IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

R.F.A No. 92 of 2001 with
Cross-objection No. 93 of 2001.

Judgement reserved on: 18.6.2008

Date of decision: 29.8.2008.

State of H.P. and anr. ….. Appellants.

Vs.

K.L.Malhotra and ors. …. Respondents.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : Mr. A.K.Bansal, Additional Advocate General.

For the Respondents : Mr. K.D. Sood with Mr. Sanjeev Sood, Advocates, for respondents No. 1 & 2.

Kuldip Singh, Judge.

This judgement shall dispose of RFA No. 92 of 2001 and Cross Objection No. 93 of 2001 arising out of judgement, decree dated 29.4.2000 passed by learned Additional District Judge, Mandi in Civil Suit No. 7/98(92), decreeing the suit of respondents No. 1, 2 against appellants for Rs.2,40,000/- inclusive of Rs.1,50,000/- ex-gratia grant alongwith interest at the rate of 12% per annum, from 10.1.1992.

2. The brief facts of the case are that respondents No. 1, 2 filed a suit against the appellants and respondent No. 3 for recovery

---

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

of Rs.5,00,000/-. The case of respondents No. 1, 2, as pleaded in the plaint, is that on 27.9.1990 one Ramesh Rana committed self immolation as a protest against "Mandal Commission Report" by pouring kerosene oil at Gandhi Chowk, Mandi at about 1.30 p.m. in full glare of police and District Administration. He was removed to Civil Hospital with 80% burn injuries. On hearing the news of self immolation, students and many residents of Mandi town came out in streets and they wanted to meet the Deputy Commissioner in this connection, but they were not allowed to do so by the police. They pelted stones, as a result of which people ran for safety. Karan Malhotra son of respondents No. 1, 2 had seen his brother Arvind Malhotra with Ajay Guleria on scooter who was shot by respondent No. 3, Karan Malhotra thought that his brother Arvind Malhotra had also sustained injuries. It has been alleged that respondent No. 3, who was DIG police had ordered firing, as a result of which Karan Malhotra suffered injuries and fell down on the entrance door of Bhut Nath temple. He was taken to District Hospital, Mandi, where he was declared dead.

3. The further case of respondent No. 1 and 2 is that firing was ordered without any provocation with an intention to kill Karan Malhotra. The police did not record the FIR despite many efforts and persuasion on behalf of the father of deceased and local residents of Mandi town. The respondent No. 1 later on filed a criminal complaint under Section 302 IPC against respondent No. 3 before the learned Chief Judicial Magistrate, Mandi.

4. It has also been alleged that many persons received injuries at the hands of police. There was no restriction for assembly of persons, no resort was made to lathi charge nor any warning was given for dispersal nor assembly was declared unlawful. The people had not taken any offensive action. In the criminal action of the police, four young boys lost their lives and many received serious bullet injuries making them infirm and crippled throughout their lives. The State is responsible for the wrongful actions of its servants.

5. It has been alleged that Karan Malhotra was born on 15.1.1976 and studying in 9th Class in Mandi Public School in the year 1990, earlier he was a student of St. Stephens School and D.A.V. Public School, Chandigarh. He was very brilliant and preparing for National Defence Academy. He would have received an average Rs.5000/- per month salary and contributed a lot to the family. The respondents No. 1 and 2 due to the death of Karan Malhotra in terms of money have suffered a loss of Rs.10,55,000/-. A notice under Section 80 CPC dated 7.3.1991 was issued to appellants and respondent No. 3. The respondents No. 1, 2 ultimately confined their claim to Rs.5,00,000/- and filed a suit. The suit was originally filed in this court, but later on suit was transferred to learned District Judge, Mandi, who assigned the same to learned Additional District Judge, Mandi.

