphyxia and death. A rare possibility of acute tension pneumothorax causing unilateral collapse of lung cannot be totally ruled out. Pneumothorax may not be detectable after 62 hours of death when post-mortem was conducted, Moreover, the ante-mortem x-ray chest had not reported this finding and on the contrary right pleural effusion has been reported.

Etiology of pneumothorax, if at all it was there, could be spontaneous, or post-traumatic due to external injuries.

b) considering the size, situation and nature of injuries described in the post-mortem report, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 12, and possibility of self-infliction cannot be ruled out. But in case of injuries Nos. 11, 13, 14 and 15 it is very unlikely to be self-inflicted.

No comments can be given regarding the age of injuries as they are inadequately described in the post mortem report.

6. Great emphasis was laid by learned counsel for the appellant to show that the deceased was a very violent person and even the medical reports show his behaviour between 8th July, 1996 to 13th July, 1996 to be highly abnormal and violent in nature and there was great difficulty even to control the deceased when he turned violent. The injury Nos. 11 and 13 to 15 are of such nature that they are not possible by beating. It may be that these were sustained while efforts were made to control him when he became violent. The Board, which examined the matter, ruled out the possibility of death due to psychiatric illness. It was further noticed, as indicated above, that the possibility of acute tension pneumothorax causing unilateral collapse of the lung cannot be totally ruled out and etiology that pneumothorax, if at all it was there, could be spontaneous or post traumatic due to external injury. This injury, as per the post-mortem report, corresponds to injury No. 13 and it was accepted to be non-self-inflicted one.

Emphasis has also been laid by learned counsel for the appellant on the medical report relating to treatment between 8th July, 1996 to 13th July, 1996. We noticed one peculiar fact that there is no reference to any of the injuries, which were detected at the time of post-mortem. It was tried to be explained by learned counsel for the appellant that the physical and mental condition of the deceased was such that it was not even possible to

examine him thoroughly and, therefore, the external injuries may not have been noticed. According to her, the possibility of deceased having sustained the injuries when there was an attempt to control him cannot be ruled out and this a more probable cause. We find no substance in this plea. It is just not possible that while the deceased was being examined by the doctors during the period from 8th to 13th July, 1996, none of them noticed any external injury on his body which easily could have been noticed, particularly considering the nature of the injuries and the places where they were noticed at the time of post-mortem. It was also submitted by learned counsel for the appellant that the deceased was involved in large number of criminal cases and as such was a violent person and if injuries were sustained by him while attempt was being made to control him that would not make the State liable for any compensation. We do not find any substance in this plea though, as a matter of fact, we have noticed that a large number of cases were registered against the deceased. That cannot be a ground for his being assaulted, which resulted in injuries and subsequently death. It was also pleaded that in a case, which involves factual disputes, a proceeding under Article 226 of the Constitution is not maintainable.

7. In view of the decisions of Apex Court in *Rudul Shah v. State of Bihar*, (1983) 4 SCC 141, *Sebastian M. Hongray v. Union of India*, (1984) 1 SCC 339, *Sebastian M. Hongray v. Union of India*, (1984) 3 SCC 82, *Bhim Singh v. State of J&K*, (1984) Supp SCC 504, *Bhim Singh v. State of J&K* (1985) 4 SCC 677, *Saheli: A Women's Resources Centre v. Commissioner of Police, Delhi Police Headquarters*, (1990) 1 SCC 422 and *State of Maharashtra v. Ravikant S. Patil*, (1991) 2 SCC 373, the liability of the State in the present case to pay the compensation cannot be doubted. 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 any action on tort has been spelt out by the Apex Court. It may be mentioned straightaway that award of compensation in a proceeding 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 distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.

8. In *Rudul Shah's* case (*supra*), it was held that in a petition under Article 32 of the Constitution, the Apex 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, C.J.* 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 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 of 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 civilization is not to perish in this country as it has perished in some others two 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". SCR pp 513 14)"

9. 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 the Apex 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 was, therefore, felt 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 (*Smt. Nilabati Behera v. State of Orissa and Ors.*, (1993) 2 SCC 746).

10. Reference may also be made to the other decisions of the Apex Court after *Rudul Shah*. In *Sebastian M. Hongray's* case (*supra*), 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 the second *Sebastain M. Hongray's* case referred supra 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 said award was made apparently following *Rudul Sah*, but without indicating anything more. In *Bhim Singh's* case (supra), 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 the Apex 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 the power to be settled by the decisions in *Rudul Sah* and *Sebastian M. Hongray* cases (supra). In *Saheli's* case (supra) 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 tortuous acts of its employees. In *Ravikant S. Patil's* case (supra), the award of compensation by the High Court for violation of the Fundamental right under Article 21 of the under-trial 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's* case, anything more was said. In *Saheli's* case, reference was made to the State's liability for tortuous acts of its servants without any reference being made to the decision in *Kasturi Lal Ralia Ram Jain v. State of U.P.*, AIR 1965 SC 1039, wherein sovereign immunity was upheld in the case of vicarious liability of the State for the tort of its employees. The decision in *Saheli's* case was, in the circumstances, was held to be in accord with the principle indicated in *Rudul Sah*.

