ANDHRA PRADESH HIGH COURT

C. Ramkonda Reddy

Vs.

State (A.P)

Appeal No. 2162 of 1986

(Jeevan Reddy and Bhaskar Rao, JJ.)

17.02.1989

JUDGMENT

Jeevan Reddy, J.

1. Plaintiffs are the appellants. Their suit for damages in a sum of Rs. 10 Lakhs against the State of Andhra Pradesh has been dismissed by the learned Subordinate Judge, Kurnool.

2. Plaintiffs 1 to 5 are the sons, and 6th plaintiff is the wife of late Challa Chinnappa Reddy. The deceased and the 1st plaintiff were accused in Crime No. 18/1977 of Owk Police Station in Banganapalle Taluk of Kurnool District. They were arrested on 25-4-1977 and remanded to judicial custody on 26-4-1977. They were lodged in Cell No. 7 of Sub-Jail of Koilakuntla. On the night intervening 5th and 6th May 1977, at about 330 a.m., some miscreants gained entry into the Sub-Jail, hurled bombs into Cell No. 7, and killed the deceased. The 1st plaintiff escaped with injuries. The said incident took place, according to the plaintiffs, on account of malfeasance and misfeasance of the defendant-State and its subordinate officials in guarding the sub-jail premises. The deceased was a rich and influential person, and his death has deprived his family and children of his guidance and experienced management. Though the deceased and the 1st plaintiff apprised the higher authorities of danger to their lives in the jail premises, they say, the concerned officials failed to take appropriate care. "There was breach of duty and callous negligence on the part of the defendant and his servants which facilitated the commission of the offence resulting in the death of Chinnappa Reddy. It is the statutory duty of the defendant and his servants to protect the life of the prisoner and is liable to compensate for the loss of the life of the prisoner". The loss of the deceased is grievous and fatal to the prospects of his children and family. The damage suffered by them is estimated at Rs. 10 Lakhs, which, they say, they are entitled to recover from the State.

3. The State denied its liability for any damages. It submitted : "it is absolutely incorrect to allege that the said incident took place on account of the malfeasance and misfeasance of the defendant and his subordinates in guarding the Sub-Jail premises". It was submitted that the Taluk Office, Sub- Treasury, and the Sub-Jail are situated within the same premises side by side, and that all the three buildings are properly guarded. The Sub-Jail guards had taken all the necessary

measures and there was no lapse or negligence on their part. "The police-guards are only responsible for preventing the prisoners from escaping from the Sub-Jail." It was further averred : "this defendant is also not aware that prior to the said incident, the local circumstances indicated threat to the life of Chinnappa Reddy and the higher authorities were apprised of the same and requested to provide proper guard and protection.....The incident occurred for reasons beyond the control of anybody and the police-guard who could not be aware of the occurrence till it had actually happened. This defendant is not answerable for the acts beyond his control, much less he is liable for compensation.... Even if there is any negligence on the part of the officials in guarding the prison, the State is not liable to be sued for damages or compensation as maintenance of jails is a sovereign function of the State. In such a case the plaintiffs have to seek their remedy, if any, against the particular officers said to be negligent....."

4. On the above pleadings, the learned Subordinate Judge framed the following issues :

> "(1) whether the plaintiffs are entitled to the damages from the defendant. If so, what amount ?
> (2) Whether the suit is bad for non-joinder of necessary parties ?
> (3) Whether the maintenance of jails comes within the sovereign acts of the State and whether the defendant is not liable for the incident dated 6-5-1977?
> (4) To what relief?"

Additional issue :

> "Whether the suit is barred by period of limitation?"

5. The learned Subordinate Judge held, on a consideration of the material placed before him, that the suit is not bad for nonjoinder of necessary parties; that there was no negligence on the part of the officials in guarding the jail, and that even if there was any negligence, the State is not liable to pay any damages/compensation, since guarding of jails is a sovereign function of State. It was also held that the suit was barred by limitation. Accordingly, the suit was dismissed, with costs.

6. In this appeal, Sri C. Poornaiah, learned counsel for the plaintiffs (appellants), challenged the correctness of the aforesaid findings, in so far as they are against the plaintiffs.

7. The following questions arise for our consideration : -

> (i) Whether the suit is barred by limitation ;
> (ii) Whether the officials in charge of the Sub-Jail were negligent in guarding it, and whether the incident took place on account of negligence on their part; and
> (iii) in case negligence in proved, whether the State cannot be held liable for compensation/damages for the reason that guarding of jails is a sovereign function of the State ?

We shall consider these questions in their proper sequence. Question of limitation :

8. The trial court held the suit as barred, applying Article 72 of the Limitation Act, whereas the contention of the plaintiff appellants is that the said Article has no application, and that the Article applicable is 113. Article 72 provides a period of one year, whereas Article 113, which is residuary in nature, provides a 3-year period of limitation. It would be appropriate to set out both the Articles. They read :-

Description of Suits :	Period of Limitation :	Time from which period begins to run :
72. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year	When the act or omission takes place.
xx	xxxx	xx
113. Any suit for which no period of limitation is provided else-where in this schedule.	Three years	When the right to sue accrues.

The contention of the State is that failure to properly guard the jails is "omitting to do an act .....in pursuance of any enactment in force for the time being in the territories to which this Act extends", within the meaning of Article 72. It is pointed out that Rule 48 of the Madras Rules framed under the Prisons Act makes the police statutorily responsible for the safe custody of the prisoners while in jail. Rule 48 must be deemed to be an 'enactment' within the meaning of Rule 72. It is, accordingly, argued that all the requirements of Article 72 are satisfied.

9. On the other hand, the contention of the appellants is that the failure to properly guard, or negligence in guarding the jails cannot be said to be an omission to do an act in pursuance of any enactment, and further that Rule 48 of the Madras Rules cannot be said to be an 'enactment'. According to them, enactment means only an Act, and does not include a Rule made by a delegate of the Legislature.

