
(2006) 11 GAU CK 0080
In the Gauhati High Court

Giribala Das

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-11-2006

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Citation : (2007) 1 GLT 1

Hon'ble Judges : B.S. Reddy, C.J.;Ketulhou Meruno, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.S. Reddy, C.J.—This is yet another case where an innocent poor man has been brutally killed at the hands of the security agencies in the name of counter insurgency operations.

2. The widow of the deceased is before us in the proceeding under Article 226 of the Constitution of India seeking an appropriate writ against respondents for payment of compensation. The case set up by her is a simple one.

3. On 24th August, 1999 at about 5 A.M. the writ petitioner's husband Phanidhar Das aged about 55 years went to answer the calls of nature in the open area at a distance of few feet away from his residential house, then all of a sudden the Army personnel fired on him and as a result of which he sustained grievous injuries resulting in his death. The inquest report was prepared by Executive Magistrate, Mangaldoi, Darrang in the hospital and later on the postmortem examination was conducted by Dr. D.N. Saikia of Mangaldoi Civil hospital. The postmortem report clearly reveals that the deceased sustained injuries caused by fire Arm and died on account of the same. The petitioner states that at the time of death her husband was aged about 55 years and left behind the petitioner and two minor daughters aged about 15 and 10 years respectively. The petitioner further states that the incident was witnessed by the neighbouring villagers and she was informed about the incident. The incident later on was published and

widely circulated in local newspapers on 25th August, 1999. It is under those circumstances, the petitioner invokes the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India with the prayer to issue appropriate directions as against the respondents directing them to pay adequate compensation.

4. This Court vide its order dated 15th June, 2000 having directed notice on motion, required the respondents to file their affidavit in the matter. The respondents in their counter affidavit denied the allegations and the averments made in the writ petition. In such view of the matter, this Court vide its order dated 10th October, 2001 directed the District Judge, Mangaldoi to hold an enquiry into the allegations made in the writ petition and submit a report to this Court within a period of four months from the date of certified copy of the order. The parties were accordingly directed to appear before the learned Judge on 19th November, 2001 to receive further instructions in the matter. The learned District Judge accordingly submitted his report which was later on set aside by this Court on the ground that no opportunity was given to the respondents Army by the learned District Judge before submitting his report to this Court. On the directions of this Court dated 8.3.2006, the learned District Judge held a de novo enquiry and due notices were issued to all the parties and submitted the report of enquiry on 12.7.2006.

5. The Union of India entered appearance before the District Judge court on 25th April, 2006 and participated in the enquiry. That altogether four witnesses were examined for and on behalf of the writ petitioner and where as two witnesses were examined for and on behalf of the Respondent Nos. 1 and 2. The State Government did not lead any evidence whatsoever.

6. The writ petitioner has been examined as PW 1. She stated in her evidence that on the date of the incident at about 5 A.M. when the deceased left the house to answer the call of nature and he was shot dead by army personnel without there being any provocation whatsoever. P.Ws 2 and 4, according to her witnessed the incident. On the information received from them she went to the place of occurrence and found the dead body of her husband lying at the place of the occurrence. She admitted that she had not seen the actual incident of killing of her husband by the army personnel.

7. PW2 in his evidence stated that at 5 A.M. early in the morning on the date of the occurrence, he was coming towards the embankment to look after his cattle and at that time he saw the deceased was sitting and attending call of nature near the embankment, then 12 army personnel of Sikh Regiment fired at the deceased. He was scolded by the army personnel when he approached the place of occurrence. He found intestine, nerves etc. coming out from the belly of the deceased. In cross examination he has stated that he had seen the actual firing by the army personnel. The army opened fire at the deceased while he was about to stand from his sitting position. He raised alarm seeing deceased falling down in the field. Local people arrived at the place of the occurrence after 15/20

minutes of the incident. He went to Kalaigaon police station along with the dead body. He had not seen any other casualties at the place of the occurrence. He could identify the army personnel from their dress and turban. He thought the army personnel were from Sikh Regiment as he found them regularly moving in his village.

8. PW3, Sishuram Das is another witness who more or less stated as to what has been stated by the PW2. He further stated that he saw the incident while he was working in his field and accordingly informed the wife of the deceased about the occurrence. He along with PW1 and others picked up the dead body in a "Thela" and took him to police station. He heard the sound of 5 rounds of firing. He identified the army personnel from their dress and turban.