6. The appellants contested the suit by filing joint written statement. The respondent No. 3 had also filed separate written statement. The appellants have taken preliminary objections of maintainability of the suit on the ground of sovereign immunity. The

objections of vagueness of the plaint and lack of cause of action have also been taken. On merits, it has been admitted that Ramesh Rana committed self immolation on 27.9.1990 and he died on the same day. It has been alleged that unlawful mob indulged in acts of arson, violence and did not disperse despite warning, the assembly was declared unlawful and army was called out in Mandi town and curfew was imposed. The Government had appointed "Kainthla Commission" to enquire into the matter. The police and District Administration had exercised all possible restraint against unlawful assembly of mob. The force was resorted to by police and District Administration after assembly was declared unlawful strictly in accordance with law. It has been denied that respondent No. 3 used any fire arm or shot at any person. It has been admitted that some boys lost their lives in the firing incident. The receipt of notice under Section 80 CPC has not been denied. It has been alleged that Karan Malhotra might have sustained injuries in the mob violence, arson for which appellants are not responsible. The appellants and respondent No. 3 ultimately denied the claim of respondents No. 1 and 2. On the pleadings of the parties, the following issues were framed: -

1. Whether the suit, in view of the allegations made, is not maintainable, as alleged in paras 1 and 3 of the preliminary objections in written statement of defendants No. 1 to 3. O.P. Defendants.

2. Whether there is no cause of action and the plaint is liable to be rejected under order 7 Rule 11 CPC. O.P. Defendants.

3. Whether Karan Malhotra, since deceased, died on account of defendant No. 3 having ordered the firing through his subordinates (Firing Squad) as alleged in para-5 of the plaint? O.P.P.

4. In case issue No. 3 is decided in the affirmative to what compensation and from whom the plaintiffs are entitled to? O.P.P.

5. Relief.

7. The learned Additional District Judge decreed the suit on 29.4.2000, as noticed above, hence the present appeal and in the appeal respondents No. 1 & 2 have filed cross objections.

8. I have heard Mr. A.K. Bansal, learned Additional Advocate General for the appellants and Mr. K.D. Sood, learned counsel for respondents No. 1 & 2/ cross objectors and gone through the record, none appeared for respondent No. 3. On behalf of the appellants, it has been submitted that learned Additional District Judge has not properly appreciated the evidence on record and has erred in decreeing the suit of respondents No. 1 & 2. At the time of alleged incident, the State was discharging its sovereign function and, therefore, the suit against the State and its officers is not maintainable. In any case, the learned Additional District Judge has awarded excess compensation. The learned Additional Advocate General has prayed for setting aside the impugned judgement, decree and dismissal of the suit. Per contra, Mr. K.D. Sood, learned counsel for respondents No. 1 & 2/ cross objectors has submitted that learned Additional District Judge has rightly held that appellants are

liable to pay compensation. He has submitted that not only the appellants but respondent No. 3 is also equally responsible for the unlawful acts and payment of damages to respondents No. 1 and 2 on account of death of Karan Malhotra. The learned counsel has submitted that respondents No. 1 and 2 are entitled to compensation as claimed in the suit. The learned Addl. District Judge has wrongly deducted Rs.1,50,000/- earlier paid to respondents No. 1 and 2 on account of ex-gratia grant. The learned counsel for respondents No. 1 and 2/ cross-objectors while supporting the impugned judgement, decree, has made submission for enhancement of compensation in favour of respondents No. 1 and 2.

9. The perusal of written statement of appellants reveals that unruly mob had committed acts of arson, looting and damage to the property. The force was used by District Administration and police only after assembly of people was declared unlawful in accordance with law and warning was given to the unlawful assembly. Later on army was called out and curfew imposed in Mandi town. It has been admitted that four boys lost their lives in the firing incident. The appellants in their written statement have not specifically denied that Karan Malhotra had not died in firing incident. The appellants ultimately took the protection of sovereign immunity to defend their action.

10. PW 1 K.L. Malhotra has stated that Karan Malhotra was born on 15.1.1976 and he died in police firing on 27.9.1990. The police or the Magistrate before firing did not give any warning. The gathering of the people was not declared unlawful by any authority.

