

(2004) 05 GAU CK 0013

In the Gauhati High Court

Case No : Writ Petition (Criminal) No. 40 of 2002

Anima Basumatary

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-05-2004

Acts Referred:

Armed Forces (Assam and Manipur) Special Powers Act, 1958 — Section 4, 5
Arms Act, 1959 — Section 25(1B)
Constitution of India, 1950 — Article 21, 22(2), 226
Penal Code, 1860 (IPC) — Section 120(B), 121, 307

Citation : (2004) GLT 700 Supp

Hon'ble Judges : P.P. Naolekar, C.J.;A.H. Saikia, J

Bench : Division Bench

Advocate : S. Das and G. Pathak, for the Appellant; G. Sinha and A. Hazarika, for the Respondent

Final Decision : Allowed

Judgement

A.H. Saikia. J.

1. We have heard Mr. S. Das, the learned Counsel appearing for the Petitioner. Also heard Mrs. G. Sinha, the learned Addl. C.G.S.C. and Mrs. A. Hazarika, the learned Addl. Sr. Govt. Advocate, Assam representing respective official Respondents.

2. This is an application under Article 226 of the Constitution of India seeking for issuance of a writ of or in the nature of Habeas Corpus and/or any other appropriate writ, direction or order of like nature directing the official Respondents especially the Army to produce one Sri Swapan Basumatary before this Court.

3. The Petitioner in the instant case is the wife of said Swapan Basumatary. Her case is that on 31.8.2002 at about 8 p.m., some unidentified Army Personnel came to their house situated at Village Charaikhola in the district of Kokrajhar

and apprehended her husband and her brother-in-law, Sri Jiban Basumatary (brother of Swapan Basumatary). The Army personnel brutally assaulted both of them at the Court yard of their house and then they were taken away in their vehicle. In spite of their repeated query, the Army personnel did not disclose the where-about of her husband as well as Jiban Basumatary. Having no other alternative, the Petitioner along with the wife of Sri Jiban Basumatary lodged an F.I.R. with the Kokrajhar Police on 1.9.2002. After enquiry, the Officer-in-charge of Kokrajhar Police Station informed them that Army Personnel of 1st Maratha Regiment camped at Gossaigaon arrested both Swapan Basumatary and Jiban Basumatary. The Petitioner again on 2.9.2002 along with Srimati Behula Basumatary, wife of Sri Jiban Basumatary filed a joint application before the Deputy Commissioner, Kokrajhar to take steps for release of their husbands from the army custody and the said application was forwarded to the Superintendent of Police, Kokrajhar for immediate report.

4. In the meantime, on 2.9.2002 itself, one Captain Sameer of 1st Maratha Regiment, camped at Gossaigaon, lodged an ejahar with the Gossaigaon Police Station stating inter-alia that acting on specific information that two insurgents belonging to National Democratic Front of Bodoland (for short the NDFB) cadres were staying at village Choraikhola under Kokrajhar Police Station, an operation was conducted wherein those two persons were apprehended. It was also alleged in the said FIR that Swapan Basumatary informed the Army about the hide out and agreed to take the Army into the said hide out. Based on such information, another operation was launched at about 10.30 p.m. on 1.9.02 in which both Swapan Basumatary and Jiban Basumatary accompanied the Army. At that juncture, while Army party moved towards the hide out, the extremists opened fire upon the Army from the jungle which lasted approximately for about 5/ 10 minutes. In that process, taking advantage of darkness and confusion, Swapan Basumatary ran away and escaped from the Army custody and melted into the jungle. Further it was informed that arms and ammunitions were also recovered from the hide out. After such operation, on 2.9.2002 the Army handed over Jiban Basumatary to Gossaigaon Police Station. On the basis of the said FIR, the Gossaigaon Police registered a case being Gossaigaon P.S. Case No. 142/2002 u/s 120(B)/121/307, IPC read with Section 25(1-B) Arms Act. Since the Petitioner's husband disappeared from the custody of Army, the Petitioner has filed this Habeas Corpus petition.

