

(2009) 05 GAU CK 0005

In the Gauhati High Court

Case No : Writ Petition (C) No's. 2154 and 2155 of 2004

Khalason Daimari and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-05-2009

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 5
Penal Code, 1860 (IPC) — Section 302

Citation : (2006) 1 GLT 490

Hon'ble Judges : Ranjan Gogoi, J;Hrishikesh Roy, J

Bench : Division Bench

Advocate : B.K. Mahajan, N.N.B. Choudhury, R.K. Pradhan, A. Choudhury and R. Ali, for the Appellant; R. Bora and P.S. Deka, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. B.K. Mahajan, learned Counsel appearing for the petitioners. Also heard Ms. R. Bora, learned Central Government counsel and Mr. RS. Deka, learned Government Advocate, who represents the State.

2. In these 2 writ petitions custodial death of 2 persons who were in Army's custody due to unauthorized shooting by an Army Officer is alleged and appropriate inquiry by an independent agency, into the circumstances of the death is prayed for by the petitioners. Further claim for compensation has also been made in the petitions.

As common arguments have been advanced in both the cases and the incident is one and is covered by a common inquiry report submitted by the learned District & Sessions Judge, Mangaldoi, we propose to dispose of both the writ petitions, by this common order.

3. The two detained persons involved in the cases share a common name, i.e. Pratul Daimari who is the son of Sri Khalason Daimari (hereinafter referred to as the Pratul Daimari-1). Both are residents of Naoherua Village under Majbat Police

Station of Darrang District.

The other Pratul Daimari is the son of Late Nahimiya Daimari and is being referred to hereinafter as "Pratul Daimari-2".

The WP(C) No. 2154/04 is filed by the father of Pratul Daimari-1 Sri Khalason Daimari.

The Petitioner in WP(C) No. 2155/04 is Smti Jyotshna Daimari who is the wife of Pratul Daimari-2.

PETITIONERS' VERSION

4. The allegations of the Petitioners with regard to the death of Pratul Daimari-1 and Pratul Daimari-2, which are relevant and are necessary for adjudication of the cases, are noted at the outset.

4.1. It is alleged that on 12.2.2004, Army personnel of 62 Field Regiment visited the house of Pratul Daimari-1 at Naoherua village and not finding him in his house, the Army personnel asked the father Sri Khalason Daimari to visit the Army Camp at Harisinga on the next day. Accordingly on 13.2.2004 the father Khalason Daimari accompanied by the village defence Secretary, visited the Army Camp, where he was asked to produce his son Pratul Daimari-1. Following day i.e. on 14.2.2004, the father took Pratul Daimari-1 to the Army Camp where the son was subjected to interrogation inside the Camp while the father was made to wait outside. Subsequently the Army released Pratul Daimari-1 and Khalason Daimari averred that he could learn from his son that the Army Authorities suspected the son to be involved with helping militants in the area and it was alleged that some militants were given food in their house. The son claimed to have stated in response that he is a student and is preparing for his BA Final Examination and he is not involved with any militants or their activities.

4.2. The father Khalason Daimari was asked to produce his son again to the Army Camp on 3.3.2004 and accordingly Pratul Daimari-1 was taken to the Camp by his father. That day Pratul Daimari-1 was detained in the Army Camp and the father was asked to take his son back the next day.

4.3. Next day when Khalason Daimari went to Harisinga Camp, he was asked by the Army Personnel, whether there is another boy by the same name (Pratul Daimari) in their village and when the Petitioner answered in the affirmative, the Army people asked Khalason Daimari (father of Pratul Daimari-1), to bring Pratul Daimari-2 to the Camp on 6.3.2004.

4.4. On 6.3.2004, Khalason Daimari reached the Harisinga Army Camp along with co-villagers Pratul Daimari-2 and his elder brother Upen Daimari. Pratul Daimari-2 was then detained in the Army Camp and Pratul Daimari-1 was released from the Army custody.