Karan Malhotra his son had told him in the hospital that police indiscriminately fired in all directions in Bhut Nath, Chanderlok streets. The firing was also done towards post office and Tarna. In this firing four boys were killed and his son also died in the hospital due to bullet injury. The people were peaceful at the time of incident. The police was aggressive. The police action was malafide. The State is responsible for the acts of police. In cross examination he has stated that Karan Malhotra was 14 years of age and was studying in Mandi public school in 9th class. The police before firing did not use lathi charge. DIG Prem Singh did not issue firing order in his presence. The incident took place after 2.00 or 2.30 p.m. Karan Malhotra died in the hospital in his presence. He has admitted that State had paid Rs.1.50,000/- ex-gratia on account of death of his son Karan Malhotra.

11. PW 2 G.D.Sharma has proved certificate dated 17.6.1992 Ex. PW 2/A issued by Principal, Mandi Public School, Mandi that Karan Malhotra had been student of 9th Class in Mandi Public School. PW 3 Arvind Malhotra, brother of deceased Karan Malhotra has stated that on 27.9.1990 as a protest against Mandal Commission Report, Ramesh Rana put himself on fire with the help of petrol/ oil, he suffered 80% burn injuries. The public wanted to see the District Administration. The police prevented the public from entering the court premises. The public had turned restive. The assembly was not declared unlawful, suddenly the police had opened fire in all directions and four persons sustained bullet injuries. One Ajay Guleria sustained fire arm injury on his face. He picked up Ajay

Guleria and had taken him to the District Hospital. Karan Malhotra had visited Bhut Nath temple. He thought as if he had sustained injury and cried. On this Prem Singh, Deputy Inspector General of Police, Mandi opened the fire, which hit his younger brother. He was taken to hospital, where he died. In cross examination, he has denied that mob had indulged in firing, arson, brick bating and damage to public property. He has denied that the police had left with no alternative but to use fire arm for controlling the mob. He admitted that later on Army was called out by the District Administration.

12. PW 4 Dr. S.S.Guleria has stated that on 28.9.1990 at 12.00 a.m., he conducted post mortem of Karan Malhotra and found the death of Karan Malhotra due to hemorrhage shock resulting from injury to femoral vessels caused by fire arm, Ex. PW 4/B is the post mortem report of Karan Malhotra duly signed by him and Dr.R.S.Chandel as well as Dr. S.N. Mehta and Dr. B.L. Kapoor. PW 5 Naresh Kumar has supported the case of respondents No. 1 and 2. Kainthla Commission Report Ex. PXX was tendered in evidence.

13. DW 1 Desh Raj Sood, Dy. S.P., Sarkaghat has stated that he was working as Inspector/ SHO, Police Station, Mandi in the year 1990. Anti Mandal agitation had started in September 1990 at Mandi. On 27.9.1990 Ramesh Rana set himself on fire with the help of oil/ petrol at 12.30 p.m. The District Administration had taken Ramesh Rana to District Hospital, Mandi. Thereafter crowd became restive and had indulged in brick bating. On 27.9.1990, the police and District Administration had given warning to the mob to stop

mischief, tear gas was used to disperse the mob, but mob did not disperse. The police used cane charge. The mob had turned violent and started looting some shops. When these measures proved ineffective, the District Administration was compelled to order firing. The orders were issued by Rattan Singh, S.D.M. and Rajesh Kumar, A.D.M.

14. DW 2 Inder Singh, Clerk in the office of Deputy Commissioner, Mandi has placed on record order dated 27.9.1990 Ex. DW 2/A of Rattan Singh, S.D.M. In cross examination, he ha stated that he does not know whether Rattan Singh issued any firing order. DW 3 Sarwan Kumar, Patwari, D.C. Office Mandi has proved on record that ex-gratia amount of Rs.1,50,000/- was paid to Kasturi Lal Malhotra vide Ex. DW 3/C. The District Attorney has tendered in evidence FIRs Ex. DX-1 to Ex. DX-7. This is the entire evidence which has been led by the parties.

