

Subhash Namdev Desai and Others Vs. State of Maharashtra and Others

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Court : Mumbai

Decided On : Dec-21-2012

Judge : A.S. Oka & S.S. Shinde

Appeal No. : Criminal Writ Petition No.1555 of 2011

Appellant : Subhash Namdev Desai and Others

Respondent : State of Maharashtra and Others

Judgement :

A.S. Oka, J.

While adjourning the Petition on 19th January 2012, this Court made it clear that the Petition will be taken up for final disposal at the admission stage.

2. The Fourth Respondent filed a complaint on 7th May 2011 with Bhudargad Taluka Police Station against the Petitioners alleging that the Petitioners have been assaulting and abusing her with a view to harass her and her family members. On the basis of the complaint, a non-cognizable offence under Section 323, 504 read with Section 34 of the Indian Penal Code was registered against the Petitioners by the said Police Station. On 9th May 2012, the Second Respondent who was ASI attached to the said Police Station arrested the Petitioners at 12.35. Though the offences registered against them were non-cognizable and bailable, it was shown that the Petitioners were arrested by way of preventive action under Section 151 of the Code of Criminal Procedure, 1973 (hereinafter referred to as

"the said Code"). It is alleged that the Second and Third Respondents (Constables attached to Bhudargadh Taluka Police Station) demanded illegal gratification from the Petitioners. On their refusal, they filed a chapter case bearing No.95 of 2011 against the Petitioners. It is contended that the Petitioners were not produced before the learned Judicial Magistrate within a period of 24 hours from their arrest and they were produced before the learned Executive Magistrate on 10th May 2012 at about 17.40. Thus, it is alleged that the Petitioners were produced nearly 29 hours after their arrest.

It is alleged that the guidelines issued by the Apex Court in the case of D.K. Basu v. State of West Bengal ((1997)1 SCC 416) have been breached by the Police. It is alleged that in any case, the Fourth Petitioner was falsely implicated as on the date of the incident he was in Pune. As a result of arrest of the Petitioners, they have been defamed in the Society. It is alleged that the marriage of the Petitioner No.1's daughter was settled. Due to his arrest, the marriage could not be solemnized. Prayer is made for quashing the chapter proceedings and for directing the Respondents to pay a sum of Rs.20,000/- each to the Petitioners by way of compensation for mental and physical harassment on account of illegal detention in breach of the guidelines issued by the Apex Court in the case of D.K. Basu (supra).

3. The Second and Third Respondents have filed a reply denying the averments made in the Petition. They have contended that Section 151 of the said Code was applied under the orders of Shri R.B. Shede, the Police Inspector attached to Bhudargad Taluka Police Station who was an officer superior to the Second and Third Respondents and that he was the officer in-charge of the Police Station. It is alleged that it was revealed from the statements recorded of the Fifth and Sixth Respondents that the Petitioners were defaming the Respondent No.4 and hence chapter proceedings were initiated. It is alleged that at 21.05, the Petitioners were released from the custody on a guarantee of their presence before the learned Magistrate given by one Shri Kolavkar and upon the orders of Shri R.B. Shede, Police Inspector of Bhudargad Police Station. It is contended that the proceedings of chapter case were sent to the learned Magistrate on 9th May 2012 and the Petitioners remained present before the learned Executive Magistrate on their own

and were released on bail. All other adverse allegations have been denied. It is contended that their record has been fairly clean.

The learned APP has fairly assisted the Court by producing the entire record including the original Station Diary, original register of preventive action and the original register showing compliance with the directions issued by the Apex Court in the case of D.K. Basu (supra). He pointed out the relevant entries in the station diary including the entry made at 21.05 on 9th May 2011 in station diary recording that on the basis of the order of the Inspector of Police Shri Shede, the Petitioners were released by informing them not to create law and order situation and not to commit breach of peace. He submitted that in view of the said entry in the station diary, it cannot be said that the detention of the Petitioners continued and they were produced before the learned Executive Magistrate on 10th May 2011 by the Police. He has also produced for perusal of the Court the file of the chapter proceedings. He has also placed on record photocopies of the relevant extract of the station diary, lock up register, register maintained to show compliance with the directions issued by the Apex Court in the case of D.K. Basu (supra) and file of the proceedings of chapter case.