5. The Army outrightly refuted the entire allegations of the Petitioner narrated in this Habeas Corpus petition by filing its response. The case of the Army is that on 31.8.02 based on specific information that two activists of the banned militant outfit of NDFB were hiding at village Charaikhola, Sri Swapan Basumatary and Sri Jiban Basumatary were apprehended from the said village at 1.30 p.m. Thereafter the aforesaid two persons were brought to Army Camp located at Gossaigaon in the Kokrajhar District. On 1.9.2002 Sri Swapan Basumatary volunteered to show to the Army a temporary hide out of the NDFB located in general area north of village Saraigaon in Ripu Reserve Forest in Gossaigaon Sub-

Division and accordingly in that night at about 9.30 p.m., and Army Patrol accompanied by Sri Swapan Basumatary, Sri Jiban Basumatary and a police representative namely UB NK 448 Dandi Kachari of the District Educative Force, Kokrajhar, posted at Sapkata Police Outpost, under Gossaigaon Police Station, launched an operation in the said general area in the vicinity to Indo-Bhutan border and when the Army Patrol reached the above mentioned area, the NDFB militants present in the hideout, opened heavy fire on the Army patrol which compelled the Army to retaliate by opening fire. Taking advantage of the said fire fight and the darkness, Sri Swapan Basumatary managed to run away in the dense forest. Denying any physical torture meted out to those two brothers, as alleged, the Army stated that immediately after the said operation in the night of 1.9.2002, an FIR was lodged on 2.9.2002 with the Gossaigaon Police informing the details of such operation as mentioned above with further information that Army recovered a huge quantity of arms and ammunition from the temporary hideout of NDFB. Alongwith such FIR, the Army also handed over Sri Jiban Basumatary to the police on the same day.

6. Considering the claims and counter claims of the respective parties and also in view of the fact that Swapan Basumatary was admittedly taken into custody by the Army and since then his whereabouts were not known as well as in view of Army personnel's claim that Swapan Basumatary had actually made his good escape by taking advantage of the fire between the Army personnel and militants, this Court by order dated 22.5.03 directed the learned District and Sessions Judge, Kokrajhar to cause an enquiry into the correctness of the allegations made by the Petitioner and submit his report to this Court.

7. The learned District Judge, in compliance of the direction of this Court, made an enquiry into the disappearance of Swapan Basumatary and on completion of such enquiry, he submitted his report dated 5.11.03 to this Court. The copies of the report dated 5.11.03 so submitted by the learned District Judge were also furnished to the learned Counsel for the respective parties. But rejecting the findings of the enquiry report, the Army filed objection on 7.4.04.

8. On careful perusal of the report above mentioned, it appears that the enquiry officer examined as many as seven witnesses on behalf of the Petitioner's side when none appeared to adduce on behalf of the Army except one Major Khushwinder Singh who only appeared and filed affidavit on behalf of the Army alongwith some documents. One Dandi Kachari, a police personnel who accompanied the Army on their operation, was also examined. On proper appreciation and assessment of the deposition of the witnesses as well as after perusal of the relevant documents produced by the parties, the enquiry officer arrived at the finding that Sri Swapan Basumatary might have been killed in the camp where he was kept for interrogation. In order to reach to conclusion, the learned District Judge observed, on consideration of the evidence of the respective witnesses that when the Army picked up both Swapan Basumatary and Jiban Basumatary, the civil administration was not informed because the

same was evident from the statement of one Sri Kiran Kr. Barua, the then Officer-in-charge of Kokrajhar Police Station who stated that in any Army operation, the Army authority informed about their plan to the police asking their participation in their such operation but in the instant case that was not done. One U.B. Nk 448 Dandi Kachari, though accompanied the Army, did not see, as he deposed as witness No. 7, any person under the custody of Army. It was also observed that only on 2.9.02, one Captain Sameer came and lodged an ejahar with the police against the person whom they picked up on 31.8.02 and he produced only Jiban Basumatary with the information that the Army recovered arms and ammunitions though those were not produced before the Police. The learned District Judge recorded the evidence of Sri Jiban Baisumataiy, witness No. 5 as follows-

