

(2006) 09 GAU CK 0099
In the Gauhati High Court

Hemadhar Hazarika

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 06-09-2006

Acts Referred:

Arms Act, 1959 — Section 25
Constitution of India, 1950 — Article 21, 22
Unlawful Activities (Prevention) Act, 1967 — Section 10, 13, 4, 5, 6

Citation : (2006) CriLJ 72

Hon'ble Judges : B.S. Reddy, C.J;H.N. Sharma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This is yet another case where an unfortunate parent approaches this Court complaining of custodial killing of his young son, Bhupen Hazarika alias Binay Sarma, aged about 26 years. Law's delays did not deter him to pursue the matter to its logical end.

2. The sordid play gets unfolded as under:

The petitioner on an earlier occasion preferred WP (C) No. 3/99 praying this Court to issue a Writ of Habeas Corpus directing the same respondents herein to produce his son, Bhupen Hazarika, in this Court. The aforesaid petition was filed, according to the petitioner, when the killing of his son was mired in confusion and controversy. The Division Bench of this Court vide its order dated 1-10-99 disposed of the said writ petition as under:

A bare perusal of the affidavit filed by the respondents Nos. 1 to 4 will show that the claim made by the writ petitioner is not correct. No doubt. it is a fact that Bhupen Hazarika alias Binoy Sarma died in the army custody and as to whether he is entitled to compensation or not that aspect of the matter need not be decided in this writ application, inasmuch as there is absolutely no material with regard to this. For that the petitioner may file appropriate application with

particulars to be decided by the Single Judge of this Court and/or by any civil Court as being found suitable by the petitioner. Accordingly, this writ application shall stand dismissed.

This order appears to us is not in conformity with the law declared by the Supreme Court from time to time in the matter of awarding of compensation in a public law remedy in cases of custodial death. This Court as well could have granted appropriate relief to the petitioner in the said writ petition. Nothing further is required to be said about it at this stage.

2A. It is under those circumstances, the petitioner has approached this Court, once again, seeking relief of payment of compensation for the custodial killing of his young son by the armed forces in the name of counter insurgency operations.

Petitioner's case:

3. The allegation levelled in the writ petition is that on 23-8-97, while the deceased was at the residence of his Uncle Punadhar Hazarika, a contingent of army personnel encircled the house and required all the inmates of the house including the deceased to come out. The deceased was mercilessly beaten up right in the presence of public. Thereafter, he was taken away by the army personnel to the Army Camp at Mariani.

4. That on 25-8-97, an FIR was lodged by one D. N. Singh, Naik Subedar. 1 Field Regiment (Meiktila) addressed to the Officer In-charge of Pulibar Police Station, District Jorhat, in which, it is, inter alia, alleged that on specific information one of the party of the Unit was moving to village Tekelagaon to carry out certain anti-Insurgency operations on 23-8-97. "Enroute, when the party was near village Khangia two suspicious looking youths were spotted standing behind the house and as the party moved closer to verify the individuals, they started running into the paddy fields; the party chased them and ordered them to stop. When they did not stop, the party fired at them. Party kept chasing them in the paddy field for a long distance. Even continuous firing from the force did not yield any desired result. One of them jumped into a deep Nala and other inside a bamboo grove in order to hide themselves. They were nabbed by pursuing party. The individuals were later identified as Bhupen Hazarika alias Binoy Sarmah, "a hardcore ULFA militant, and Ajit Bora alias Jayanta Neog, Financial Secretary of Kakadanga Sakha of ULFA". It is alleged that certain ammunition was also recovered from Bhupen Hazarika. Even, according to the statements made in the FIR, Ajit Bora was handed over to the Police Station of Pulibor for further necessary action as may be required in law. The FIR was registered as Pulibor PS Case No. 69/97 under Sections 10 and 13 of the Unlawful Activities (Prevention) Act read with Section 25(i)(a) of the Arms Act.

5. The fact remains that the deceased Bhupen Hazarika, despite being arrested by army along with Ajit Bora alias Jayanta Neog on 23-8-97, was not handed over by the army to the police till 25-8-97. The FIR dated 25-8-97 as well as forwarding report dated 26-8-97 speak of only about Ajit Bora and nothing about

Bhupen Hazarika.

6. That, in the evening of 25-8-97, a team consisting of police as well as army personnel came to the petitioner's brother's house and handed over a container of human flesh wrapped in polythene cover kept inside a cement bag and stated that they were remains of Bhupen Hazarika and advised the petitioner's family to consign the remains to flame without any further wastage of time.

7. The petitioner learnt that on 25-8-97 the army personnel accompanied with police constable had taken remains of Bhupen Hazarika to Civil Hospital at Jorhat for the purposes of postmortem. None of the family members of the deceased were informed about the same. The postmortem report stated that no opinion for the cause of death could be given and accordingly, the pieces of bone along with few other remains were preserved for forensic analysis.