15. It is the case of appellants that mob before firing became restive and had started arson, looting etc. It is also the case of the appellants that before firing, warning was given to the mob to disperse, lathi charge, tear gas was also used but all proved ineffective. It has also been submitted on behalf of the appellants that assembly of the people was declared unlawful, order under Section 144 Cr.P.C. was promulgated. DW 1 was the Station House Officer, Police Station, Mandi at the time of incident. He has given some version in his statement, but he has nowhere stated that he was present on the spot at the time of firing. In cross examination, he has stated that he was on duty at Mandi, but has not stated specifically

that he was present at the place of firing. Ex. DX-1 to Ex. DX-7 are the copies of FIRs of different incidents, which took place on 27.9.1990 in between 1.15 p.m. to 3.00 p.m. in Mandi town. These FIRs have not been proved on record in accordance with law. These FIRs have been just placed on record in the statement of District Attorney. Ex. DW 2/A is the copy of order dated 27.9.1990 vide which Sub Divisional Magistrate, Mandi Sadar in exercise of powers under Section 144 Cr.P.C. ordered clamping of curfew within the limits of Mandi town from 7.00 p.m. on 27.9.1990 till further orders. The appellants have placed nothing on record to show that before firing any lawful authority declared assembly of persons at the place of firing unlawful nor any order of lawful authority has been placed on record for opening firing by the police on the said date. Ex. PXX is the copy of inquiry report of Kainthla Commission. It was tendered in evidence in the court below by the learned counsel for respondents No. 1 and 2. At the time of tendering of Ex. PXX in evidence, no objection was taken by the appellants and therefore, the objection of the appellants in this court that report Ex. PXX is not admissible in evidence because the author of the report has not been produced in the court to prove the report is not available to the appellants. The report Ex. PXX will be deemed to have been taken on record with the approval of the appellants as no objection was taken by the appellants when report Ex. PXX was taken on record. In paragraph 4 of the written statement appellants themselves have referred “Kainthla Commission”, therefore, appellants cannot object to the admissibility

of Kainthla Commission report Ex. PXX. In paragraph- 71, the Commission in Ex. PXX, has concluded as follows:-

> **"The conclusion that emerges from the facts and circumstances considered is that the District Administration and the police were taken by surprise by the self-immolation of late Shri Ramesh Rana and appears to have become panicky by the all round vandalism in the town. The police further got angered and provoked to retaliate to the stone bombardment made on them by the agitated boys. The police played the childish game of exchange of stone throwing with the boys. But the boys naturally being extra active in this monkey business were having upper hand but had to pay heavily with their lives and limbs. As noticed earlier, the particular situation obtaining in Seri and Chauhatta Bazars was not such which called for opening fire and that also on all sides and lanes in an indiscriminate manner. It could have been controlled with wielding of effective lathi charge and use of tear gas and also making some arrests of agitation leaders and a few miscreants. The pelting of stones by the mob of boys and others resulting in simple injuries to a dozen of policemen and the incidents of damage by breakage and burning caused in Chauhatta and Seri Sectors is not sufficient for the police to take resort to the extreme preventing step of firing on the mob taking the young lives of four budding boys and inflicting fire arm injuries to a score of them. The firing made was very excessive to meet the situation and in a manner not warranted by law. There was no need at all to do firing at sufficiently far away and residential areas from the places of trouble in Seri and Chauhatta."**

16. PW 4 Dr. S.S. Guleria has proved post mortem report Ex. PW 4/B of Karan Malhotra and opined that Karan Malhotra had died due to fire arm injury. The case of respondents No. 1 and 2 in the plaint is that Karan Malhotra had died due to police firing on 27.9.1990. This fact has not been specifically denied by the appellants in their written statement. PW 1 and PW 2 by way of oral

evidence have also proved that Karan Malhotra died due to police firing on 27.7.1990. The cumulative effect of oral and documentary evidence is that respondents No. 1 and 2 have proved that Karan Malhotra had died due to police firing on 27.9.1990. The appellants have failed to justify the police firing which caused the death of Karan Malhotra. No doubt, some evidence has come on record that on 27.9.1990 there was some unrest in Mandi town due to self immolation committed by Ramesh Rana in protest of Mandal Commission Report. However, the appellants have failed to prove that the situation was so bad that it could not have been dealt with by any mode other than the police firing. In any case, the appellants have failed to justify the police firing leading to the death of Karan Malhotra. The learned Additional District Judge has rightly appreciated the material on record in coming to the conclusion that police firing which caused death of Karan Malhotra was unjustified.