4.5. On 7.3.2004 the Army reached village Naoherua in a Tata Mobile vehicle and picked up Pratul Daimari-1 once again from his house on the plea that his

signature is needed for some medical certificate and the family was informed that he would be released, after taking such signature. Then Pratul Daimari-1 was made to board the Army's Tata Mobile vehicle.

4.6. Later on, Khalason Daimari could learnt from co-villagers that at Rowta Gate, the Army personnel pushed someone dressed in Army uniform from their running vehicle and while that person tried to run away, the Army personnel opened fire and then the fleeing person surrendered and was made to re-board the Army vehicle.

4.7. In WP(C) No. 2155/04, Smti. Jusna Daimari averred that her husband Pratul Daimari-2 is a cultivator and they have 3 minor children.

4.8. She stated that on being informed by co-villager Khalason Daimari (father of Pratul Daimari-1), that Pratul Daimari-2 is wanted at the Harisinga Army Camp, her husband with her brother-in-law Upen Daimari along with Khalason Daimari visited the Harisinga Camp of 62 Field Regiment on 6.3.2004.

4.9. At the Camp, Upen Daimari was told that Pratul Daimari-2 will be detained in the Camp and will be released the next day.

4.10. But when on 7.3.2004 morning Upen Daimari visited the Army Camp along with a relative Phorun Basumatary, Pratul Daimari-2 was not released and they were asked to return the next day to take back their brother.

4.11. It is averred that on 8.3.2004 information reached the writ Petitioner that dead bodies of Pratul Daimari-1 and Pratul Daimari-2 are lying at Paneri Police Station.

4.12. Since the two detained persons were found killed with bullet wounds while they were in Army custody and it was suspected that they were brutally murdered and attempts were made to give out an incorrect version on the circumstances leading to their death, the present writ petitions have been filed by the father and wife respectively of the 2 victims, seeking appropriate relief in public law.

ARMY'S VERSION

5. The above versions of the Petitioners were denied in the affidavit-in-opposition submitted by the Army Officer Vishal Saxena, wherein it is stated that Pratul Daimari-1 and Pratul Daimari-2 were suspected to be involved with militant activities.

5.1. It is further averred that both the persons showed their willingness to surrender and it is not correct to say that Army had detained them.

5.2. However, it is admitted that Khalason Daimari, the father of Pratul Daimari-1 was asked to bring his son to the Harisinga Army Camp for the purpose of interrogation.

5.3. In the Army's counter affidavit it is averred that on 7.3.2004, the Army

personnel of Harisinga Camp visited the residence of Pratul Daimari-1 to confirm whether the individual wanted to surrender and when Pratul Daimari-1 agreed, he was picked up in a Tata Mobile vehicle and brought to the Camp.

5.4. At the Camp, it is averred that Pratul Daimari-1 indicated that he can show the place where arms have been concealed and accordingly the Army proceeded along with the detained person to Mazbat area, where the arms and ammunition were supposed to have been kept hidden.

5.5. In paragraph 11 of the Army's counter affidavit in WP(C) No. 2154/04 it is stated that Petitioner's son Pratul Daimari-1 "after reaching Dhansiri Tea Garden jumped out of the running Tata Mobile after grabbing a weapon of one of the near by soldier. The weapon fell to the side of the vehicle and the individual without wasting time ran without weapon. The individual was challenged verbally by the Army Personnel but it had no affect on the Petitioner's son. Subsequently weapons were fired in air to stop the individual from fleeing in which they were successful. The individual was told that since he had betrayed the good faith reposed on him he will be handed over to the nearest Police Station. The deceased son asked forgiveness and assured the Army Personnel of Harisinga Camp that he along with other Pratul Daimary would indicate the spot where they had buried the weapons. Both the Pratul Daimary, were taken to village Laxmi Nalla between Ghagra II and Lesigaon where they indicated the burial site. Once the Army Personnel stalled digging, one person took the advantage of darkness vanished from there and before the Army Personnel could react suddenly a burst of automatic fire came from one side. The Army Personnel immediately retaliated and opened fire. After the firing stopped, both Daimarys were found dead. An AK-56 rifle with two magazines, 39 live rounds and seven fired cartridges were recovered from the spot. Later the Army Personnel of Harisinga found another AK-56, one magazine and 14 live round near the spot from where the two deceased had taken out the weapons."