4. The learned counsel appearing for the Petitioners submitted that there was no warrant to preventively arrest the Petitioners under Section 151 of the said Code. He submitted that the entry of the release at 21.05 in the station diary is false and incorrect and the order of the learned Executive Magistrate shows that the Petitioners were produced before him at 5.40 p.m on 10th May 2011 which clearly proves the case that till that time, the Petitioners were in custody. He urged that while arresting the Petitioners, the guidelines issued by the Apex Court in the case of D.K.Basu (supra) have not been complied with and hence, there is a gross violation of Articles 21 and 22 of the Constitution of India. He urged that the chapter proceedings were completely mala fide and the entire proceedings are otherwise illegal as there is no order passed by the learned Executive Magistrate under Section 111 of the said Code. He urged that only on account of registration of one non-cognizable offence, not only that the Petitioners were detained under Section 151 of the said Code, but chapter proceedings were also illegally initiated. He, therefore, submitted that this is a fit case to award compensation to the

Petitioners apart from quashing the chapter proceedings. Learned counsel appearing for the Second and Third Respondents pointed out that they have acted as per the instructions of the superior Police Officer Shri Shede and in fact, as seen from the station diary, at 21.05 on 9th May 2011, the Petitioners were released under the orders of Shri Shede, the Police Inspector.

He urged that the substantial compliance with the directions issued by the Apex Court in the case of D.K. Basu (supra) has been made by maintaining a register and making necessary entries in the register in that behalf. He urged that the Memorandum of Arrest may not have been drawn, but all the necessary requisites have been complied with while making entries in the said register including obtaining the signatures of the witnesses etc. He urged that the allegations against the Petitioners are as regards the assault and causing harassment to a minor girl. He urged that as far as chapter proceedings are concerned, except for forwarding the proposal, no role has been played by the Police and in fact while releasing the Petitioners at 21.05, statement of one Shri Kolavkar was recorded who assured the presence of the Petitioners before the learned Executive Magistrate. He relied upon a decision of the Apex Court in the case of Ahmed Noormohmed Bhatii v. State of Gujarat and Others (AIR 2005 SC 2115). He submitted that no illegality has been committed by the Second and Third Respondents. The learned counsel appearing for the Fourth to Sixth Respondents supported the submissions of the learned counsel appearing for the Second and Third Respondents and urged that no illegalities have been committed.

5. We have given careful consideration to the submissions. As the allegations have been made as regards non-implementation of the directions issued by the Apex Court in the case of D.K. Basu (supra), it will be necessary to make a reference to the said guidelines contained in Paragraphs 35 to 38 of the decision in the case of D.K. Basu (supra). The Paragraphs 35 to 38 of the said decision read thus:

"35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee

and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

"36. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter."

"37. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier."

"38. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee." (emphasis added)

6. At this stage, it is necessary to make a reference to Section 41B of the said Code which was incorporated by Act No.5 of 2009 by virtue of Section 6 thereof. It appears that the Section 6 of the said Act No.5 of 2005 was brought into force on 1st November 2010. Section 41B reads thus:-

"41B. Procedure of arrest and duties of officer making arrest.-Every police officer while making an arrest shall -

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be-

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest."

7. Thus, the legislature has now incorporated the guidelines laid down by the Apex Court in the case of D.K. Basu (Supra) in the said Code in the form of Section 41B. Admittedly, there is no separate Memorandum of Arrest of the Petitioners drawn by the police. A register has been maintained at the Police Station which is described as the register of showing compliance with the directions of the Apex Court in the case of D.K. Basu (supra). There are columns therein such as the name and the address of the persons arrested, time and date of arrest, the offence alleged, names of the Investigating Officer and the Officer of the Police who arrested the person, names of the relatives of the arrestee who have been informed about the arrest, signatures of the relative or friend of the Arrestee and the signature of the Arrestee. The mandate of the directions of the Apex Court in the case of D.K. Basu (supra) as well as Section 41B of the said Code requires drawing of a separate Memorandum of Arrest in case of arrest of an individual. The practice of maintaining such a register without drawing a separate

Memorandum of Arrest is not consistent with the directions of the Apex Court in the case of D.K. Basu (supra) and the requirements of Section 41B of the said Code. The register can be in addition to the arrest memorandum. Therefore, as the directions issued by the Apex Court flow from Articles 21 and 22 of the Constitution of India, breach thereof amounts to violation of Article 21 of the Constitution of India.

8. Now coming to the other facts of the case, the complaint was filed on 7th May 2012 by the Fourth Respondent alleging that the Petitioners have been assaulting and abusing her. The non-cognizable offences under Section 323, 504 read with Section 34 of the Indian Penal Code were registered on the basis of the incidents of 21st April, 2011 and 5th May 2011. On 7th May 2011, the offence was registered by the Second Respondent. On 7th May 2011, the Second Respondent issued an order addressed to the Police Patil to keep the Petitioners present at the Police Station on 8th May 2011 at 9.00 a.m. The Second and the Third Respondents have stated in the reply that the Petitioners did not appear on 8th May 2011. The Station Diary entry No.18 made by the Second Respondent at 12.35 on 9th May 2011 shows that the Petitioners were arrested under Section 151 of the said Code and a proposal for initiating chapter proceedings has been made. Against the said entry No.18, Chapter Case No.95 of 2011 has been mentioned. There is also a reference to Sections 107 and 151 of the Code of Criminal Procedure, 1973.