17. The learned counsel for respondents No. 1 and 2 has submitted that respondent No. 3 is responsible for causing death of Karan Malhotra due to firing. PW 1 has admitted that Prem Singh had not fired in his presence nor he ordered firing in his presence. PW 3 has, however, stated that Prem Singh, DIG had opened fire, which hit his younger brother. It appears PW 3 could not properly pin-point the person who actually fired at his younger brother Karan Malhotra. Prem Singh, DIG happened to be in the vicinity and being the senior officer, therefore, PW 3 concluded that Karan Malhotra died due to the bullet injury fired by Prem Singh. It has not been proved on record that Prem Singh in fact was carrying any weapon

on 27.9.1990 at the relevant time. It has been proved that Karan Malhotra died of bullet injury but the bullet which caused the death of Karan Malhotra was fired by Prem Singh has not been proved on record. In report Ex. PXX, the Commission has exonerated Prem Singh, DIG. The Commission has rather appreciated the work of Prem Singh, DIG in paragraphs No. 66 and 67 of the report. There is nothing on record to show that Karan Malhotra died of bullet injury fired by Prem Singh or the bullet which caused the death of Karan Malhotra was fired at the instance or instigation of Prem Singh, DIG. The learned Additional District Judge has rightly exonerated Prem Singh.

18. The learned Additional Advocate General has submitted that firing was resorted under compelling circumstances in to protect public and private property and to control the unruly mob. The fire arms were used and such action of the police and administration was as per Rule 14.56 of the Punjab Police Rules, 1934 (for short, the Rules) as applicable in Himachal Pradesh. The relevant part of Rule 14.56 of the Rules is reproduced hereinbelow:-

> **"(e) When the responsible police officer, whether acting under the orders of a magistrate or independently, considers that the use of firearms is necessary, he shall, unless circumstances make such action impossible, warn the crowd that if they do not immediately disperse, fire with live ammunition will be opened upon them. If the District Magistrate or, in a sub-division, the sub-divisional officer is present, his orders shall invariably be obtained immediately the necessity of opening fire becomes imminent. If the senior police officer present is of non-gazetted rank, he shall at such stage obtain the orders of the senior magistrate present (other than an honorary Magistrate).**

(f) In order that the decision to open fire may be promptly acted upon without loss of control or confusion, the responsible police officer shall, as soon as it appears likely that the use of firearms will be necessary, tell off a detachment of armed police to be held in readiness. When fire is to be opened, the responsible police officer shall decide the minimum volume necessary to be effective in the circumstances and shall give precise orders accordingly, as to the particular men or files who are to fire and the number of rounds to be fired; and whether volleys or independent aimed shots are to be fired, and shall ensure that his orders are not exceeded and that no firing contrary to or without orders takes place. Whatever volume of fire is ordered, it shall be applied with the maximum of effect; the aim shall be kept low and directed at the most threatening parts of the crowd; in no circumstances shall firing over the heads of or at the fringes of the crowd be allowed. Since buckshot is not an effective charge at any range at which it is safe to use it, Government has directed that the use of buckshot ammunition against crowds should be prohibited.

(g) When no Magistrate is present, the police officer in command, as is contemplated in the Criminal Procedure Code, shall be responsible for the opening of fire. Invariably, whether the order to use firearms has been given by a magistrate, or by a police officer, the order to cease fire shall be given as soon as the unlawful assembly shows a disposition to retire or disperse.

(h) While the disposition of the police must be left to the police officer in command, every precaution should be taken that a force armed with firearms is not brought so close to a dangerous crowd, as to risk its either being overwhelmed by numbers or being forced to inflict heavy casualties. If the use of firearms cannot be avoiden, firing should be carried out from a distance sufficient to obviate the risk of the force being rushed and to enable strict fire-control to be maintained.

(i) On occasions of religious festivals police carrying firearms should ordinarily not be employed to escort processions. They should be posted in front or in the rear of the procession where they are in least danger of being thrown into confusion by the mob and can be kept under the control of the officer in command and their petty officers.