5.6. For Pratul Daimari-2 also, in the counter affidavit filed on 20.5.2004 in WP(C) No. 2155/04, it is averred that Pratul Daimari-2 willingly came to Harisinga Army Camp to voluntarily surrender and he along with Pratul Daimari-1 agreed to take the Army Personnel to the place where arms were kept concealed.

5.7. Accordingly it is claimed that both Pratul Daimaris were taken to village Laxmi Nalla between Ghagra II and Lesigaon where they allegedly showed the Army personnel the spot where weapons were allegedly buried. It is also claimed that while the Army personnel started digging at the site, Pratul Daimari-2 taking advantage of the darkness, disappeared from the site and re-appeared with an AK-56 rifle and started firing at Lieutenant Sartaj Mehta. Meantime Pratul Daimari-1 ran with a grenade. It is claimed that 7 rounds hit the Bullet Proof Jacket (BPJ) of Lieutenant Sartaj Mehta and he fell down due to impact. As Pratul Daimari-1 was about to lob a grenade, Lieutenant Sartaj Mehta fired his weapon killing both the detained persons on the spot. It is further averred that an AK-56 rifle with two magazines containing 39 rounds of live cartridges and 7 rounds of

fired cartridges were recovered from the spot. Later another AK-56 rifles with 14 rounds of live cartridges were also recovered in the area. On the killing of the 2 persons, the Army filed an FIR in the Paneri Police Station leading to filing of Paneri PS. Case No. 21/04.

5.8. It is further claimed that both the Pratul Daimaris were killed by the Army in a retaliatory (self defence) action when one of the detained person fired on the Army Officer with a pre-hidden weapon, after they led them to a place, where the detained persons claimed to have kept concealed weapons.

ENQUIRY

6. Because of the conflicting versions of the Petitioners and the Army Authorities, direction was given by this Court on 8.4.2008 to the learned District & Sessions Judge, for holding an enquiry into the death of Pratul Daimari, son of Khalason Daimari and Pratul Daimari, son of Nahimia Daimary.

7. Following this Court's order, requisite enquiry was conducted by the learned District & Sessions Judge, Darrang where opportunities to adduce evidence to both the parties were afforded and a report dated 10.2.2009 has been furnished to the Court, copies of which have also been made available to all the parties. Although the enquiry report need not be discussed in great detail, it would be relevant to mention the fact that it has been held in the enquiry that both Pratul Daimaris died in an encounter with the Army, as per the version given by the Army Authorities.

8. After the death of the 2 persons by firing of the Army Officer, an FIR has been lodged with the Paneri Police Station by Lieutenant Sartaj Mehta of 62 Field Regiment. From the FIR it can be gathered on 7.3.2004, both the Pratul Daimari-1 and Pratul Daimari-2 were in custody of the Army Authorities and they were being taken while in such custody, to Laxmi Nalla area of Mazbat, allegedly to show concealed weapons.

9. In the Army's FIR, it is further stated that the Army Personnel started from the Army Camp at about 2030 hrs. with the 2 detained persons and reached the area at about 9:15 PM. It was mentioned in the FIR that while the Army personnel were digging for the weapons at the spot indicated by the apprehended, Pratul Daimari-2 ran towards the bamboo grooves and took out an AK-56 rifles and started firing at the informant Lieutenant Sartaj Mehta. In the meantime Pratul Daimari-1 ran away with a grenade. It is stated in the FIR that 7 rounds of bullet hit Lieutenant Sartaj Mehta's "Bullet Proof Jacket" (BPJ) and he fell down due to the impact. As the other detenu i.e. son of Khalason Daimari was about to lob a grenade at Lieutenant Sartaj Mehta, he allegedly retaliated and killed both the detained persons who died at the spot.

