
(2022) 08 J&K CK 0009

In the Jammu And Kashmir High Court

Case No : Others Writ Petition No. 393 Of 2005

Abdul Razak Ahangar

APPELLANT

Vs

State Of J&K& Ors

RESPONDENT

Date of Decision : 10-08-2022

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 302, 307

Arms Act, 1959 — Section 7, 25

Code Of Criminal Procedure, 1973 — Section 161

Citation : (2022) 08 J&K CK 0009

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Mir Manzoor, Asifa Padroo, T. M. Shamsi

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1) The petitioner has filed the instant writ petition seeking a writ of mandamus against the respondents to pay compensation for the death of his son. A further direction seeking an enquiry into the circumstance in which the death of petitioner's son has taken place has also been sought.

2) During the pendency of the writ petition, the petitioner Ab. Razak passed away and his legal heirs were brought on record. In the petition it has been alleged that on 19.03.2004, police personnel of Special Task Force, Camp Achabal, apprehended son of the petitioner, namely, Bashir Ahmad Ahangar and handed him over to 5 PARA of Army that was camped at Vailoo Kokernag. It is further alleged in the writ petition that the petitioner's deceased son was shot dead by the army personnel. It is alleged that after the death of the deceased, his dead body was handed over to the petitioner by Police Station, Dooru, and there were visible signs of torture and interrogation on the body of the deceased as he had been mercilessly beaten by iron rods. It is further alleged that there were scars on the face and forehead of the deceased and that he had been fired

upon. The petitioner has claimed that his deceased son was not involved in any militancy related activity nor he had any criminal antecedents. It is contended that a false story has been fabricated by the respondents that the deceased was a militant and that he had been killed in an encounter.

3) It is claimed that the petitioner had approached the concerned authorities for investigation in the matter but no action was taken by the respondents. It is averred that the deceased was the elder son of the petitioner and that he has left behind two brothers, three sisters and old aged father. On these grounds, the petitioner has sought compensation from the respondents for having caused death of his son.

4) Respondents No.1 to 4 have filed a joint reply/status report. In the reply, they have submitted that on 19.03.2004, the DSB Camp Achabal apprehended deceased Bashir Ahmad Ahangar on the grounds of suspicion. During his preliminary questioning/interrogation, he admitted himself to be an active militant of LeT operating with code name "Abu Humeera". The deceased further revealed details about a hideout of "Abu Maaz", divisional commander of LeT. The said hideout was disclosed to be located at Mati Gawran Larnoo. The deceased Bashir Ahmad Ahangar led the forces towards the said hideout for the purpose of recovery of arms/ammunition etc. from there. When the forces along with the deceased reached near the hideout, the militants fired indiscriminately from inside the hideout, which was retaliated by the Government forces and, as a result of this encounter, the arrested militant Bashir Ahmad Ahangar received a bullet injury and he succumbed to the same. It is further averred in the reply that FIR No.28/2004 for offences under Section 302, 307 RPC read with Section 7/25 Arms Act was registered and during investigation of the case, statements of the witnesses under Section 161 of the Cr. P. C were recorded. Regarding recovery of arms and ammunition from the hideout, a seizure memo was prepared and during investigation, it was found that the deceased Bashir Ahmad Ahangar had died in the incident while leading the forces for the purpose of recovery of arms and ammunition from the hideout. According to respondents Nos.1 to 4, the militants who fired upon the deceased could not be identified and traced and, as such, a closure report was submitted before the competent authority.

5) Initially a reply affidavit came to be filed by Colonel Vineet Seth on behalf of respondent No. 5, Union of India. In the said reply affidavit, the story of handing over of deceased Bashir Ahmad Ahangar to 5 PARA of Army Camp Vailoo Kokernag and his subsequent killing was denied. It was specifically averred in the affidavit that the deceased was never handed over to the personnel of 5 PARA by STF Achabal.

6) Later on, a detailed counter affidavit came to be filed by Colonel Vikas Singh, Commanding Officer 1 PARA (SF) on behalf of respondent No. 5. Prior to that, another affidavit came to be filed by Colonel V.K. Nambiar of 1 PARA (SF) in which it was clarified that because 1 PARA (SF) was not impleaded as a party/

respondent to the writ petition, as such, the correct facts were not brought before this Court and in fact, it is 1 PARA (SF) whose personnel apprehended the deceased Bashir Ahmad Ahangar of LeT. It has been further submitted in the affidavit that upon interrogation of the deceased, he disclosed the location of the hideout and a joint operation was conducted by the personnel of 1 Para (SF) and STF. It is claimed that the troops were fired upon by the terrorists at about 17:30 hours and in the ensuing gunfight, the deceased Bashir Ahmad Ahangar sustained injuries and died on spot. In the reply affidavit, it has been clarified that the personnel of 5 PARA were not involved in the conduct of operation. In fact, the joint operation was conducted by the personnel of 1 PARA (SF) and STF. It has been reiterated that deceased Bashir Ahmad Ahangar who was guiding the security forces to the hideout, sustained serious injuries in the gunfight between militants and the forces.