10. The expression 'enactment' is defined in Clause (19) of Section 3 of the General Clauses Act. It reads :

> "Enactment shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal, Madras or Bombay Code, and shall also include any provision contained in any Act or in any such Regulation as aforesaid".

On the basis of this definition it is contended by the learned counsel for the appellants that Rules do not fall within the expression 'enactment'. We are unable to agree. Rules are nothing but a specie of legislation. The Legislature, instead of enacting the same itself delegates that power and authority to another person or authority. That person or authority makes the Rules merely as the

delegate of the Legislature. It is, therefore, not correct to say that Rules are not enacted by the Legislature. Whatever is enacted by the delegate of the Legislature is also the enactment of Legislature. This conclusion finds support from the decision in *Rathbone v. Bundock*[1],

11. The more important question, however, is whether the negligence in properly guarding the jails on the part of the police officials can be said to be an omission to do an act in pursuance of an enactment ? We think not. In *Mohd. Sadaat Ali, v. Lahore Corporation*[2], a Bench of five Judges considered identical words occurring in Article 2 of the Limitation Act, 1908, which read as follows :

2. For compensation for doing for omitting to do an act alleged to be in pursuance of of any enactment in force for the time being in British India :	Ninety days	When the act or omission takes place ".

. . . . . .".

The question was whether the failure of the Municipal Committee to maintain the water supply system in proper order amounts to an omission to do an act in pursuance of an enactment. Separate opinions were delivered by Abdur Rahman, J., Munir, J., Mahajan, J., and Achhru Ram, J., while Harries, C.J. agreed with the opinion of Mahajan, J. Though the conclusion reached by Abdur Rahman and Mahajan, JJ. is the same, the precise reasoning by which they arrived at that conclusion is slightly different. Abdur Rahman, J. held that the failure to maintain the water supply system properly cannot be said to be an omission to do an act in pursuance of an enactment. The enactment directs the Municipality to maintain the water supply in proper order, and not otherwise. This is what the learned Judge said :

> "The language of column 1 of Article 2, if it is given its ordinary grammatical meaning in such a way as not to make any words either superfluous or having been used in a wrong place....I must hold that the act or omission must have been such as the person acting or omitting may have honestly believed to be in pursuance of an enactment. I cannot interpret the words 'alleged to be in pursuance of any enactment' as merely qualifying the doing of an act and not qualifying the words 'omitting to do any act' which immediately precede them. If this is the correct, probable or even equally possible, interpretation of the language of column 1 of Article 2, Limitation Act, the breach or failure by local body which it was enjoined by Section 132, Punjab Municipal Act, to perform could not necessarily or in any case reasonably fall within the ambit of this article".

The learned Judge was thus of the opinion that unless the omission is in pursuance of an enactment, Article 2 is not attracted.

12. Mahajan, J. agreed with Abdur Rahman, J. that "when an act is not done which is prescribed by the statute, the failure to do it is a breach or disobedience of the command

[1](1962) 2 QB 260

[2] AIR 1945 Lah 324

of the Legislature and cannot be said to be an omission to do an act alleged to be in pursuance of a statute so as to bring into play the provisions of Article 2, Limitation Act", and held further "the Article has no application to cases where there is a failure or non- performance of statutory duties by an official public body when it is not executing any particular act.... in the present case no act was being executed under colour of a statutory duty. That duty was being simply ignored. I do not think that when a Corporation is simply sitting idle and doing nothing, to such an omission Article 2 has any application. It is only an omission in the execution of an act which is within the ambit of the Article. In short, in the present case, the omission to do an act could not have been made under colour of a statutory power, nor could such an omission be in the honest belief that that omission was justified by the statute...". In short, the approach of Mahajan, J. was that while omitting to do an act, the officer or authority must honestly believe that he was omitting to do that act in pursuance of a statute. This decision has been approved by the Supreme Court in *State of Punjab v. Modern Cultivators*[3], Applying the test aforesaid, it must be held that the failure or negligence on the part of the police in safeguarding the prisoners is not an omission in pursuance of an enactment, namely, Rule 48 of the Madras Rules. As stated above, Rule 48 obliges the police to safeguard the prisoners while in their custody, and makes them statutorily responsible for the safe-custody of the prisoners. It cannot be said that while failing to properly guard the jail officials were honestly believing that they were failing to do so in pursuance of an enactment. We are, therefore, of the opinion that Article 72 has no application. The only other Article which is attracted is the residuary Article in Article 113 - and it is admitted that the suit is within limitation if Article 113 is applied. Question of negligence of the police in guarding the jail :

13. The 1st plaintiff, who is examined as P.W. 1, deposed that while in jail, they informed the Inspector of Police that there is a conspiracy against them, and that their life is in danger. He says, they also sent a written representation to that effect to the Collector, and the Home Minister. He deposed that on 5-5-1977 he specifically told the Circle Inspector of Police that, according to specific information received by them, there may be an attack upon them that night. According to him, the Circle Inspector took it in a lighter vein and said that no incident will happen in the jail, and that they need not bother. He deposed that in spite of the said representation extra guard was not provided, and that they asked three of their followers to sleep near the jail. Actually one of the three persons died when the culprits threw a bomb at them while running away from the jail after throwing bombs into Cell No. 7. The Sub-Inspector of Police, D.W. 1, has however denied this allegation. But there are several circumstances which induce us to accept the testimony of P.W. 1. Firstly, the Circle-Inspector of Police to whom the deceased and P.W. 1 are said to have complained is not examined. Secondly, in his dying declaration recorded by the learned Judicial Magistrate within a few hours of the incident, the deceased stated that while in the police lock-up, they received information that a conspiracy was afoot to kill them in jail, and that the Sub-Inspector of police, D.W. 1 was a party to the conspiracy. The learned Magistrate also recorded the statement of P.W. 1 at the same time, and he stated that both the deceased and himself requested the police to provide better protection since they expect danger to their lives, but that their complaint was not heeded. These statements made at the earliest occasion tend to prove the veracity of P.W. 1's statement. Even apart from this, the very evidence of D.W. 1 goes to establish negligence on the part