10. It may be noted that when the detained persons were taken by the Army authorities from their camp to the site where they were eventually killed, no civilian Police had accompanied the Army personnel and it is submitted by Ms. R.

Bora, learned Central Govt, counsel that although requisitions were given to the Harisinga Police Out Post, they regretted that police personnel cannot be provided to accompany the Army team.

ARMY'S EVIDENCE IN ENQUIRY

11. Before we proceed further, it may be appropriate to take note of the evidence of Captain Sartaj Mehta (at the relevant time Lieutenant Sartaj Mehta) who stated in his evidence before the District & Sessions Judge, Darrang that they reached the site of the encounter along with the two apprehended persons as they had allegedly claimed that they would be able to show where weapons were concealed. The Army Officer stated that the hands of both the detainees were initially tied with rope and later it was untied so that they could dig out the earth and take out the weapons.

11.1. It is also deposed that after 3/4 minutes of digging by the detained persons, suddenly the Officer heard burst of gun fire and bullets hit him on his chest but he was saved due to wearing of bullet proof jacket. Then the Army personnel took position and retaliatory firing was made. About 30/35 minutes later, when stock of the situation was taken, it was found that the dead bodies of both the detained persons were lying there. It was also stated that one AK-56 rifles, not belonging to the Army was in the hands of Pratul Daimari-1, son of Khalason Daimari. Thereafter the Officer deposed that the Army authorities took both the dead bodies to the Paneri Police Station and handed them over to the police for taking further necessary action.

DISCREPANCIES

12. On comparing the versions given by Lieutenant Sartaj Mehta in the FIR and also the version given by him in his evidence before the learned District & Sessions Judge, Darrang we find that there are several vital discrepancies.

12.1. Firstly in the FIR filed, immediately after the incident, it was claimed by the Officer that the Army personnel were digging at the site, whereas in the enquiry he stated that the hands of both the detainees were untied, to enable them to dig to unearth the concealed arms and weapons.

12.2. Secondly in the FIR it is claimed that Pratul Daimari-2 fired at and shot Lieutenant Sartaj Mehta on his Bullet Proof Jacket whereas in the enquiry, Lieutenant Mehta stated that unknown attackers fired 6/7 bullets and AK-56 rifle was found in the hand of the Pratul Daimari-1, son of Khalason Daimari.

12.3. Thirdly in the FIR it was stated by Lieutenant Mehta that Pratul Daimari-2 ran away with a grenade, whereas no grenade was mentioned in the deposition of the Army Officer in the enquiry proceeding.

12.4. Fourth major discrepancy between the FIR and the deposition is that in the FIR Lieutenant Mehta stated that he started firing when Pratul Daimari-2 was about to lob a grenade. But in the deposition, no grenade was mentioned and it

was stated that after the bullets, allegedly fired by Pratul Daimari-1, hit the Bullet Proof Jacket of the Army Officer, he fell down and then the Officer ordered his man to fire. Thereafter they awaited for about 30/35 minutes, as a precautionary measure and only after such time when they took stock of the situation, the two dead bodies were discovered.

IMPROBABILITY OF ARMY'S VERSION

13. Apart from the above discrepancies, we also find the version given by the Army to be highly improbable because it is on record that the alleged incident took place when it was dark after 8:30 P.M., in a jungle like area. It is claimed that 7 bullets were fired by one of the detenu who tried to flee from the custody of one officer and at least 10 soldiers. Most remarkably, notwithstanding the darkness and the jungle terrain which would make accurate shooting well nigh impossible even for an expert shooter, it is claimed that all the 7 bullets fired by Pratul Daimari, hit their alleged target and that, each of those 7 bullets pierced the Bullet Proof Jacket, worn by Lieutenant Sartaj Mehta.