9. Post-mortem examination over the deceased was conducted at Mangaldoi Civil Hospital on 24th August, 1999 by PW 4, Dr. Debendra Nath Saikia and following injuries were found on the body of the deceased:

External appearance:

(I) Dead body of a male individual about 48 years of age. Mouth and eyes are open. Hair and moustache back. Regor mortis present all over the body. Few intestinal coils are out through an wound in the right iliac region. Blood discharge through anus.

Wounds:

(1) One small entry wound (0.35 cm) circular in shape just left to the back bone at the level of 5th L. Vertebrae, margin inverted.

(2) Exit wound in the right iliac region 1 cm below the mid inguinal about 2 cm, in diameter with irregular margin, circular in shape, few coils of intestines are coming out through the wounds. Intestinal coils are lacerated and apart in two sites, post peritoneal wall lacerated, congested and the lower abdomen is full of blood.

II. Cranium and Spinal Canal - Healthy and intact.

III. Thorax-Healthy, Heart-empty. Vessels empty.

IV. Abdomen - Walls and peitonoum Lacerated and congested.

Mouth-Pharynx, Oesophagus, Healthy. Stomach and its contents - Stomach empty.

Small intestine - large intestine and its contents-

Most of the coils are lacerated, torn and congested. Most of the coils are empty except few with gas only.

Liver, spleen, kidneys, Bladder, organs of generation, external and internal-Healthy and intact.

V. Muscles bones and joints-Injuries as described above. Fracture-Fracture of the bone of the 5th vertebrae. Fracture with a hole in the bone. Injuries are ante mortem in nature.

10. Doctor opined that the death occurred due to shock and hemorrhage as a result of injuries sustained by the deceased. Ext. 1 is the postmortem report and Ext. 2 is the photocopy of the original. PW.4, the Medical Officer has been subjected to cross examination by the respondent Nos. 1 and 2. The Medical Officer in his cross examination stated that he has not found any bullet on the person of the deceased at the time of examination, but from the entry as well as the exit wound and the injuries found in the viscera it is ascertained that the injury was bullet injury caused by weapon.

11. The Respondent Nos. 1 and 2 have examined two witnesses on their behalf, namely, Lt. S. Katiyal DW1 and Maj. H.C. Singh DW 2. The evidence of DW1 is to the effect that on receipt of information from the reliable source that a group of ULFA militants were proceeding towards Bhutan to attend an important meeting and took shelter in village Borpukhuri combing operation was planned with a team consisting of two JCOs and 20 army personnel and they commenced their operation by cordoning of the said village and took position near the house where the militants were suspected to be hiding and at that time some militants started firing upon them and in retaliation they opened fire and in the exchange of fire one militant was killed, one was injured but managed to escape. Two militants have surrendered themselves. Some incriminating documents were also recovered from them. Later on, they came to know that one old man aged about 55 years died in the encounter and the people took him to hospital in pull cart. In the cross examination, DW 1 stated that they informed the police before commencing their operation in that particular area. The representatives from the police were also present with them. According to him, there was an exchange of fire of 22 to 25 rounds. He resorted to fire from 75 to 100 meters distance from the house surrounded by them. The operation came to an end after the halt of exchange of fire. Two militants surrendered around 3-30 A.M.

12. As per DW2 there was an army operation at Kalaigaon and during the operation there was exchange of fire which continued only for 5 minutes and when the fire stopped they found one dead body lying in the field. They searched the house and two militants were apprehended and from their possession incriminating documents had been recovered. They called the police and handed over the dead body of the deceased to the police. He denied that they had gunned down innocent Phanidhar Das during the course of operation. They have recovered the incriminating documents and explosives from the extremists.

13. The learned District Judge upon appreciation of the materials on record and the evidence found the very basis of the case set up by the Army to be false, frivolous and fictitious. The learned Judge based on the evidence of PW 1 and the Medical Officer, PW4 and the postmortem report came to the conclusion that it was the Army personnel from 7th Sikh Light Infantry fired at the deceased

without any provocation whatsoever and caused his death.

14. The Army filed their objections to the report submitted by the learned District Judge inter alia contending that the evidence of DW 1 and 2 clearly suggest that allegations have been made either to malign the image of Army under the influence/threat of militants or with the aim of securing compensation. They have reiterated their stand that during the exchange of fire one militant was killed, two were surrendered, while one injured militant managed to escape. According to them, the death of Phanidhar Das was probably due to the indiscriminate firing by the militants.