[3] AIR 1965 SC 17

of the police officials. He deposed thus in cross-examination :

"The 9 members of the guarding party work in three shifts a day and for each shift 2 Police Constables will be on duty physically in the sub-jail premises. The head of the guarding party will be paying occasional visits to the Sub-Jail in order to verify whether the police guards are performing their duties with alterness or not. This system is followed during the day time. During nights all the 9 members of the guarding party will have to stay in the sub-jail premises. The police-guards are expected to guard the premises of the sub-jail in order to prevent the intruders from coming into the jail premises either by scaling its walls or through the main entrance. During the nights at least 2 members of the guarding party must keep continual vigil.....Out of the two members of the guarding party one will be stationed at the main entrance of the Police Station which is also the only entrance into the sub- jail premises and other will be stationed inside the sub-jail. No Police Constable is posted to keep vigil by moving around the outer side of the sub-jail.....As per the record maintained in the Police Station, P.C. 656 was acting as the front sentry and P.C. 483 was acting as the rear side sentry at the time of the incident.....".

It is thus clear that though 9 members of the police party must stay in the sub-jail premises during the night, only two were there on that night. The witness did not produce his General Diary maintained in the Police Station to establish that 9 members of the guarding party were staying in the sub-jail on that night. The learned Magistrate who visited the jail immediately after receiving the information and on learning of the incident, stated in his report, EX.A-9, submitted to the Addl. District and Sessions Judge, Kurnool, that only two Constables were guarding the jail that night. He opined : "I am inclined to think that the alleged explosion in Cell No. 7 took (place) for want of adequate vigilance on the part of the police personnel.....". His notes of inspection appended to Ex.A-9 show that Cell No. 7 is on the first- floor, and that the culprits put up a ladder, tied it with a rope to the wooden parapet, went up to the first-floor, and threw the bomb into Cell No. 7. He also reported that while going away, when they were challenged by the three persons sleeping outside the jail (kept there by the deceased and P.W. 1 as an additional precaution), they threw bombs at them, killing one of them and injuring the other two. It is also evident from Ex.A-14 that both the said Constables were suspended on 23-5-1977. The report of the learned Magistrate and his notes of inspection (Ex.A-9) clearly show that the Police Constables guarding the jail were not vigilant, and that P.C. 483, whose duty it was to guard the cell, was probably sleeping at that time. The learned Magistrate has observed in his report "if P.C. 483 was more vigilant, perhaps the untoward incident would not have occurred.....". The very manner in which the culprits gained entry into the jail shows that it could not have happened but for the negligence on the part of the police to guard the jail properly and to ensure the safety of prisoners, as required by Rule 48 of the Madras Rules aforesaid. It may be noted that Kurnool District is one of the districts in Rayalaseema area of the State, notorious for factions and blood-feuds. Use of bombs is not a rare occurrence in that area. In such a situation, and more so when a specific request was made for additional precautions, the failure not only to provide additional precautions, but the failure to provide even the normal guard duty cannot but be termed as gross negligence. It is an omission to perform the statutory responsibility placed upon them by Rule 48 of the Madras Prisons Rules. It is a failure to take reasonable care. On this issue too we disagree with the learned trial Judge. The defense of sovereign functions and its validity in this case :

14. Clause (1) of Article 300 of the Constitution of India declares, inter alia, that the Government

of a State may sue or be sued by the name of the State in relation to its affairs in the like cases as the corresponding Provinces or the corresponding Indian States might have sued or be sued, if the Constitution had not been enacted. This, however, is subject to any Act made by the Legislature of such State, by virtue of powers conferred by the Constitution. In order to appreciate the significance of the words "had not this Constitution been enacted", occurring in Clause (1) of Article 300, it is necessary to briefly notice the history of Indian Administration from the time of the East India Company. From 1765 to 1858 the Company had a dual character, viz., that of a trader, as well as of a sovereign. By the Charter Act of 1833 the Company came to hold the Government of India in trust for the British Crown. In 1858 the Crown assumed sovereignty of India to take over the Administration of India from the hands of the Company. Section 65 of the Government of India Act, 1858, declared the Secretary of State in Council to be a 'body corporate' for the purpose of suing, and being sued, and provided "..... all persons shall and may have.... the same proceedings..... against the Secretary of State in Council of India as they could have done against the said company.....". This concept was reiterated in Sub-section(2) of Section 32 of the Government of India Act, 1915, which declared "every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858 and this Act had not been passed". This was again reproduced in sub-section(1) of Section 176 of the Government of India Act, 1935, with a slight modification. The sub-section read :

> "(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this Chapter may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed ".

This very provision has been re-incorporated in clause (1) of Article 300, which reads thus :

> "(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act or Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

So far neither the Legislature of this State nor the Parliament has made any law as contemplated by Clause (1) of Article 300. The position today, therefore, is that the State Government would be liable for damages in this case if such a suit could be filed against the corresponding Province, which inevitably brings in the previous enactments on the subject, and the dual nature of the East India Company. In short, the position obtaining today, in the words of the Supreme Court in *Kasturi Lal v. State of U.P*[4]*.,* "(there is) a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the