Shri Jiban Basumatary is examined as witness No. 5 and he stated that on 31.8.2002 at about 8.30 p.m., the army personnel came and assaulted them. Thereafter, the army blind folded them and taken then (sic) at Gossaigaon. The army started assaulting them from the morning. They shouted. At one time, he could not hear the cry of his brother. Then a person came near the officer who was assaulting him and informed that the other is dead. Thereafter, at night, he was taken to jungle and he was informed that his brother is also there. After going a long distance, the army started firing. Then they started shouting stating that Swapan fled away. He was taken back and on the next day, he was produced before the police station but Swapan Basumatary did not return back.

9. In the objection filed against the enquiry report, the Army took the stand to the effect that since the Armed Forces (Assam and Manipur) Special Powers Act, 1958 (for short "the Act") was in operation in the entire N.E. Region enabling the Army, operating against the terrorists, to uphold the sovereignty and integrity of the country and to prevent violence and engage itself to find those terrorists, many of those terrorists were interrogated and consequently hide out of all those terrorist were also located. Those two brothers were amongst those who were interrogated and the Army was led by them to the hide out of NDFB. During such movement, there was heavy exchange of fire and Swapan Basxmiatary escaped into the deep jungle and once he escaped he could not surface over ground. It was also categorically averred in the said objection that those persons were not arrested/detained but they were simply interrogated and released and for such limited purpose, though important, no notice or knowledge of the Civil Administration was necessary.

9A. It is really amazing and interesting to read the instant objection so filed on behalf of the Army, operating in the State under the Act which explicitly indicates that the use of armed forces shall be only in the aid of the civil power. Suffice it to refer paragraph-4 of the objection which reads as under:

That the Court of enquiry has given a finding that detention of civilian for long duration without knowledge of the Civil Administration put a big question mark on the story made out by the Army authority. In this connection it is stated that

those persons were not arrested/detained but they were simply interrogated and released. For that limited but important purpose no notice/knowledge of the civil authorities is necessary. However, after interrogation when they confessed to having knowledge of a hideout in the area North of Saraigaon, then only proper requisitioning of police representative was carried out on 1.9.02 by the Army (Ref. to witness No. 1).

10. Having meticulously examined the report so submitted by the learned District Judge and the objection filed by the Army, it appears that Sri Swapan Basumatary was in the custody of the Army for the purpose of interrogation and from their custody only he disappeared. Now question is whether Shri Swapan Basumatary really escaped into the jungle from the Army custody when he accompanied the Army to locate the hide out of the NDFB as claimed by the Army. Interestingly, before the enquiry officer, the Army did not adduce any evidence to prove this factum. On the other hand, from the deposition of the witnesses especially the witness No. 5, as noticed above, who was also admittedly taken by the Army for interrogation, it appears that on the eventful day, the Army blindfolded them and took them to Gossaigaon where the Army started assaulting them from the morning. According to this witness, they shouted but at one time he could not hear the cry of his brother. In view thereof, the story of Sri Swapan Basumatary's escape from the Army custody smacks doubt and suspicion.

11. Besides, it is categorically stated by the Army that Swapan Basumatary alongwith his brother were taken for interrogation. Therefore let us now examine whether the Army has the power under the Act to interrogate a person by keeping him in their custody. In order to understand and appreciate this issue, it would be pertinent to refer to the provisions of the Act especially Sections 4 and 5 which read as under:

4. Special Powers of the armed forces. Any commissioned officer, warrant officer, noncommissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area-

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying on of weapon or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified, position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offences;

(c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to affect the arrest;

(d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises and for that purpose use such force as may be necessary.