15. We have carefully considered the objection raised by the Union of India to the report submitted by the district Judge. We have no hesitation whatsoever to reject the objection so raised in as much as we do not find merit whatsoever in any of the grounds so taken. The objection raised by the respondents on the face of it is untenable and unsustainable. There is no explanation from the respondents as to what happened to the dead body of the so called militant killed by the army in the exchange of fire. There is nothing on record to suggest that they had lodged the First Information Report to the police and handed over the dead body of the deceased. No such report was made available in the enquiry before the District Judge. There is no evidence of seizure of any incriminating materials, recovery of arms and explosives as suggested in their evidence. No details of the alleged surrender of militants are forthcoming. In such circumstances, we have no hesitation to hold that the respondents have set up absolutely a false and fictitious case in order to save their skin.

16. In the circumstances, we do not find any reason to reject the report of the learned District Judge. It is apparent from the version set up by the respondent No. 1 and 2 that they had violated the instructions issued in due course. That were issued from the Army headquarters from time to time. As per instructions before launching any search operation by the Army as such they are required to obtain definite information about the unlawful activities from the local civil authorities. There is no evidence of their obtaining any such definite information about any unlawful activity before launching the operation in that particular area that lead to the unfortunate incident. They were also required as far as possible to cooperate with the representatives of the local civil administration during the operation. It is falsely stated by the respondents with a view to mislead the court and to save their skin as if they had secured the presence of the local police, but there is no evidence or material in support of the same. According to the instructions, they are required to provide the list of persons arrested and handed over to the nearest police station with least possible delay and while handing over to the police a report should accompany with detailed circumstances occasioning the arrest. They were also required to make out a list of arms and ammunitions or other incriminating materials/documents taken into possession and all such arms ammunitions and tools etc. should be handed over to the police personnel along with seizure list. It is the obligation on the part of the

respondents to make record of the area of the operation having date and time and persons participated in such operation. None of these instructions have been followed by the respondents in the instant case. It appears that they are not even aware of those instructions.

17. We have also noticed that there is no evidence available on record made by the respondents of their handing over the dead body of the militant alleged to have been killed in the encounter; no affidavit in support of handing over the arrested militant; no seizure report prepared; no handing over of incriminating materials including of arms and explosives. In the circumstances, we hold that the respondent Nos. 1 and 2 set up a totally false, frivolous and fictitious defence. The case put forward is absolutely unbelievable.

18. For the aforesaid reasons, we confirm the findings and conclusions drawn by the learned District Judge, Mangaldoi which are based on record.

19. This is a clear case where one and only conclusion that can be drawn is that the petitioner's husband was killed in a cold bladed manner by the Army without there being any provocation whatsoever for doing so.

20. The only question that survives for our consideration is whether the respondents are liable to pay compensation to the petitioner for causing death of the petitioner's husband.

21. The law is well settled that in case where violation of fundamental rights guaranteed under Article 21 of the Constitution of India is established, the Courts may award compensation in the proceedings under Article 226 of the Constitution of India provided the violation of Article 21 is patently incontrovertible and such violation is gross in magnitude shocking the conscience of the Court. The award of compensation by a public authority is always in addition to damages that may be awarded to be assessed and ascertained in a properly constituted proceedings. Variety of factors may have to be taken into consideration in awarding the compensation.

22. In view of our conclusions that the Army personnel indulged and resorted to unprovoked firing which led to the death of the petitioner's husband and shocks the conscience of the Court. There is no option left but to award compensation to the petitioner suitably. The husband of the petitioner at the time of his death was aged 55 years and left behind him the widow (Petitioner) and two minor daughters. He was the sole bread winner of the family.

23. On consideration of the, material available on record and having regard to the totality of the facts and circumstances of the case, we consider it appropriate to award a sum of Rs. 2,00,000.00 (Rupees Two Lakh only) as compensation payable to the petitioner within a period of two (2) months from the date of receipt of the copy of this order. The petitioner is entitled to the costs quantified at Rs. 10,000/- (Ten thousand only). The amount shall be deposited with the Registrar General of this Court for its payment to the petitioner on her being

properly identified to his satisfaction.

24. The writ petition is accordingly allowed.