delegation of any sovereign powers. If a tortuous act is committed by a public servant and it gives rise to a claim for damages, the question to ask is; was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose.....". The Court emphasized the distinction between 'sovereign functions' and 'non-sovereign functions' particularly at the present time when in pursuit of the welfare ideal, the Central and State Governments are entering into many commercial and other undertakings and activities "which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved". The Court observed that it is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. It is equally relevant to notice the facts of this case. One Ralia Ram, a partner of the appellant firm, was taken into custody by three Police Constables while he was passing through a street in Meerut. His belongings were searched, he was taken to Police Station and detained there. Certain quantity of gold and silver was seized from him and kept in police custody. On the next day he was released, and though the other articles seized from him were returned to him, the gold seized from him was not returned. A suit was accordingly instituted for recovery of the said gold or its value. The defence was that the gold seized from Ralia Ram was kept in the Police Malkhana under the charge of the Head Constable who misappropriated the same and fled to Pakistan. It was pleaded that even if it is found that the Police Officers were negligent in discharge of their duties, the State could not be held liable for the loss resulting from such negligence, inasmuch as the negligence on the part of the police officers occurred while they were discharging their statutory duties, relatable to sovereign functions of the State. The Supreme Court found that the police officers were negligent, but held that the State is not liable inasmuch as the power to arrest a person, to search him and to seize the property found with him is a power conferred upon the officers by statute, and that the said power can be properly characterized as a sovereign power. Having so held, the Supreme Court observed that it is high time the Legislatures in India seriously consider whether they should not pass legislative enactment's to regulate and control their claim for immunity in cases like the one before the Supreme Court on the same lines as has been done in England by the Crown Proceedings Act, 1947.

[4] AIR 1965 SC 1039

We note with regret that to this day no such Act has been made though more than 23 years have passed by since the said observations were made by the Supreme Court.

15. In Kasturi Lal's case (supra), the plaintiff relied upon the earlier decision of the Supreme Court in *State of Rajasthan v. Vidhyawati*[5], where the State was held vicariously liable for the tortious act committed by its employee. The employee concerned was the driver of a Jeep owned and maintained by the State of Rajasthan for the official use of the Collector of the District. He drove the vehicle rashly and negligently while bringing it back from the workshop after repairs and knocked down a pedestrian and fatally injured him. This decision was distinguished in

Kasturi Lal (supra) saying that "when the Government employee was driving the jeep car from the workshop to the Collector's residence for the Collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or governmental powers of the State.....In fact, the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all.....". We do not think it necessary to refer to the several cases on the subject, all of which are referred to and discussed in Kasturi Lal (supra).

16. Now there can be little doubt that the deceased and P.W. 1 were arrested by the police officers of the State in the course of investigation into an alleged crime, and they were detained in jail under the orders of a Magistrate. All this is referable to the sovereign power, or function, as may be called, of the State. The obligation to ensure the safety of the prisoners, enjoined upon the State by Rule 48 of the Madras Prisons Rules, is incidental to the said sovereign power. If we apply the principle of Kasturi Lal, (supra), it is evident that the suit must fail notwithstanding our finding of negligence on the part of prison officials. Indeed, that is what the trial Court has done. The question, however, arises whether this immunity of the State overrides the right to life and liberty guaranteed by Article 21 of the Constitution? In shorty whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State? We shall take two hypothetical cases to test the proposition. One is a case where a person is arrested and lodged in a jail. While in jail he suffers from a heart attack and cries for relief. The officers guarding the prison notice his condition, realize that he needs medical attention, but fail to take any steps for providing such relief, though several hours pass by. The man dies. Had the person not been arrested and put in jail, he would have been at home among the members of his family and/or friends, who would have definitely provided him medical relief and saved his life. Having arrested him, having confined him in jail away from his relations and friends, and having allowed him to suffer and die without raking any steps for rendering medical help, can the State still claim that it is not liable? Can the theory of sovereign power be a complete answer to this kind of gross negligence?

17. The second case is where a person is arrested by the police in the course of investigation of a crime, and while in police custody he is subjected to third-degree methods, resulting in his death. Can the State claim in this case as well that inasmuch as

[5] AIR 1962 SC 933

the person was arrested by the police officers in exercise of their statutory powers relatable to sovereign functions of the State, the State is not liable, even though the police officers acted beyond law in subjecting him to third degree methods leading to his death? One may say that applying third degree methods or torture is not permitted by law. True. But so is misappropriation not permitted by law; (reference is to Kasturilal's case, (AIR 1965 Supreme Court 1039). If the State is not liable for the misappropriation by its officials, it is equally not liable for any other offence committed by its officials. The question is : is this the law under the Constitution? This is a new aspect which emerged during the course of debate before us. It does not appear to have been considered by any Court so far.

18. Article 21 of the Constitution declares "no person shall be deprived of his life or personal liberty except according to procedure established by law". Though our Constitution did not adopt

the words "due process of law" and chose to employ, in place, the words "procedure established by law", the distinction, if any, between the two expressions has become academic, in view of the decision of the Supreme Court in Maneka Gandhi, AIR 1978 Supreme Court 597. It is held in Maneka Gandhi that the procedure contemplated by Article 21 should be fair and reasonable; that it should be "right and just and fair", and not arbitrary, fanciful, or oppressive. Otherwise, it was held, it would be no procedure at all, and the requirement of Article 21 would not be satisfied; - this is indeed the soul of the concept 'due process of law'. In our opinion, the right to life and liberty guaranteed by Article 21 is so fundamental and basic that no compromise is possible with this right. It is 'non-negotiable'. This is the minimum requirement which must be guaranteed to enable a citizen to live with human dignity. The State has no right to take any action which will deprive a citizen of the enjoyment of this basic right except in accordance with a law which is reasonable, fair and just. Now take the two hypothetical cases mentioned by us hereinbefore. Can it be said that the prison officials were acting in accordance with law when they failed to take any steps for rendering medical aid to a prisoner suffering from a heart attack? Can it be said that applying third degree methods and bringing about the death of the detenu in police custody is an action in accordance with law? Similarly, can it be said in this case that negligence of the prison officials in ensuring the safety of the deceased, by failing to take reasonable care required of them, in spite of a specific request therefor, is an action in accordance with the procedure prescribed by law? Indeed, all these actions are precisely contrary to law. Rule 48 of the Madras Prisons Rules enjoins the prison officials to ensure the safety of the prisoners. Similarly, there is no law which empowers the police to apply third-degree methods, or to mete out such treatment as results in the death of the detenu in a Police Station. In all these cases it must be said that the person concerned has been deprived of his life otherwise than in accordance with - indeed, contrary to the procedure prescribed by law. Can the fundamental right to life guaranteed by Article 21 be defeated by pleading the archaic defense of sovereign functions? Does it mean that the said theory clothes the State with the right to violate the fundamental right to life and liberty, guaranteed by Article 21? In other words, does the said concept constitute an exception to Article 21? We think not. Article 21 does not recognize any exception, and no such exception can be read into it by reference to Clause (1) of Article 300. Where a citizen has been deprived of his life, or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the sovereign functions of the State. Indeed, this is the principle that flows from three later decisions of the Supreme Court.

