

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 08.06.2023

Pronounced on:16.06.2023

OWP No.718/2015

MST. JANA & OTHERS

... PETITIONER(S)

*Through: - Mr. Z. A. Qureshi, Sr. Adv. with
Ms. Raziya Amin, Advocate.*

Vs.

STATE OF J&K & another

...RESPONDENT(S)

*Through: - Mr. Mohsin S. Qadiri, Sr. AAG
with Ms. Maha Majeed, Advocate.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioners have sought compensation from the respondents on account of custodial death of their kin, namely, Mohammad Ismail Shah.

2) According to the petitioners, who happen to be the legal heirs of deceased Mohammad Ismail Shah, the deceased was lodged in Central Jail, Srinagar, as an undertrial in case FIR No.174/2009 for offences under Section 302, 109 RPC of Police Station, Kulgam and in case of FIR No.169/2009 of Police Station, Qazigund. While undergoing custody in the jail, the deceased was attacked by co-prisoner, namely, Ghulam Hassan Malik, as a result of which the

deceased received fatal injuries and he died in Central Jail, Srinagar. FIR No.16/2013 for offence under Section 302 RPC was registered with Police Station, Rainawari, and investigation of the case was conducted by the police.

3) It seems that the petitioners had to file a writ petition bearing OWP No.647/2013 when the investigation was not taken to its logical conclusion. The said writ petition was disposed of by this Court on 22.05.2013 with a direction to the investigating agency to complete the investigation. Ultimately, the challan was filed against Ghulam Hassan Malik before learned Sessions Judge, Srinagar, on 29.07.2013, which is stated to be pending.

4) It has been contended by the petitioners that the deceased while in Central Jail, Srinagar, was under custody and protection of State and its functionaries and, as such, they were under a legal obligation to protect his life. It has been submitted that the State and its functionaries have failed to discharge their legal duty which resulted in murder of the deceased in the jail premises itself. According to the petitioners, they have been deprived of the company and affection of their kin due to his untimely death and, as such, they are entitled to recover compensation from the respondents.

5) The respondents have filed their reply to the writ petition, in which they have submitted that the deceased was lodged as an undertrial in Central Jail, Srinagar, on 16.09.2009 in connection with case FIR 174/2009 of Police Station, Kulgam and FIR No.169/2009 of

Police Station, Qazigund for offences under Section 302, 109, 34 RPC. It has been further submitted that the deceased was facing trial before learned Sessions Judge, Kulgam, and was also facing trial in FIR No.32/2008 of Police Station, Chadoora, for offences under Section 451, 454, 380, 420 and 411 of RPC before Judicial Magistrate, 1st Class, Chadoora. The respondents have submitted that on 06.04.2013_at about 7.00 AM, when all the jail inmates were in sound sleep, the deceased was attacked with a stone, while he was asleep, by another prisoner, namely, Ghulam Hassan Malik, who was also lodged in the jail in connection with case FIR No.235/2008 for offence under Section 302 RPC of Police Station, Shopian. The deceased was immediately shifted to Government JLNH Hospital, Rainawari where he was given adequate treatment but he could not survive and died in late hours of 06.04.2013. It has been submitted that postmortem of the deceased was conducted and FIR No.16/2013 for offence under Section 302 RPC was registered with Police Station, Rainawari. The challan of the case is stated to be pending before the learned Sessions Judge, Srinagar.

6) The respondents have submitted that all the measures regarding safe custody of the prisoners were taken and the jail inmates were not allowed to keep any prohibited article in their possession. It has also been further submitted that jail inmates were housed in barracks which were being regularly searched. It has also been submitted that the watch and ward staff deployed inside the jail always remains vigilant and they discharge their duties in terms of the provisions of

the Jail Manual. However, it has been submitted that the jail buildings/barracks are old structured, as a result of which Ghulam Hassan Malik managed to remove a stone from the wall with which he attacked the deceased.

7) I have heard learned counsel for the parties and perused the pleadings.

8) So far as the factual aspects of the case are concerned, the same are not in dispute. It is an admitted case of the parties that the deceased was lodged in Central Jail, Srinagar, as an undertrial prisoner. It is also admitted case of the parties that while being lodged inside the jail, the deceased was attacked by a co-prisoner, which resulted in his death. While the petitioners claim that it was legal duty of the respondents to ensure safety and security of the deceased prisoner, the respondents claim that every possible measure was taken to ensure the safety and security of the prisoners but still then the unfortunate incident took place for which they cannot be held responsible.

9) From the material on record, it is clear that when the deceased was in custody, his homicidal death took place when he was attacked by co-prisoner. Thus, his death can safely be termed as 'custodial death'. It is true that the respondents have launched prosecution against the co-prisoner for having caused death of the deceased but that does not absolve them of their responsibility to ensure the safety of the deceased who was lodged in the jail at the relevant time.

10) It has been contended by the respondents that all safety measures in accordance with the provisions of the Jail Manual were taken by them but in spite of this, the unfortunate incident took place and, therefore, it cannot be stated that the State and its functionaries have been negligent.