5. Arrested persons to be made over to the police - Any person arrested and taken into custody under this Act shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

12. From a bare perusal of the above provisions, it appears that the Act provides and empowers the members of the Armed Forces to perform the activities specifically prescribed therein for the maintenance of public order in the disturbed area even to the extent of causing death to any person who is acting in contravention of any law or order for the time being in force. But Section 4 which provides for special powers for the armed forces does not indicate anywhere or otherwise the power of the Army to interrogate any such person after taking him into custody. Language of Section 4 is very clear and unambiguous. Any Army officer in the rank of commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, shall have only limited four categories of powers to be exercised u/s 4 i.e. (1) to fire upon even causing of death against any person who is acting in contravention of any law or order for the time being in force for maintenance of public order, (2) to destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or any structure used as training camp for armed volunteers or utilised as hide out by armed gangs etc., (3) to arrest without warrant any person who has committed a cognizable offence or is about to commit of such offence and (4) to enter and search without warrant any premises to make any such arrest or recovery of any person believed to be wrongfully detained or restrained. Section 5 of the Act, on the other hand, clearly mandates that any person arrested or taken into custody under the Act must be made over to the officer-in-charge to the nearest police station with the least possible delay. Hence, the requirement of law is that once a person is arrested or detained, he has to be immediately made over to the police i.e. the civil administration without causing any delay. This provision has been incorporated in the Act showing due respect to the fundamental rights guaranteed to a citizen under Articles 21 and 22(2) of the Constitution of India which provide that no person shall be deprived of his life and personal liberty except according to procedure established by law and every person who is arrested and detained in custody shall be produced before the nearest Magistrate

within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no person shall be detained in custody beyond the said period without the authority of a magistrate respectively. But the power of interrogation of a person by the Army has not been provided either under the Constitution or the Act. In the instant case, the Petitioner's husband was taken into custody on 31.8.03 and he was not handed over to the police contrary to the provision of Section 5. But the act manifestly ordains that the armed forces shall have to act with the aid of civil authorities. It is the legislative intent that both the armed forces and the civil authorities have to work together as hand in glove. It is the statutory necessity that both these authorities must act with co-operation and in harmony and not as an individual body in doing any activities under the Act.

13. The scope of Sections 4 and 5 of the Act has already been dealt with by this Court in (1) *Muljibhai and Another Vs. United India Insurance Co. Ltd. and Others*, (ii) *Smt. Luithukla v. Rishang Keishing and Ors.* reported in (1988) 2 GLR 159 and (iii) *Smt. Girija Baruah v. Union of India and Ors.* reported in (1993) 1 GLR 101 (Full Bench). In *Luithukla's* case (*supra*), this Court in paragraph 10 observed as follows:

...But as pointed out in *Nungshitombi's* case though the armed forces have been given wide powers by the Act, these are sought to be confined within the narrow limit and in this limit also they do not really supplant the ordinary machinery for maintaining law and order or for that matter public order, but they supplement the working of ordinary law enforcing machinery. According to us the civil authorities and the armed forces have to work as hand in glove and not in suppression of any side. It is because of this that the Act requires by its Section 5 that any person arrested and taken into custody by the armed forces have to be made over to the officer-in-charge of the nearest police station with the least possible delay. May we say that in our constitutional set up there is no provision for a military rule in any part of the territory of India. Of course, the armed forces must be allowed free hand in so far as dealing with insurgents or terrorists are concerned but then while dealing with others they have to strike a balance between crushing of violence and crushing of liberty. Further the armed forces must act in co-operation with the district administration and not as an independent body. Of course, so far as operational part of the activity of the armed forces is concerned, they must be given free hand, but in other matters they must take the civil authorities in confidence and work in harmony.