19. In *Rudul Sah v. State of Bihar*[6], the petitioner was kept in jail for a period of fourteen years after he was acquitted, on the specious ground that he was insane. He was directed to be released by the Supreme Court in a petition for habeas corpus moved on his behalf. In addition to release, the detenu also claimed compensation on account of the deprivation of his fundamental right guaranteed by Article 21. The question arose whether the Supreme Court has power to award compensation on account of such deprivation in a petition under Article 32? It was answered in the following words by Chandrachud, C.J., speaking for a Bench of three Judges (at p. 1086) : -

> "Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its

> violaters in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental 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 added)

Accordingly, a total sum of Rs. 35,000/- was awarded by way of compensation. In *Sebastian M. Hondray v. Union of India*[7], a writ of habeas corpus was issued directing the Union of India, Secretary, Ministry of Home Affairs, and the 21st Sikh Regiment, Phungrei Camp, to produce two persons who were taken to Phungrei Camp by Jawans of 21st Sikh Regiment on 10-3-1982. The respondents were directed to produce the persons before the Supreme Court on 12-12-1983. They were not produced on the plea that they were not in the custody or control of the said respondents. It was also stated that in spite of extensive search, they could not be traced. The Court concluded, on the basis of the material placed before it, that the said two persons "must have met an unnatural death", and that *prima facie* it would be an offence of murder. The Court could not, however, say who was responsible for the offence. The question that faced the Supreme Court was : what is the relief to be granted in that petition for issuance of a writ of habeas corpus, where the respondents were clearly found guilty of wilful disobedience to the writ issued? The Court directed that "as a measure of exemplary costs as is permissible in such cases, respondents Nos. 1 and 2 shall pay Rs. 1 lakh to each of the aforementioned two women (wives of the missing persons) within a period of four weeks from today.....". The basis

[6] AIR 1983 SC 1086
[7] AIR 1984 SC 1026

of the said award is, however, not Article

21, but wilful disobedience to the process of the Court amounting to contempt of Court. The said amount was awarded as a measure of exemplary costs.

20. In *Bhim Singh v. State of J. and K.*[8], a Member of the Legislative Assembly was arrested by police officers while he was on his way to Srinagar to attend the Legislative Assembly Session. He moved a writ of habeas corpus and, on an examination of relevant facts, the Supreme Court found that Bhim Singh was deprived of his constitutional rights guaranteed by Articles 21 and 22(2). This is what Chinnappa Reddy, J. said, speaking for the Court (at p. 499) : -

> "The police officers..... acted deliberately and *mala fide* and the Magistrate and the Sub-Judge aided them either by colluding with them or by their casual attitude. We do not have any doubt that Shri Bhim Singh was not produced either before the Magistrate on 11th or before the Sub-Judge on 13th, though he was arrested in the early hours of the

morning of 10th. There certainly was a gross violation of Shri Bhim Singh's constitutional rights under Articles 21 and 22(2).....We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of exemplary costs or otherwise is now established by the decisions of this Court in *Rudul Sah v. State of Bihar*[9], and *Sebastian M. Hongray v. Union of India*[10], When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs. 50,000/- within two months from today....."

21. In *Maharaj v. Attorney General of Trinidad and Tobago*[11] *(No. 2),* the Privy Council was faced with a somewhat similar problem. Indeed, the facts of this case are extremely interesting, and instructive. On April 17, 1975, a Judge of the High Court of Trinidad and Tobago committed the appellant, Maharaj, a Barrister, to prison for seven days, for contempt of Court. Section 1 of the Constitution of Trinidad and Tobago recognizes and protects human rights and fundamental rights of its citizens. It says :

"1. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due

[8] AIR 1986 SC 494 [10] AIR 1984 SC 1026

[9] AIR 1983 SC 1086 [11](1978) 2 All England Reporter 670

process of law..... (other clauses omitted as unnecessary)....".

We may also notice Sections 2, 3 and 6. In so far as they are relevant, they read thus :

"2. Subject to the provisions of Sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall- (a) authorise or effect the arbitrary detention, imprisonment or exile of any person.....(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.....

"3. (1) Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.....

"6. (1) For the removal of doubts it is hereby declared that if any person alleges that any

of the provisions of the foregoing sections or section of this Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction- (a) to hear and determine any application made by any person in pursuance of Sub-section(1) of this section; and (b) to determine any question arising in the case of any person which is referred to it in pursuance of Sub-section(3) thereof, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections or section to the protection of which the person concerned is entitled.

(3) If in any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of the said foregoing sections or section the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.

(4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal.

(5) Nothing in this section shall limit the power of Parliament to confer on the High Court or the Court of Appeal such powers as Parliament may think it in relation to the exercise by the High Court or the Court of Appeal, as the case may be, of its jurisdiction in respect of the matters arising under this Chapter....".