(j) On occasions when firearms have been used against unlawful assemblies it should be the duty of the Magistrate, if one is present, to make adequate arrangement for the care of the wounded persons and for their removal to hospital and also for the disposal of the dead, if any. He should also, then and there, draw up a full report in consultation with the senior police officer present, stating all the circumstances and noting the number of rounds of ammunition issued and expended. If no Magistrate is present, this report shall be prepared by the senior police officer who shall also take all possible action with regard to wounded and dead."

The appellants have placed nothing on record to show that administration and police handled the mob in accordance with Rule 14.56. There is nothing on record to show that any warning was given to the crowd to disperse failing which firing would be opened nor any time was given to mob to disperse. There is no order of the responsible police officer or any authorized Magistrate on record for opening firing. No report of the Magistrate or Police Officer in compliance to Rule 14.56 (j) has been placed on record. It is thus clear that firing resorted to by the police and the administration was in violation of the mandate of law. Therefore, police and administration cannot take the shelter of Rule 14.56 for resorting firing on the mob.

19. The learned Additional Advocate General has also submitted that opening of firing at the relevant time is otherwise

protected under sovereign function of the State. He has submitted that at the most Karan Malhotra died when servants of the State were discharging their duties under sovereign act of the State, therefore, no action in tort is maintainable against the State and its servants by respondents No.1, 2.

20. Mr. K.D. Sood, learned counsel for respondents No. 1 and 2 has submitted that police and administration acted in violation of law, by no stretch the patent illegal act of the police and administration for killing Karan Malhotra comes under the sovereign function of the State. The police has grossly violated Article 21 of the Constitution in killing Karan Malhotra without any provocation, the deceased even remotely was not a member of the mob on the relevant date and time. In order to appreciate the rival contentions on the point of sovereign act of State, it would be relevant to refer to some decided cases on the point.

21. In **M/s Kasturi Lal Ralia Ram Jain** vs. **The State of Uttar Pradesh** AIR 1965 SC 1039, it has been held as under:-

> **"In the present case, the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power of arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained; and so, we**

inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable."

22. In **Smt. Nilabati Behera alias Lalita Behera** vs. **State of Orissa and others** AIR 1993 SC 1960, after noticing ***M/s Kasturi Lal Ralia Ram Jain*** (supra), has held as follows:-

"In this context, it is sufficient to say that the decision of this Court in Kasturilal (AIR 1965 SC 1039) upholding the State's plea of sovereign immunity for tortuous acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Arts. 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in Rudul Sah (AIR 1983 SC 1086) and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Arts. 32 and 226 of the Constitution. On the other hand, Kasturilal related to value of goods seized and not returned to the owner due to the fault of Government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, in-applicable in this context and distinguishable."

The Supreme Court in **Smt. Nilabati Behera's** (Supra) has drawn distinction between claim against the State in tort under ordinary process and a claim for compensation for violation of fundamental rights. The Supreme Court after drawing the distinction between aforesaid to types of claims has distinguished *M/s Kasturi Lal Ralia Ram Jain* in *Smt. Nilabati Behera.*

23. The Supreme Court in **D.K.Basu** vs. **State of West Bengal** AIR 1997 SC 610, has reiterated *Smt. Nilabati Behera,* as follows:-

> **"Till about two decades ago the liability of the Government for tortuous act of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortuous acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of the India. In Nilabati Behera v. State (1993 AIR SCW 2366) (supra) the decision of this Court in Kasturi Lal Ralia Ram Jain v. State of U.P., (1965) 1 SCR 375 : (AIR 1965 SC 1039), wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained……..."**