8. The case set up by the petitioner is that admittedly the deceased was arrested on 23-8-97 along with Ajit Bora and Ajit Bora alone was handed over to the police as required in law while illegally detaining the deceased by the army in their custody. The deceased met his death while in army custody. The army alone is to be held responsible for the killing of petitioner's son Bhupen Hazarika.

9. The petitioner accordingly prays the Court to issue appropriate direction directing the respondents to pay adequate compensation to the petitioner for killing his son in the custody.

Order of Court:

10. This Court having regard to the nature of controversy vide its order dated 11-4-2001 directed the learned District Judge, Jorhat to conduct an enquiry and submit report to this Court within a period of 4 months from the date of receipt of copy of the order. Parties were accordingly directed to appear before the District Judge on 28-5-2001.

Report of the D.J.:

11. The learned District Judge accordingly made an enquiry into the matter and submitted report dated 21-3-2003 for consideration of this Court. The following conclusions were drawn by the learned District Judge in his report:

1. Deceased Bhupen Hazarika alias Binay Sarma was arrested by the Army on 23-8-97 and he died on 25-8-97 while in custody of the Army.

2. The deceased Bhupen Hazarika who was arrested by Army on 23-8-97 was not handed over to the police till his death on 25-8-97.

3. Though the evidence of DW-1 and DW-2 give an indication that the said arrested youth died in an explosion while he tried to open the door of the hut (secret hideout), no definite opinion in this regard could be given because the doctor who conducted the postmortem examination has not given any definite opinion that the cause of the death of the arrested person was due to explosion.

Nature of enquiry in this Writ Petition:

12. It may not be necessary to discuss in detail the evidence that were recorded during the course of enquiry by the District Judge and the materials that were produced before him inasmuch as this proceeding confines itself to adjudicate issue relating to violation of guaranteed fundamental right and the enquiry itself is confined to record if there is any violation of right to life or personal liberty at the hands of the police/army. The enquiry is not for the purpose of adjudicating upon the guilt of any officer with a view to record any conviction and award of sentence. The limited scope of enquiry is to decide whether the guaranteed fundamental right of the person under Article 21 has been violated and whether the State is liable, to, pay compensation for such infringement. We have dealt with this aspect of the matter in somewhat detail in our judgment in WP (Cri) No. 34/05 dated 29-8-06. We do not propose to burden this short order of ours with all that what we have stated in the said judgment.

Case of Respondents:

13. However, we may notice the defence set up by the army in order to satisfy ourselves as to whether the findings and the conclusions drawn by the District Judge are in accordance with law.

14. The army admitted that Bhupen Hazarika along with Ajit Bora were taken into custody on 23-8-97 during their anti insurgency operations. On interrogation of Bhupen Hazarika, the army collected lots of information about "ULFA militants and the said militant also disclosed to them about one secret hideout of the militants which was at village Akoae at Mariani, Makokchung near Nagaland border". He is alleged to have disclosed lots of arms and ammunitions that had been stored in the said hideout. On the strength of the said information, the joint operation with the police was conducted on 25-8-97 in which the Officer in-Charge of Mariani Police Station (Examined as DW 2) was also present. On reaching the place, the army personnel cordoned off the area and the militant Bhupen Hazarika was directed to call the militants out of their hideout. The militant Bhupen Hazarika reportedly called few names of his accomplices, but there was no response from inside the hut. The army personnel asked the deceased to go and open the door of the hut and when the militant went towards the hut and as he opened the door of the hut, there was a very loud explosion due to which the deceased fell towards the interior of the hut and immediately there was a second explosion. Two of their Jawans were also severely injured in the said explosion. In order to make sure that there are no other militants inside the hut, the army personnel also hurled two grenades into the hut. After completion of the operation, a search was carried out and the army personnel found human flesh scattered all over the area. Surprisingly enough, an interesting version coming forth from the respondents army, which is worth noticing, namely, even after two explosions and the army hurling its own grenades into the hut, a big box was found intact inside the hut containing lots of arms and ammunitions, medicines, letter pads, literature, tooth brush, tooth

paste, aluminium vessels, steel glass etc. Everything else got perished in the explosion except the seized articles which remained intact. The human flesh found in the hut was collected by the army and handed over to the police for postmortem examination. The army lodged an FIR before the Officer In-charge of Pulibbr PS, Jorhat on 25-8-97.

Analysis:

15. During the cross examination, the DW 1, Colonel P. P. S. Pahwa, admitted that at the time of raid and ambush, Bhupen Hazarika was under their custody. DW 2 in his evidence more or less corroborated as to what has been stated by DW 1.

16. The version put forth by the Army, to say the least, is absolutely concocted and false on its face. Stranger than fiction. No reasonable person in his senses could accept that after two explosions and after hurling two more grenades by the army into the same hut, the ammunition, literature, medicines, tooth brush, tooth paste, aluminium vessels and steel glass etc. remained intact. The deceased, even according to the version of the army, while opening the door of the hut, got injured in the explosion and reduced into pieces of human flesh, but the ULFA literature, ammunition, medicines, tooth brush, tooth paste, aluminium vessels, steel glass etc. remained intact. Concoction knows no limits.