The appellant moved another Judge of the High Court contending that he was deprived of his liberty except by due process of law and, therefore, his detention was in contravention of Section 1(a) of the Constitution. It is unnecessary to trace the course of proceedings in that behalf, except to say that on July 27, 1976, the Privy Council allowed the appeal on the ground that the Judge who committed the appellant for contempt had failed to specify sufficiently the nature of the contempt charged against him before committing him to prison and, therefore, the order committing him to seven days imprisonment was invalid; (reported in (1977) 1 All England Reporter 411). The appellant claimed monetary compensation for contravention of his constitutional right guaranteed by Section 1(a), which claim ultimately came up for consideration before the Privy Council. It was held that the appellant was deprived of his liberty without due process of law within the meaning of Section 1(a) and that he was entitled to apply to the High Court for redress under Section 6(1) in respect of his imprisonment. The following observations of the Privy Council are relevant :

"The right to apply to the High Court for redress' conferred by Section 6(1) is expressed to be 'without prejudice to any other action with respect to the same matter which is lawfully available'. The clear intention is to create a new remedy whether there was already some other existing remedy or not.....What then was the nature of the 'redress' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as :

'Reparation of, satisfaction or compensation for a wrong sustained or the loss resulting from this'. At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened: but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation.

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*[12], 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....."

22. It is evident that Section 1(a) of the Constitution of Trinidad and Tobago corresponds to Article 21 of our Constitution, while Section 2 corresponds to Article 13. Section 6, it is clear, corresponds to Article 32, and more particularly to Article 226 of our Constitution.

23. It is contended by the learned Addl. Advocate General, appearing for the respondents-defendants, that in the three cases before the Supreme Court, referred to above, the State did not put forward the defense of sovereign functions, and that, moreover, they were cases of writ petitions under Article 32 of the Constitution, which clothes the Supreme Court with very wide powers. He submitted that what can be done by the Supreme Court under Article 32 cannot be done by a civil Court. We are not impressed by this argument. It is true that in none of the three cases was the defense of sovereign functions pleaded.

[12]1971 AC 972

We must presume that the said defence was advisedly not put forward. Moreover, we see no distinction in principle. We are equally of the view that the concept of immunity in respect of sovereign functions, implicit in Clause (1) of Article 300, cannot be recognized as an exception to Article 21. The fundamental rights are sacrosanct. They have been variously described as basic, inalienable, and indefeasible. The founding-fathers incorporated the exceptions in the Articles themselves - wherever they were found advisable, or appropriate. No such exception has been incorporated in Article 21, and we are not prepared to read the archaic concept of immunity of sovereign functions, incorporated in Article 300(1), as an exception to Article 21. True it is that the Constitution must be read as an integrated whole; but, since the right guranteed by Article 21 is too fundamental and basic to admit of any compromise, we are not prepared to read any exception in to it by a process of interpretation. We must presume that, if the founding-

fathers intended to provide any exception, they would have said so specifically in Part- III itself.

24. We are perfectly aware that the principle adumbrated herein opens up a new vista for individual claims for damages against the State. It may add to the present-day difficult financial position of the State. But we are of the opinion that such a remedy is not only salutary but essential for good Government and for ensuring Rule of law. The officials of the Government act in the name of, and for and on behalf of the State; it is but just that State is made liable for their acts and defaults. It is no answer to say that the aggrieved person can proceed against the official concerned; that is neither a practicable nor efficacious remedy. Firstly, the official does not act in his individual capacity, but as an agent or representative of the State. A civil remedy against an official may very often be a case of chasing a mirage. And a criminal action is no solace. Just as it is necessary to check evasion and violation of law on the part of citizens, it is equally necessary to ensure that the State officials do not act with gross negligence and do not abuse their powers, to the detriment of life and liberty of the citizens. Both are equally important. State power does not confer a licence upon its officials to act contrary to law, or to be grossly negligent in their duties, to the detriment of life and liberty of the citizens. So long as the officials act fairly and with reasonable care, no action can lie. Only where they abuse their powers, act with gross negligence, resulting in deprivation of life and liberty of the citizens, does the State become liable for compensation.

25. For the above reasons, we find that the claim for damages must succeed. Indeed, this is the only mode in which the right to life guaranteed to the deceased by Article 21 can be enforced. The trial Court has found that if the plaintiffs are found entitled to damages, it should be in a sum of Rs. 1,44,000/-. No material has been brought to our notice inducing us to disagree with the said determination. The plaintiffs are entitled to the said amount.

26. The appeal is, accordingly, allowed in part. The suit is decreed in a sum of Rs. 1,44,000/- (Rupees One Lakh Forty Four Thousand only). The said amount shall carry interest at the rate of 6% per annum from the date of suit till realisation. In the circumstances of the case, however, we direct the parties to bear their own costs throughout.

Per Bhaskar Rao J. (concurring) :-

27. I am in absolute agreement with my learned brother that the appeal is to be allowed by partly decreeing the suit in a sum of Rs. 1,44,000/- with interest thereon. However, in so far as the doctrine of sovereign immunity is concerned, I would like to record my views.

28. In England the immunity of the Crown from liability for a tort was based on the maxim : 'The King can do no wrong'. Ours is a sovereign socialist secular democratic republic and Article 21 of our Constitution protects the life and liberty of the citizens, except according to procedure established by law. In cases where this guaranteed right is invaded or infringed, may be by the State or by another citizen or body, an action lies under law for proper remedy. No doubt Article 300(1) of the Constitution renders immunity to the State against an action, if there is any law made clothing such immunity. It is not in dispute that so far neither this State nor the Parliament has legislated any law by virtue of the powers under Clause (1) of Article 300. However, there does lie no action if the act complained of is one committed in discharge of 'sovereign functions' since actions in accordance with the procedure established by law are immune and excepted from

the protection guaranteed by Article 21 as regards the life and liberty of a citizen.