The Full Bench of this Court in *Girija Baruah's* case (*supra*), in paragraph 14 held as follows:

Armed forces have been conferred certain extra ordinary powers under the Act with a view to aid the Civil authority. Such powers have been conferred on the basis that the ground situation in a disturbed area is so bad and chaotic and the law and order situation is so poor that civil authority cannot always be trusted to arrest persons who have committed cognizable offences or against whom

reasonable suspicion exists that they have committed cognizable offences or they are about to commit cognizable offences. The legislature thought it fit that, Armed forces under those circumstances must act in aid of the civil authority. This has been done for the well being of the people. At the same time legislature has mandated that those arrested should be made over to the civil authority with the least possible delay. This is how the legislature sought to maintain balance between conflicting claims of public interest and individual liberty. The existing law protects people who are taken into custody by civil police.

14. There is no dispute that in the operational activities under the Act, the Army must be given free hand but such independency in the working shall be subject to the provisions of Sections 4 and 5. In the case in hand, in our considered opinion, the Army acted illegally and without jurisdiction on two counts. Firstly-Swapan Basumatary was not made over to the police with the least possible delay though he was taken into custody on 31.8.03 and secondly, having not empowered and authorised to interrogate under the Act, the Army put Swapan Basumatary to interrogation. Besides, the whole episode of escape of Swapan Basumatary, as projected by the Army, cannot be believed and approved in the given facts and circumstances of the case. Consequently, there is no hesitation on our part to hold that Sri Swapan Basumatary must have been in the custody of the Army and it was for the Army to explain and take responsibility for the missing of the said person. In spite of the petition being pending in this Court for a long period the Respondents have not produced Swapan Basumatary before us and inevitable conclusion is that Respondents are not in a position to produce him before us.

15. Now question is whether the Petitioner is entitled to get any compensation for the missing of Swapan Basumatary. In the backdrop of this factual scenario and since the Army has failed to place sufficient and valid reasons before this Court proving the fact of disappearance of Swapan Basumatary from its custody, we can firmly say that the Petitioner is entitled to get compensation for such disappearance of her husband from the army detention. Be it noted that if Swapan Basumatary could have been alive, else by now either he could have been made to the nearest police station or produced before this Court but nothing of that sort has occurred in the present case.

16. The Apex Court as well as this Court in a catena of decisions relying on several land mark decisions especially in Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, and D.K. Basu Vs. State of West Bengal, had adequately compensated the victim or victims of army and police atrocities including the custodial death (See (i) Smt. Zakheli Sema Vs. Union of India (UOI) and Others, (2) Tarulata Devi Vs. State of Assam and Others, (3) Mahmud Ali. Union of India and Ors. reported in 2001 (3) GLT 542 ; (4) Sanu Saikia Vs. Union of India (UOI) and Others, and (5) Tekarongsan and Ors. v. Union of India and Ors. reported in 2005 (1) GLT 218. Since the custodial death/torture, being an infringement of basic human rights guaranteed under Article 21 of the

Constitution of India, universally condemned as one of the worst crime in civilized society governed by rule of law, we do not want to burden this judgment with reiteration of the settled law laid down in precedents above mentioned.

17. Accordingly we are inclined to grant monetary compensation to the Petitioner which is quantified at Rs. 1,75,000/- (Rupees one lakh seventy five thousand) only. It is ordered accordingly. Be it made clear that the entire amount of compensation quantified above shall be deposited by the Respondent/Union of India particularly the concerned Army authority before this Registry through bank draft within a period of three months from the date of receipt of the certified copy of this order and on being deposited, this Registry shall pay the said amount of compensation to the Petitioner on proper identification by her counsel.

18. Needless to say that the Petitioner shall be at liberty to seek other remedy or remedies by way of damages in any civil or other competent Court, if so advised, and grant of such compensation would be a subject separate in the facts and the law applicable thereof.

19. For the foregoing reasons and observations, this Habeas Corpus petition stands allowed. However, considering the facts and circumstances of the case, we are not disinclined to pass any order as to costs.