11) In the instant case, the attack upon the deceased has taken place at 7 AM in the morning. Had the watch and ward staff of the jail been vigilant, this incident could have been avoided as the incident has taken place in the morning and not in the dead of night. The respondents have themselves admitted that jail building is very old and the co-prisoner managed to take out a stone from the wall of the jail which he used as a weapon of attack upon the deceased. The fact that the respondent State has failed to properly manage the jail barracks and allowed condition of the same to deteriorate to such a level that a co-prisoner was able to take out a stone/brick from the wall, shows clear negligence and callousness on the part of the respondents. This negligence and callousness on the part of respondents has resulted in death of the deceased inside the jail. The jail authorities have, therefore, failed to ensure safety and security of the unfortunate undertrial prisoner. Therefore, respondents cannot escape their responsibility for the custodial death of the deceased.

12) The only question, in the facts and circumstances of the case, that arises for consideration in this writ petition is as to whether the petitioners are entitled to compensation for the death of their kin. In

this regard, it would be apt to refer to some case law dealing with custodial death and compensation.

13) The Supreme Court in the case of **Saheli vs. Commissioner of Police**, (1990) 1 SCC 422, observed as under:

10. It is now apparent from the report dated December 5, 1987 of the Inspector of the Crime Branch, Delhi as well as the counter-affidavit of the Deputy Commissioner of Police, Delhi on behalf of the Commissioner of Police, Delhi and also from the fact that the prosecution has been launched in connection with the death of Naresh, son of Kamlesh Kumari showing that Naresh was done to death on account of the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency. The mother of the child, Kamlesh Kumari, in our considered opinion, is so entitled to get compensation for the death of her son from respondent 2, Delhi Administration.

11. An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held hereinbefore that the son of Kamlesh Kumari aged 9 years died due to beating and assault by the SHO, Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. Respondent 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the SHO of Anand Parbat Police Station, Shri Lal Singh.

14) In **Smt. Nilabati Behera alias Behera alias Lalita Behera vs. State of Orissa**, AIR 1993 SC 1960, the Supreme Court made the following observations on the point of custodial death:

“16. 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 Shah 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.

33. 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 wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and persecute the offender under the penal law. 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.

15) In **Meena Singh vs. State of Bihar**, 2001 Cr. L. J. 3573, Patna High Court awarded compensation to the next of kin of the victim who was attacked and killed by co-prisoners.

16) The High Court of Punjab & Haryana in the case of **Amandeep Singh vs. State of Punjab**, MANU/PH/2868/2012, awarded compensation to the next of kin of the deceased who was killed by a co-prisoner.

17) The Supreme Court in the case of in **Re-Inhuman Conditions in 1382 Prisons**, (2017) 10 SCC 658, discussed the need to compensate in custodial death cases in the following words:

55. Over the last several years, there have been discussions on the rights of victims and one of the rights of a victim of crime is to obtain compensation. Schemes for victim compensation have been framed by almost every State and that is a wholesome development. But it is important for the Central Government and the State Governments to realise that persons who suffer an unnatural death in a prison are also victims—sometimes of a crime and sometimes of negligence and apathy or both. There is no reason at all to exclude their next of kin from receiving compensation only because the victim of an unnatural death is a criminal. Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison

custody, that person could nevertheless be a victim of an unnatural death. Hence, the need to compensate the next of kin.

18) A Division Bench of the High Court of Chhattisgarh in the case of **Saroj Shrivastava vs. State of Chhattisgarh and Ors.** reported in MANU/CG/0110/2018, has, after taking note of the aforesaid judgments, observed as under:

“21. The above quoted judgements make it clear that for the violation of fundamental rights of a citizen by the State or its servants, in the purported exercise of their powers, the affected citizen can resort to the remedy in public law by taking recourse to Article 226 of the Constitution of India. It further makes it clear that 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. Thus, it is settled law that compensation can be awarded for violation of fundamental rights in public law domain.

22. Above being the position of fact and law, we have no hesitation in holding that the petitioner, who is widow of the deceased detenu, is entitled to compensation for wrongful loss of her husband and the State being the employer of the employees on account of whose negligence the death of deceased took place, is liable to pay such compensation to the petitioner.

19) From the foregoing analysis of law on the subject, it is clear that even though the deceased was an undertrial in a murder case, the respondents were not absolved of their liability to ensure his safety and security in the jail. A prisoner cannot be deprived of his constitutional rights except in accordance with law. Therefore, the deceased in the instant case despite being an undertrial prisoner in a murder case was entitled to protection by the jail authorities. Since his

killing took place while he was in jail, he was deprived of his life in contravention of the law. His untimely death has deprived the petitioners, who happen to be the widow, sons and daughters of the deceased, of his love and affection as also his company, as such, they are entitled to compensation from the respondents whose negligence has resulted in his untimely death.

20) Having regard to the age of the deceased, who, as per the postmortem report, was 48 years old at the relevant time, and keeping in view the fact that all the children of the deceased are major, ends of justice would be met if an amount of Rs.5.00 lacs is awarded as compensation in favour of the petitioners to be paid by the respondents.

21) Accordingly, the respondents are directed to pay a compensation of Rs.5.00 lacs (rupees five lacs) to the petitioners within a period of three months from the date of announcement of this judgment and in case the amount of compensation is not paid to the petitioners within the aforesaid period, it shall carry interest @ 6% per annum from the date of this judgment. The amount of compensation shall be paid to the petitioners in equal shares.

**(SANJAYDHAR)
JUDGE**

**Srinagar,
16.06.2023
"Bhat Altaf, PS"**

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No