29. In the present case, the deceased was in judicial custody having involved in Crime No. 18/77 of the Owk Police-Station. Prosecuting the citizens and putting them in jail, no doubt, deprives the liberty of the citizens; but it is permissible under law and accordingly there is no infringement of Article 21. The deprivation of the liberty is, thus, in discharge of the sovereign functions and immune from acting having been hit by the doctrine of sovereign immunity. Deprivation of liberty is different from deprivation of life. An under-trial prisoner in judicial custody though deprived of liberty by virtue of the sovereign functions is still entitled to the protection of his life. It is pertinent at this stage to refer to a few decisions of the Supreme Court, one in *Sunil Batra v. Delhi Administration*[13], and the other also in *Sunil Batra v. Delhi Administration*[14], In the former decision, D.A. Desai, J., agreeing with Krishna Iyer, J., and speaking for himself, Chandrachud, C.J., Murtaza Fazl Ali and Shinghal, JJ. laid down :

> "It is no more open to debate that convicts are not wholly denuded of their fundamental rights. No iron curtain can be drawn between the prisoner and the Constitution. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed.....However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial."

Thus, the prisoner's right to protection of his life while in prison is all the more substantial in nature. In the latter decision, Krishna Iyer, J., dealing with the rights of prisoners and their protection held :

> "Prisons are built with stones of law and so it behoves the Court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority', when Part

[13] AIR 1978 SC 1675

[14] AIR 1980 SC 1579

> III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock. And when the Court takes cognizance of such violence and violation, it does like the hound of Heaven. 'But with unhurrying chase. And Unperturbed pace. Deliberate speed and Majestic instancy' follow the official offender and frown down the outlaw adventure."

[Para 5]
It is further held in para 30 thus :

> "Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods 'right, just and fair'. Again in *D. Bhuvan Mohan Patnaik v. State of A.P*[15]*.,* Chandrachud, J. (as he then was) observed (at p. 2094) :

> "Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to 'practise' a profession.....But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property..... Likewise even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law."

These decisions provide the background that even in a prison a convict or an under-trial prisoner is very well entitled to his precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life. This right to life is more substantial in nature and the responsibility of the prison-authorities is much more onerous when the prisoner complains of a threat to this precious right.

30. Adverting to the grant of compensation for infraction or invasion of the rights guaranteed under Article 21 of the Constitution, it is to be noticed that the immunity of the Crown in England based on the maxim 'The King can do no wrong', was getting eroded as per the needs of time and the changing circumstances that have brought in certain new legislations. In England, during days earlier to 1964, when a police officer committed a tort the position was anomalous. He himself was personally liable 1947 AC 573 and the police authority could not be made liable vicariously, at least in connection with matters like arrest and detention. By virtue of the Police Act, 1964, the Chief Constable was made liable for torts committed by constables under his direction and control in the performance or purported performance of their functions, in the same way as a master is liable for the torts of his servants.

31. Earlier to the Police Act, 1964, by virtue of the Crown Proceedings Act, 1947 the very rigour of the maxim 'The King can do no wrong' and therefore no action could lay against the Sovereign personally was diluted since the Act intended to make the Crown liable in tort in the same way as a private person and dispensed with the then existing procedure of making a petition of right to the Attorney General for grant of a fiat so as to sue the Crown.

[15] AIR 1974 SC 2092

32. In *Home Office v. Dorset Yacht Co. Ltd*[16]*.,* seven out of ten borstal trainees working on an island in a harbour under the supervision and control of three borstal officers escaped and went aboard a yacht during night time. They set the yacht in motion and collided with the yacht of the respondents therein. For the damage caused to the yacht due to the collision, the respondents sued the Home Office for damages. The preliminary issue framed was, whether the Home Office, its servants or agents owed any duty of care to the respondents capable of giving rise to a liability in damages with respect to the detention of persons undergoing sentences of borstal training, or with respect to the manner in which such persons were treated, employed, disciplined, controlled or supervised whilst undergoing such sentences. Deciding the question, the House of Lords observed that the taking by the trainees of the nearby yacht and the causing of damages to the other yacht belonging to the respondents ought to have been foreseen by the borstal officers as likely to occur if they failed to exercise proper control or supervision. In those circumstances, it was held that the officers *prima facie* owed a duty of care to the respondents and allowed the case to go for trial on other issues of fact.

33. In *Maharaj v. A.G. of Trinidad*[17], a Judge of the High Court of Trinidad and Tobago on 17-4-1975 committed the appellant therein for seven days to prison for contempt of Court. On the very same day the appellant applied *ex parte* by a motion to another High Court Judge and obtained orders of release forthwith pending final determination of the motion. On the substantive hearing of the motion, a third judge (Scott J.) dismissed the motion and ordered the appellant to serve the remaining six days of his sentence, which he served. On an appeal to the Judicial Committee the committal order was held to be invalid since the Judge who made the committal order had failed to specify sufficiently the nature of the contempt charged against the appellant. This failure, the Judicial Committee held had resulted in deprivation of liberty by the appellant otherwise than by due process of law. Consequently, the appellant was held to be entitled to claim damages for the inconvenience and distress suffered during the imprisonment.

34. In *Holden v. Chief Constable of Lancashire*[18], the plaintiff, who was thought by the police to be acting suspiciously, was arrested and detained in a holding cell for 20 minutes. Subsequently, the plaintiff brought an action for damages for wrongful arrest. The Judge ruled that the question, whether to award exemplary damages would be withdrawn from the jury because the arrest and subsequent imprisonment was only for 20 minutes and there was no oppressive behaviour. This withdrawal of the question of awarding exemplary damages from the jury was challenged before the Court of Appeal by the plaintiff. The Court of Appeal held that the plaintiff could recover exemplary damages for unconstitutional action, such as an unlawful arrest, by a servant of the Crown even though there was no oppressive behaviour or other aggravating circumstances present, and accordingly the question whether to award exemplary damages should have been left to the jury.