24. In **State of Andhra Pradesh** vs. **Challa Ramkrishna Reddy and others** AIR 2000 SC 2083, two persons namely Challa Chinnapa Reddy and his son Challa Ramkrishna Reddy were arrested in a criminal case and were in judicial custody and were lodged in Sub Jail, Koilkuntla. In the intervening night of 5th and 6th May, 1997, some persons entered the premises of Sub Jail and hurled bombs as a result of which Challa Chinnappa Reddy sustained grievous injuries and later on died, but his son Challa Ramkrishna Reddy, who was also lodged in the Jail escaped with some injuries. Challa Ramkrishna Reddy and his four brothers and mother filed a suit against State of Andhra Pradesh claiming a sum of Rs.10,00,000/- as damages on account of negligence of defendants

which had resulted in death of Challa Chinnappa Reddy. The suit was dismissed including on the ground of sovereign functions of the State. The decision of the trial court was assailed in appeal in High Court. The High Court considered Art. 21 of the Constitution and came to the conclusion that since the right to life was part of fundamental right of a person and that person cannot be deprived of his life and liberty except in accordance with the procedure established by law, the suit was liable to be decreed as the officers of the State in not providing adequate security to the deceased, who was lodged with his son in the jail, had acted negligently. The High Court decreed the suit for Rs;1,44,000/- alongwith interest. The judgement of the High Court was assailed before the Supreme Court. The judgement of the High Court was assailed before the Supreme Court and the Supreme Court has held as follows:-

> **"Right to Life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that Right. A prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the Right to Life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights."**

The Supreme Court noticed **N. Nagendra Rao & Co.** v. **State of A.P.** AIR 1994 SC 2663, where immunity of the State for sovereign functions has been explained as follows:-

> **"But there the immunity ends. No civilized system can permit an executive to play with the people of its country and**

claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as `sovereign and non-sovereign' or `governmental or non-governmental' is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown but merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the `financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation', or because of `logical and practical ground', or that `there could be no legal right as against the State which made the law gradually gave way to the movement from, `State irresponsibility to State responsibility'. In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no

rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity."

The Supreme Court ultimately has held as follows:-

"This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including Police Officers & personnel for their to tortuous act. Though most of these cases were decided under Public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact.

Moreover, these decisions, as far example, Nilabati Behera v. State of Orissa, (1993) 2 SCC 746: (1993) 2 SCR 581: AIR 1993 SC 1960: (1993 AIR SCW 2366): In Re: Death of Sawinder Singh Grover, (1995) Supp (4) SCC 450: (1992) 6 JT (SC) 271: 1992(3) Scale 34(2); and D.K. Basu v. State of West Bengal, (1997) 1 SCC 416: AIR 1997 SC 610: (1997 AIR SCW 233), would indicate that so far as Fundamental Rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend it action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail."

25. In **The State of Madhya Pradesh and another** vs. **Smt. Shantibai and another** AIR 2005 M.P. 66, the police personnel fired in the air for dispersing mob. The bullets hit two ladies, who filed a suit and claimed Rs.1,75,000/- compensation. The trial court held that there was negligence on the part of police officers in firing on

account of which plaintiffs were injured. The State Government was ordered to pay compensation Rs.50,000/- to plaintiff No.1 and Rs.25,000/- to plaintiff No.2 alongwith interest at the rate of 12% per annum. The appeal was filed in the High Court where doctrine of sovereign immunity was invoked by the State. The question in appeal was whether the State Government is not liable to pay damages because of the doctrine of sovereign immunity. On those facts it was held that police officer was negligent qua the plaintiffs. It has been further held as follows:-

> **"……. In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. Maintenance of law and order or repression of crime may be inalienable function, for proper exercise of which the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense. The suit for damages for negligence of officers of State in discharging statutory duty is maintainable, is also supported by Art.300.**
>
> **In view of the above legal position, the plea of sovereign immunity is not available to the defendants in the present case.**

The plaintiffs sustained injuries at the hands of police officers even though unwittingly. They deserve some compensation from the State to repair the damage done to them. They were innocent victims. The judgement and decree of the trial court are unassailable."