11. Decision in *Kasturilal's* case (supra) upholding the State's plea of sovereign immunity for tortuous 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 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's* case 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.

12. The decision of Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago*, (No. 2) (1978) 2 All ER 670 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 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."

13. 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 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.

14. 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's case (supra) 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.

15. 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.

16. This view finds support from the decisions of the Apex Court in the Bhagalpur Blinding cases: Khatri (II) v. State Bihar, (1981) 1 SCC 627 and Khatri (IV) v. State of Bihar, (1981) 2 SCC 493 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. In Union Carbide Corporation v. Union of India, (1991) 4 SCC 584, it was held 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.....(per Mishra, C.J.)". To the same effect are the observations of Venkatchaliah, J. (as his Lordship, then was), who rendered the leading judgment in the Bhopal Gas case with regard to the Court's power to grant relief.

17. We have made copious reference to the decision of Smt. Nilabati Behera v. State of Orissa and Ors., (1993) 2 SCC 746 above and have in fact borrowed the conclusions from the said case.

18. The position was again reiterated in great detail by the Apex Court in *People's Union for Civil Liberties v. Union of India Anr.*, 1997 (1) SCALE 706 and in *D.K. Basil v. State of West Bengal*, 1996 (9) SCALE 298. In paragraph 56 of the judgment, it was noticed as follows: -

"Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and some time perhaps the only suitable remedy for redressal of the established infringement of the fundamental right of life of a citizen by the public servants and the State is victoriously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damage which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizens, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

19. Custodial death is perhaps one of the worst crimes in a civilized society governed by the Rules of Law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. Court 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 civilized 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? The 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, under trials, detenus and other prisoners in custody, except according to the procedure established by law placing such reasonable restrictions as are permitted by law.

20. With reference to quantum of compensation awarded in several decisions of the Apex Court, e.g. Rs. 35,000/- in *Rudul Sah's case*, Rs. 75,000/- in *Saheli's case*, Rs. 1,50,000/-

in Smt. Nelabati Behera's case (where age of deceased was 22 years), it is submitted that quantum fixed in the case in hand is high. Fixing of compensation is not an easy task. The logic for payment of compensation has to be kept in view while fixing compensation. The Rule of Law requires that the wrongs should not remain un-redressed. All the individuals or persons committing wrongs should be liable in an action for damages for reach of civil law or for criminal punishment. Law of torts is founded on the principle that every injury must have a remedy. 'Compensation' means anything given to make things equivalent, a thing given or to make amends for loss, recompense, remuneration or pay; it need not, therefore, necessarily be in terms of money, because law may specify principles on which and manner in which compensation is to be determined as given. Compensation is an act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss; or be made whole in respect of his injury; something given or obtained as equivalent, rendering of equivalent given for property taken or for an injury done to another, a recompense in value, a recompense given for a thing received, a recompense for whole injury suffered; remuneration or satisfaction for injury or damage or every description. The expression 'compensation' is not ordinarily used as an equivalent to 'damage' although compensation may often have to be measured by the same rule as damages in an action for a breach. The term 'compensation' as pointed out in the Oxford Dictionary signifies that which is given in recompense, an equivalent rendered, 'damages' on the other hand constitute the sum of money, claimed or adjudged to be paid in compensation for loss or injury sustained. 'Compensation' is a return for a loss or damages sustained. Justice requires that it should be equal in value, although not alike in kind, 'Amends' is return for something that a faulty in ourselves or towards others. 'Satisfaction' is that which satisfies the individual requiring it, is given for personal injuries, and may be made either by a return or otherwise, according to disposition of the person to be satisfied. 'Recompense' is a voluntary return for a voluntary service. It is made in a generous feeling and derives its value not so much from the magnitude of service or return, as from intention of the parties towards each other, and it is received not so much as a matter of right as of courtesy. 'Remuneration' is not Voluntary as recompense, but it is equally indefinite, being estimated rather according to condition of the person and dignity of service than its positive worth. 'Requital' is the return of a kindness, the making it is an act of gratitude. 'Reward' may be bad return when it is inadequate to the merits of the person. In cases of assessment of damages, pure mathematics cannot be relied on exclusively to arrive at a reasonable estimate of just compensation for much pertains to the realms of hypothesis, and in that region arithmetic is a good servant but a bad master and therefore, an award should be of a round sum rather than one actually computed. (Per Lord Ruttan J in Ball v. Kraft, 1967 ACJ 230 SC of British Columbia Canada). The following broad principles govern the grant of damages:-

- (i) There should not be any negligence on the part of the claimant himself.
- (ii) There should not be any improper conduct on the part of the claimant himself.