9. This Court has repeatedly held that passing an order as required under Section 111 of the said Code is a condition precedent for initiating action under Section 107 of the said Code. The file of the chapter case shows that no such order was passed by the learned Executive Magistrate. Without there being any order passed under Section 111 of the said Code, the so called chapter case was numbered and the number is mentioned in the Entry No.18 on 9th May 2011. It is surprising that without there being initiation of proceedings under Section 107, the number of the chapter case appears in the entry made in station diary. Thus the proceedings of the chapter case are bad in law. On the same day, at 21.05, there is an Entry No.27 which records that on the instructions of the Inspector of Police Shri Shede, the Petitioners were released on giving them warning not to create

law and order situation and to maintain peace. Shri Shede, the Inspector of Police has also stated in the affidavit that the Petitioners have been released by him at 21.05 on 9th May 2011 under his orders. Perusal of the file of the chapter proceedings No.95 of 2011 shows that on the report submitted by the Second Respondent to the learned Executive Magistrate, there is an order passed on 10th May 2011 by the learned Executive Magistrate recording that the Petitioners were produced at 05.40 p.m. (17.40) and were released on bail. It is contended that the entry of release of the Petitioners at 21.05 of 9th May 2012 is fabricated inasmuch as the aforesaid order of the learned Executive Magistrate shows that the Petitioners were produced before him and that they were in custody of the Police till then.

10. Section 151 of the said Code reads thus:-

"151. Arrest to prevent the commission of cognizable offences. (1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.

Maharashtra: In section 151 -

(a) In sub-section (2), after the words "required or authorised" the words "under sub-section (3) or" shall be inserted;

(b) After sub-section (2), the following sub-section shall be inserted, namely, -

"(3) (a) Where a person is arrested under this section and the officer making the arrest or the officer of the police station before whom the arrested person is produced, has reasonable grounds to believe that the detention of the arrested person for a period longer than twenty-four hours from the time of arrest (excluding the time required to take the arrested person from the place of arrest to the court

of a Judicial Magistrate) is necessary by reason that-

(i) The person is likely to continue the design to commit, or is likely to commit, the cognizable offence referred to in subsection referred to in sub-section (1) after his release; and

(ii) The circumstances of the case are such that his being at large is likely to be prejudicial to the maintenance of public order.

The officer making the arrest, or the officer in charge of the police station, shall produce such arrested person before the nearest Judicial Magistrate, together with a report in writing stating the reasons for the continued detention of such person for a period longer than twenty-four hours.

(b) Notwithstanding anything contained in this Code or any other law or the time being in force, where the Magistrate before whom such arrested person is produced is satisfied that there are reasonable grounds for the temporary detention of such person in custody beyond the period of twenty-four hours, he may from time to time, by order remand such person to such custody as he may think fit.

Provided that, no person shall be detained under this section for a period exceeding fifteen days at a time, and for a total period exceeding thirty days from the date of arrest of such person.

(c) When any person is remanded to custody under clause (b), the Magistrate shall, as soon as may be communicate to such person the grounds on which the order has been made and such person may, make a representation against the order to the Court of Session. The Sessions Judge may on receipt of such representation after holding such inquiry as he deems fit, either reject the representation, or if he considers that further detention of the arrested person is not necessary, or that it is otherwise proper and Just so to do, may vacate the order and the arrested person shall then be released forthwith." (Vide Maharashtra Act 7 of 1981 (w.e.f. 2751980))."

11. For taking preventive action under Section 151 of the said Code, mere knowledge by the Police Officer of a design to commit cognizable offence is not sufficient. Preventive action can be taken only if it appears to such officer that the commission of offence cannot be otherwise prevented. In the present case, the action has been taken by the Second Respondent. We have perused the affidavit of the Second and Third Respondents. It is not recorded in the affidavit that the Second Respondent was satisfied that the commission of cognizable offence cannot be prevented without arresting the Petitioners. That satisfaction has not been recorded by the Inspector of Police who has filed the affidavit who ultimately ordered their release. Hence, the arrest under Section 151 was not at all warranted. The arrest under Section 151 is illegal. Moreover, the entry of arrest of the Petitioners made in the Station Diary at 12.35 on 9th May 2011 and in particular entry against Column Number 2 shows that the Petitioners were arrested in chapter case No.95 of 2011. The file of the chapter case shows that a proposal was submitted by the Second Respondent to the Learned Executive Magistrate on 9th May 2011 for initiating chapter proceedings. In fact, the proposal records that on 9th May 2011, the Petitioners were arrested at 12.35 under Section 151 of the said Code. In fact, the file of chapter proceedings shows that there was no order passed by the learned Executive Magistrate under Section 111 of the said Code and, therefore, no proceeding was ordered to be initiated. The Second Respondent while making entry of arrest in the station diary has shown the Petitioners arrested in connection with the chapter case apart from Section 151 of the said Code.