35. Turning to the position in United States of America, it is to be noticed that the Federal Tort Claims Act waived the federal government's immunity from tort liability and specifically imposed liability on the United States for damages resulting from the negligent or wrongful acts or omissions of government employees. The question that

[16](1970) 2 All England Reporter 294 [18](1986) 3 All England Reporter 83

[17](1978) 2 All England Reporter 670

consequently arose in *United States v. Muniz*[19], was, whether the United States was liable under the said Act for the acts or omissions of its employees resulting in personal injury or death to a federal prisoner. There, the two plaintiffs during confinement in federal prisons suffered injuries because of the negligence of the, prison employees, in one case due to the negligence in diagnosis and treatment of a benign brain tumor and in the other on account of the assault by other inmates of the prison. The allegation was. that the prison authorities were negligent in failing to provide enough guards and adequate supervision of prisoners. The Supreme Court of United States held that the injuries were attributable to the negligence of prison officials in failing to provide adequate guards and to properly supervise the prisoners. According to the Supreme Court, the Federal Tort Claims Act is designed not only to avoid injustice to those having meritorious claims barred till then by sovereign immunity and also waived the sovereign immunity for claims arising out of negligent treatment in government hospitals.

36. To have a reference to the law in Australia on this doctrine of sovereign immunity, it is to be seen that in *Parker v. The Commonwealth of Australia*[20], two ships of the Royal Australian Navy, viz. Melbourne and Voyager, came into collision on the highseas about 20 miles off the

Australian cost. Melbourne struck the Voyager and she sank along with some men therein resulting in the death of one Parker. His widow brought an action against the Commonwealth for damages on the basis that her husband's death was caused by the negligence of the officers and crew of the ships of the Commonwealth. The deceased Parker was a civilian employed by the Navy Department in a technical capacity. In those facts and circumstances Windeyer, J., of the High Court of Australia held that the Commonwealth was liable in tort for damages and that the widow of Parker could bring in the suit for damages for the negligent acts or omission of the members of the Royal Australian Navy

37. Thus, even in advanced countries like England, United States and Australia the trend and tendency is to whittle down the rigour of sovereign immunity and pave a smooth and sailing way for laying actions against the Government for torts suffered or injuries caused to the citizens at the behest of the governmental machinery by means otherwise than through procedure established by law.

38. Adverting to the case-law in our country, it is in Rudul Sah v, State of Bihar, AIR 1983 Supreme Court 1086, the Supreme Court held that mere ordering release from illegal detention while exercising jurisdiction under Article 32 of the Constitution does not suffice and meet the requirements of Article 21 and that it is mulcting its violaters in the payment of monetary compensation that really warrants. In that case the petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full dressed trial. He filed a Hebeas Corpus petition in the Supreme Court for his release and obtained that relief, It was the contention that he was entitled to be compensated for his illegal detention. The Supreme Court not only ordered payment of Rs. 30,000/-, compensation in the nature of a palliative, but also kept the petitioner at liberty to bring in a civil suit for recovering damages from the State and its erring officials.

39. In *Sebastian v. Union of India*[21], against the writ of habeas corpus issued directing

[19](1963) 10 L ed 2d 805 [21] AIR 1984 SC 1026

[20]112 CLR 295 (Aus)

production of two persons before the Supreme Court, the Government, failed to do so asserting that they left the regimental camp. Turning down the assertion and holding that the respondents therein were responsible for civil contempt and keeping in view the torture, the agony and the mental oppression through which the wives of the two persons had to pass, the Supreme Court directed the respondents to pay Rs. 1 lakh to each of the two women as a measure of exemplary costs.

40. Again in *Bhim Singh v. State of J. and K*[22]., one Bhim Singh had incurred the wrath of the powers of the police. The police were successful in preventing the said Bhim Singh, a Member of the Legislative Assembly of Jammu and Kashmir, from attending the Session of the Assembly on 11-9-1985. He was originally suspended from the Assembly in August and on 9th Sept. he got that order of suspension stayed by the High Court and was proceeding on the intervening night of 9/10 th September, '85 to Srinagar. Enroute at about, 3- 00 a.m. on 10th he was arrested and taken by the police. As it was not known where he had been taken away, his wife filed a writ before the Supreme Court to direct the respondents to produce Bhim Singh before the Court, to declare his detention illegal and to set him at liberty. The defense of the Police that under orders of remand, two from Executive Magistrates and one from Sub- Judge, Bhim Singh was kept

under judicial custody was commented upon by the Supreme Court observing that both the judicial Officers acted without any sense of responsibility of genuine concern for liberty of the subject since they were obtained by the Police Officers without producing Bhim Singh before them. The Supreme Court held that the arrest and imprisonment were in gross- violation of the rights of Bhim Singh under Articles 21 and 22(2). The Supreme Court further observing that when a person comes to the Court with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief, malice or invasion may not be washed away or wished away by simply ordering his release, but by also compensating the victim by awarding suitable monetary compensation, ordered payment of Rs. 50,000/- as compensation to Bhim Singh.

41. Even in Kasturi Lal v. State of U.P[23]., the Supreme Court while distinguishing 'Sovereign functions' and 'nonsovereign functions' held that in cases where the tort or damages suffered was in discharge of the sovereign functions the citizens should not be precluded from making a claim therefor against the State. However, in the facts and circumstances of that case, the Supreme Court though found the police officers to be negligent held that the State was not liable inasmuch as the power to arrest a person, to search him and to seize the property found with him is one conferred-sovereign power- upon the Officers by the statute. Whatever it is, this is a decision rendered much earlier in point of time to all the other decisions referred to supra of our country and other advanced countries abroad.

42. In this background of the case law and the constitutional position, I am in full agreement with my learned brother that in the facts and circumstances of the present case, viz. the negligence on the part of the police officials in failing to provide adequate guard to protect the life of the deceased, more so when the deceased apprehended danger to his

[22] AIR 1986 SC 494
[23] AIR 1965 SC 1039

life and also expressed the need, the invocation of the doctrine of sovereign immunity by the State is not permissible.

43. PER COURT : - The learned Addl. Advocate-General makes an oral request for leave to appeal to Supreme Court under Article 133 of the Constitution. This case raises a substantial question of law of general importance which, in our opinion, needs to be considered by the Supreme Court. Accordingly, a certificate shall issue under Article 133 of the Constitution.
Appeal partly allowed.