7) The supplementary affidavit of Colonel A.D. Saha, Commanding Officer of 1 PARA SF and the counter affidavit of Sh. Vikas Singh, Commanding Officer of 1 PARA (SF) also project the same version as has been projected in the affidavit of Col. V. K. Nambiar of 1 PARA.(SF).

8) I have heard learned counsel for the parties and perused the pleadings and the documents on record. I have also gone through the Case Diary in respect of FIR No.28/2004 for offences under Section 302, 307 RPC read with Section 7/25 Arms Act of Police Station Kokernag.

9) Learned counsel for the petitioner has contended that there are contradictory versions regarding circumstances of death of the deceased given by the respondents in their affidavits. It has been contended that in the FIR lodged by the police, it is claimed that the joint operation was conducted by the personnel of 5 PARA and STF whereas the affidavits filed on behalf of respondent No. 5 claim that the 5 PARA of the Army was not involved in the joint operation but it was 1 PARA (SF) of the Army that was involved in the operation. According to the learned counsel this clearly shows that the version of respondents that deceased Bashir Ahmad Ahangar had died due to firing by militants is a cooked-up story to cover up the main cause which has lead to his death. According to the learned counsel, on this ground, it has to be presumed that the death of deceased has been caused by the respondents and, as such, they are liable to pay compensation to the petitioner in accordance with the judicial pronouncements delivered by this Court and the Supreme Court from time to time. In this regard, the learned counsel has relied upon the following judgments of this Court and the Supreme Court:

- i. Mohd. Maqbool Dar vs. State of J&K & Ors., 2012(2)JKJ 34;
- ii. Rohtash Kumar vs. State of Haryana & Ors., 2013(2) Scale 482;
- iii. Smt. Nilabati Behera alias Lalita Behera vs. State of Orissa and others, 1993 STPL(LE) 18272 SC;

iv. Extra Judicial Victim Families Association and another vs. Union of India & another, 2013 CrLJ (SC) 1084;

10) In order to saddle the liability of payment of compensation on account of death of the deceased upon the respondents, it has to be shown by the petitioner that it is the respondents who are responsible for causing death of the deceased. In this regard, the respondents have categorically, in their reply affidavits, denied having caused the death of the deceased. According to the respondents, the deceased, on the basis of suspicion, was picked up by the personnel of STF Achabal and thereafter he was handed over to the Army. It is claimed that the deceased led the army and the personnel of STF to a hideout of militants in connection with recovery of arms and ammunition. It is claimed by the respondents that on reaching the hideout, an encounter took place between the militants and the troops and during this encounter, the deceased suffered bullet injuries leading to his death.

11) There are certainly contradictions in the version of respondents to the extent that while as per the version of the police, it is the personnel of 5 PARA of the Army who were involved in the joint operation but as per the version of Union of India, it is the personnel of 1 PARA (SF) of the army who were involved in the joint operation. However, there is unanimity in the stand of the respondents that the death of the deceased occurred as a result of the encounter between troops and the militants. The respondents have not given any contradictory version as regards the cause of death of the deceased, though there may be contradictions in their versions as regards the identity of the battalion to which the forces of the Army who had participated in the joint operation, belonged.

12) Upon perusal of the Case Diary relating to the FIR that was registered in respect of the death of the deceased, it is revealed that during the investigation of the case, statements of police personnel belonging to the STF Achabal have been recorded and all of them have in unanimity stated that the deceased had died in the encounter that took place between the troops and the militants. The presence of Major Patil of 5 PARA, whose statement under Section 161 of the Cr.P.C has also been recorded during the investigation of the case, may be doubtful because of the stand taken by respondent- Union of India but then the other material on record of the Case Diary clearly points towards the fact that the death of the deceased had taken place as a result of the encounter and not as a result of the custodial torture committed by the troops upon the deceased, as has been claimed by the petitioner. There is also material on record of the Case Diary to prima facie suggest that the deceased was working for a proscribed militant organization.

13) From the forgoing analysis of the facts and the material on record, it becomes clear that the cause of death of the deceased in the instant case as claimed by the petitioner is seriously disputed by the respondents. Thus, disputed question of fact as regards the cause of death of the deceased has arisen in this case from the pleadings and the material on record. It is not a clear-

cut case where the petitioner's claim that the death of the deceased has been caused by the respondents is substantiated by the material on record or that the same stands admitted by the respondents. In view of this, this Court in exercise of its writ jurisdiction would not venture into the arena of determining the disputed questions of fact that have arisen in this case, particularly the one relating to the cause of death of the deceased on which hinges the fate of this case.

14) For the forgoing reasons, I do not find any merit in this writ petition. The same is, accordingly, dismissed, leaving it open to the petitioner to avail appropriate remedy as may be available to him under law.

15) The Case Diary be returned to the learned counsel for respondents.