In the entry No.18 in the station diary of the arrest of the Petitioners, there is not even a reference to drawing Memorandum of Arrest or making of an entry in the "register of compliance of the directions issued by the Apex Court in the case of D.K. Basu (supra)". There is no entry in the station diary as regards the information of arrest given to the relatives or friend of the Petitioners. Thus, there is a breach of the directions issued by the Apex Court in the case of D.K. Basu (supra). Thus, the arrest of the Petitioners is rendered illegal.

12. However, there is no reason to disbelieve the case of the Police that on 9th May 2011 at 21.05, the Petitioners were released. There is an entry in the station

diary to that effect. Merely because the learned Executive Magistrate has recorded that the Petitioners were produced before him, it cannot be said that the Petitioners continued to remain in custody till 05.40 p.m. on 10th May 2011.

13. There is another serious aspect which needs to be looked into. In the register of preventive action maintained by the Police Station, an entry of preventive action of chapter proceedings is made by the Second Respondent on 10th May 2011. The said entry has been made after erasing the original entry by whitener and on the erased portion, the said entry has been made. Apart from this, perusal of the file of chapter proceedings shows that the order under Section 111 of the said Code was not passed which is a condition precedent for initiating proceedings under Section 107 of the said Code. Therefore, further action of taking bond from the Petitioners in the said proceedings is rendered illegal. In fact, the order of release of the Petitioners on bail has been passed by the learned Executive Magistrate on the proposal of the Second Respondent submitted for initiating the proceedings. Thus, the proceeding under Section 107 of the said Code is completely illegal.

14. Now other question is whether the Petitioners are entitled to compensation on account of their illegal arrest and violation of fundamental rights under Article 21 of the Constitution of India. In the case of Nilabati Behera v. State of Orissa ((1993)2 SCC 746), the issue regarding grant of compensation in a public law remedy was considered by the Apex Court. In Paragraphs 17 and 22, it was held thus:-

"17. It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary

compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah*¹ and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights."

"22. The above discussion indicates the principle on which the court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in *Rudul Sah*¹ and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in *Rudul Sah*¹ and others in that line have to be understood and *Kasturilal*⁸ distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."

Hence, this Court is empowered to grant compensation in this Petition under Article 226 of the Constitution of India when the violation of Article 21 is clearly established.

15. The Petitioners were arrested without complying with the directions issued by the Apex Court in the case of *D.K. Basu* (supra). Moreover, without recording satisfaction that the commission of cognizable offence cannot be prevented without arresting the Petitioners, they were illegally arrested under Section 151 of the said Code. Thirdly, the Petitioners were compelled to give bonds in chapter proceedings, the initiation of which itself was bad. The Petitioners were thus illegally detained for more than 8 hours in the police lock up. Only one non-

cognizable case was registered against the Petitioners. Therefore, compensation of Rs.20,000/- each prayed for by them is reasonable and proper.

16. The State Government will have to hold an inquiry into the conduct of the Second and Third Respondents by appointing an appropriate higher officer. If any dereliction of duty is found on their part, a disciplinary inquiry will have to be initiated. As far as compensation is concerned, the same will have to be paid by the State Government. It will be open for the State Government to initiate appropriate proceedings and recover it from the erring police officers.

17. Hence, we pass the following order:

(a) We direct the State Government to pay compensation of Rs.20,000/-(Twenty Thousand) each to the Petitioners within a period of eight weeks from today;

(b) The proceedings of the chapter case No.95 of 2011 before the learned Executive Magistrate, Taluka-Bhudargad, District-Kolhapur, is quashed and set aside and the bonds taken from the Petitioners stand cancelled;

(c) The State Government shall appoint an officer to examine the conduct of the Second and Third Respondents;

(d) If after preliminary inquiry, it is found that the Second and Third Respondents are guilty of dereliction of duty, appropriate disciplinary inquiry shall be initiated against them;

(e) The Petition is disposed of on above terms.

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