The deceased obviously had been taken to some unknown place and killed in cold blood in most barbaric way that shocks the conscience of any civilized world. All in the name of fighting terror.

17. The police officer, in his evidence, in clear and categorical terms, stated that Bhupen Hazarika was not produced in the police station by the army personnel after his arrest on 23-8-97 for his production in turn before the nearest Magistrate as is required in law.

It is under those circumstances, the learned District Judge arrived at the conclusions referred to hereinabove. The formal objection filed by the Union of India as against the report of the learned District Judge needs no serious consideration inasmuch as no objection worth its name has been made except repeating what has been stated before the District Judge.

18. On consideration of the materials, available on record, we have no doubt whatsoever in our mind that the army acted in highly arbitrary manner and violated the provisions of the Armed Forces (Special Provisions) Act, 1958 (as amended). The Apex Court in Naga People's Movement of Human Rights Vs. Union of India (UOI), , while upholding the Constitutional validity of the provisions of the Act, observed that the powers conferred u/s 4(c) read with Section 5 of the Act which require that any person arrested and taken into custody 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 has to be exercised in consonance with the overriding

requirements of Clauses 1 and 2 of Article 22 of the Constitution which means that the person who is arrested by an Officer specified in Section 4 has to be made over to the Officer in-charge of the nearest police station with the least possible delay so that the person arrested can be produced before the nearest magistrate within a period to twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and that no such person can be detained in custody beyond the said period without the authority of a Magistrate.

19. In the instant case, the army having taken the deceased into custody on 23-8-97 did not take any steps whatsoever as is required in law. The provisions of the Act have been violated with impunity by the Army.

20. The instructions issued by the Army Head Quarter from time to time in the form of a list "Dos and Don'ts" were placed before the Supreme Court in Naga People's Movement of Human Rights case which inter alia provide that as far as possible representatives of local civil administration are to be co-opted during the raids. That a list of arrested persons are required to be prepared for their handing over to the nearest police station with least possible delay; while handing over to the police station a report should accompany with detailed circumstances occasioning the arrest; every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested; do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest, police station, do not use any force after having arrested a person except when he is trying to escape. Most importantly the army is directed not to interrogate the arrested person/persons. The instructions strictly prohibit the members of the armed forces' interrogation of the arrested person/persons. They are prevented from using excessive force; they are directed not to make the arrested person/persons subject to torture while in custody.

21. The Supreme Court after having taken the said circular instructions into consideration directed as under:

60. The safeguards" against an arbitrary exercise of powers conferred under Sections 4 and 5 as Indicated above as well as the said direction should be incorporated in the instructions contained in the list of "Dos and Don'ts" and the instructions should be suitably amended to bring them in conformity with the guidelines contained in the decisions of this Court in this regard.

61. In order that the people may feel assured that there is an effective check against misuse or abuse of powers by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably compensated by the State and the requisite sanction u/s 6 of the Central Act

should be granted for instruction of prosecution and/or a civil suit or other proceedings against the person/ persons responsible for such violation.

22. On consideration of the relevant facts, we are of the opinion that the army personnel in the instant case with impunity acted not only in contravention with the mandatory provisions of the Act but also the instructions issued by the Army Head Quarter from time to time.

23. It is a fit case requiring our interference to grant adequate compensation to the petitioner as we have found the violation of Article 21 in the instant case is patent and Incontrovertible and it is of such a magnitude that shocks the conscience of the Court. The deceased undoubtedly died at the hands of the army when he was in their custody. The deceased at the relevant time was aged about 26 years and was studying, in B.A. and had already a technical degree to his credit obtained from Prince of Wales; Jorhat. The material available on record do not disclose that he was required by the police or by the army in connection with any criminal case. He was not involved in any unlawful or illegal activities. The life of a young man came to an end in a very tragic manner, in the hands of the armed forces, which is deeply disturbing.

Relief:

24. The 1st respondent shall order and fix responsibility as to the persons found responsible for misusing or abusing the powers conferred under the Act for which purposes a thorough enquiry has to be ordered. The Union of India shall take appropriate steps for institution of prosecution by initiating appropriate proceeding against the person/persons found responsible for violation and infringement of the guaranteed fundamental rights and human rights of the deceased. The 1st respondent is accordingly directed to pay compensation of Rs. 3.5 lakhs (three lakhs fifty thousand) only payable to the petitioner on his being properly identified before the Registrar General of this Court. The amount shall be deposited with the Registrar General of Gauhati High Court within a period of two months from today.

25. Writ petition is accordingly allowed with cost quantified at Rs. 20.000/- (Rupees twenty thousand) only.