26. The police and the administration was negligent in opening firing, which killed Karan Malhotra. There was gross violation of Article 21 of the Constitution. The State has no right to take away the life of a citizen except by following due process of law. The servants of the State if take law in their own hands and violate Article 21 of the Constitution then State is liable for the acts of its servants and in that situation cannot seek protection by pleading sovereign immunity. The servants of the State are expected to deal with the public with care and caution. They should handle the mob tactfully and should resort to force after careful assessment, firing should be strictly in accordance with law and that too as a last resort. The servants of the State cannot be permitted to take law in their own hands under the shelter of sovereign immunity. In view of facts and circumstances of the present case, the police had killed Karan Malhotra son of respondents No. 1 and 2 without any provocation on the part of the deceased. It has not been proved on record that Karan Malhotra had indulged in any act which provoked the police to fire at him causing his death. In these circumstances, the appellants have failed to bring their case within the ambit of sovereign immunity, in fact no case for sovereign immunity has been made out by the State.

27. The appellants have assailed the impugned judgement, decree on the ground of quantum also. On the contrary, the respondents No. 1, 2 have filed cross-objections for enhancement of compensation. Mr. K.D. Sood, learned counsel for respondents No. 1, 2 has submitted that deceased was studying in 9th class. He had brilliant academic career and was 14 years of age at the time of incident. He has submitted that though respondents No. 1, 2 were entitled to higher amount of compensation, but they had confined their claim to Rs.5,00,000/- in the suit, the learned Additional District Judge has awarded Rs.2,40,000/- compensation inclusive Rs.1,50,000/- ex-gratia grant, he has submitted that the amount awarded by the learned Additional District Judge is on the lower side. Mr. Sood has submitted that in **M.S.Grewal and another** vs. **Deep Chand Sood and others** AIR 2001 SC 3660, fourteen students studying in 4th, 5th and 6th classes were drowned due to the negligence of the teachers accompanying them on picnic. The High Court in writ petition awarded Rs.5,00,000/- compensation to each of the parents of fourteen students and the Supreme Court upheld the decision of the High Court regarding the quantum of compensation. Mr. Sood has further submitted that in the present case, the deceased was studying in 9th class, who was having very brilliant academic career. He has submitted that in view of **M.S.Grewal's** case (supra), the respondents No. 1, 2 are entitled to Rs.5,00,000/- compensation.

28. The learned counsel has also submitted that learned Additional District Judge has wrongly deducted Rs.1,50,000/- from

Rs.2,40,000/- amount of compensation assessed. He has submitted that Rs.1,50,000/- was paid to respondents No. 1, 2 on account of ex-gratia grant by the State, therefore, while awarding compensation to respondents No. 1, 2, the amount of Rs.1,50,000/- should not be included in the amount of compensation. There is force in the submission of Mr. Sood that amount of compensation awarded by the learned Additional District Judge to respondents No. 1 and 2 is on the lower side. In view of **M.S.Grewal's** case (supra), the respondents No. 1, 2 are entitled to Rs.5,00,000/- compensation on account of death of Karan Malhotra. So far as the amount of ex-gratia grant is concerned, nothing has been placed on record to show whether the amount of ex-gratia grant was paid under some scheme, instructions of the government. In the absence of scheme or instructions, the amount of Rs.1,50,000/- can be said to be a sort of help rendered by the State to respondents No. 1 and 2 on account of death of their son Karan Malhotra. In these circumstances, while assessing the compensation, the amount of Rs.1,50,000/- is to be included. Therefore, respondents No. 1 and 2 are entitled to compensation of Rs.5,00,000/- including Rs.1,50,000/- on account of death of Karan Malhotra from the appellants. On the amount of compensation, the respondents No. 1 and 2 are also entitled to interest at the rate of 9% per annum from the date of institution of the suit till realization. In view of above discussion, the appeal is liable to be dismissed and the cross objections are liable to be accepted.

29. No other point was urged.

30. As a result of the above discussion, the appeal being RFA No. 92 of 2001 is dismissed and the Cross Objections No. 93 of 2001 are allowed. A decree of Rs.5,00,000/- inclusive of Rs.1,50,000/- as ex-gratia grant alongwith interest at the rate of 9% per annum from the date of institution of the suit i.e. 10.1.1992 till the realization of the decretal amount is passed in favour of respondents No. 1, 2 – cross objectors- plaintiffs and against the appellants No. 1, 2- defendants with costs throughout.

August 29, 2008. **(Kuldip Singh)**
(*Hem*) **Judge.**