(iii) The claimant should have taken all the reasonable action to maintain the loss on injury sustained by him.

(iv) The acts of the claimant should be lawful, just and reasonable. (v) The amount of damages should not exceed the loss sustained by him, and damages may be minimized if own conduct has resulted contributory negligence, or has rendered some of the damages too remote or has constituted a failure to mitigate the damages, either by not taking such steps to reduce the original loss or to avert further loss.

21. It is true that perfect compensation is hardly possible and money cannot renew a physique frame that has been battered and shattered, as stated by Lord Morris in *West v. Shephard* : (1964) AC 326. Justice requires that it should be equal in value, although not alike in kind. Object of providing compensation is to place claimant as far as possible in the same position financially, as he was before accident. Broadly speaking, in the case of death basis of compensation is loss of pecuniary benefits to the dependants of the deceased which includes pecuniary loss, expenses, etc. and loss to the estate. Object is to mitigate hardship that has been caused to the legal representative due to sudden demise of the deceased in the accident. Compensation awarded should not be inadequate and should neither be unreasonable, excessive, nor deficient. There can be no exact uniform rule for measuring the damage. It cannot be arrived at by precise mathematical calculation, but amount recoverable depends on broad facts and circumstances of each case. It should neither be punitive against whom claim is decreed nor it should be a source of profit of the, person in whose favour it is awarded. Upjohn L.J. in *Charter House Credit v. Tolly*, (1963) 2 QB 683 remarked, "the assessment of damages has never been an exact science, it is essentially practical".

22. It is pleaded by the opposite parties that there was no negligence involved to warrant grant of compensation. The doctrine of *res ipsa loquitur* would seem to apply to the facts of the case. It is explained in very illustrative passage in *Clerk and Lindsell on Torts* (Sixteenth Edition) pages 568-569, which reads as follows:-

"Doctrine of *res ipsa loquitur*. The onus of proof, which lies on a party alleging negligence is, as pointed, out, that he should establish his case by preponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain case for him to reply on the mere fact that something happened as affording *prima facie* evidence of want of due care on the other's part; '*res ipsa loquitur* is a principle which helps him to do so'. In effect, therefore, reliance on it is a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by Erle, C.J. "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

It is not more than a rule of evidence and states no principle of law. "This convenient and succinct formula", said Morris L.J., "possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. "It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission producing the result. The Court hears only the plaintiff's side of the story, and if this makes it more probable than not that the occurrence was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to rebut that probability. It is not necessary for *res ipsa loquitur* to be specifically pleaded."

Reference may be made to another passage from the same book at page 723 which reads as follows:-

"Liability to children, an occupier must be prepared for children to be less careful than adults. Something which would not be a danger to an adult may very well be one to a child, and a warning sufficient for an adult may be insufficient for a child. In *Moloney v. Lambeth London Borough Council* an occupier was held liable to a four years old boy who fell through the bare of a balustrade. If a person the size of the plaintiff lost his balance he was liable to go through the gap. The staircase did not comply with the occupier's duty of care to a child of the age. But in *Ward v. Nertfordshire Co.*, it was held there was no liability to a child aged eight who fell against a long standing brick and flint wall in a school's playground. The wall was not inherently dangerous and the presence of a supervisor would not have prevented the accident."

23. In the aforesaid ground, there can be no doubt in view of background facts highlighted above about the State's liability to pay the compensation. The residual question is whether the quantum as fixed is high. The deceased was of about 21 years. To our query, learned counsel for the respondent, on ascertaining from the respondent who was present in the Court, stated that his age is presently about 70 years and his family presently consists of himself, his wife, a son and two daughters. Taking into account the decision of the Apex Court in the matter of fixation of compensation under Motor Vehicles Statutes, and the cases noted above, and also the fact that loss dependencies, if any, is that of parents and their age, the compensation is fixed at Rs. 2 lacs. Pursuant to the order passed by this Court, a sum of Rs. 1,25,000/- has been paid to the respondent. The amount, pursuant to the direction given by learned Single Judge, has been deposited in the Registry of this Court, as noted by the order dated 28.5.1998. In addition to Rs. 1,25,000/- already paid, Rs. 75,000/- is further payable in terms of our order. The same shall be released by the Registry from the amount deposited along with accrued interest, if any, thereon to the respondent. Balance amount be returned to the State.

The appeal is accordingly disposed of.