13.1. The Army Officer claims that a detained man under watchful eyes of at least 11 Army Personnel, not only made an attempted escape but also conveniently locate an AK-56 Rifle with ammunition and fired the same with such amazing accuracy at night hours that, all 7 shots fired by him, hit the bullet proof jacket worn by Lieutenant Mehta.

We consider it highly improbable that a fleeing detenu, while firing in utter darkness, would be able to hit a particular human target, that too only in the specific area of the bullet proof jacket worn by Lieutenant Mehta.

13.2. What is also of significance is that none of the fired 7 bullets hit any other body parts of the Officer except the part, which is covered by the Bullet Proof Jacket and that none of the other 10 Army Jawans, were hit by the said bullets, sprayed by the fleeing detenu.

13.3. It is also on record that the other jawans present during the alleged shooting did not support the version given by the officer in their deposition during the Enquiry by the learned District Judge.

ARMY'S POWER UNDER THE ACT

14. We must also note that the Army is empowered to operate in the State under the provisions of the Armed Forces (Special Powers) Act, 1958 (hereinafter referred to as the Act) and under the said Act, the Armed Forces are permitted to act only in aid of Civil Power and are not at liberty to act in any manner as they like. The Act does not give any power to the Army to summon people to their Camp, detain them or to go on mission with such apprehended persons. In any case, the Army has limited operational right under the Act and cannot usurp unilaterally the right of the police to deal with persons even if they are suspected to be involved with some illegal activities.

Furthermore, u/s 5 of the Act, the Army Authorities are required to make over any person that they arrest, 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.

15. Despite the aforesaid provisions of the Act, we find that the Army Personnel in the instant case, even after admittedly taking the two detained persons into their custody, never bothered to hand them over to the nearest Police Station as is required by law and decided to conduct their own operation, to allegedly unearth concealed weapons, which misadventure led to the tragic death of the apprehended persons.

CONCLUSION

16. From the above discussions, we are of the opinion that the Army Personnel of the 62 Field Regiment stationed at Harisinga Camp at the relevant time disregarded the law, while dealing with the arrested persons. We have also noticed the discrepancies in the version given by the Army Authorities and we have no hesitation to conclude that, a concocted story to suit the convenience of the Army personnel, have been presented in the Court.

Though it may not be possible for us to conclude finally under what circumstances the death of the detainees have been caused, but since it is admitted that the two detainees died while they were in the custody of the Army Authorities, we can definitely conclude that it is the Army Authorities, who are responsible for the death of the two apprehended persons.

17. The records show that Pratul Daimari-1 was a final year BA student of College when he was killed. Pratul Daimari-2 was a married person with his wife and 3 minor children. Both of them were living with their family.

On the direction of the Army Authorities, both the detainees were brought to the Harisinga Army Camp by their family members and this voluntary act is an indication that they were not involved with any militant organization, as is sought to be made out. If they were militants or were involved with any illegal activities, the detained persons would try to keep their distance from the Army and their families too would not voluntarily present them at the Army Camp on mere asking. Thus we feel that two innocent lives have been extinguished by the inane and irresponsible acts of members of a disciplined force.

18. Having regard to the above discussion, we are of the opinion that the Army Authorities must compensate the surviving family members, as they are solely responsible for the tragic and unwarranted death of Pratul Daimari-1 and Pratul Daimari-2, who were in their custody at the relevant time.

Determination of the quantum of compensation, in the last resort, is a subjective determination though all care and caution should be exercised to ensure that such determination is made on an objective consideration of all relevant facts.

19. One Petitioner (Smti Jusna Daimari) lost her husband and has to maintain herself and bring up 3 minor children. The other Petitioner (Sri Khalason Daimari) has lost his college going young son who was expected to provide for the family after being established in life. Taking into account all such facts we are of the view that quantification of the compensation amount in each of the cases at Rs. 4,00,000/- (Rupees four lakhs) would meet the ends of justice. We, therefore, order accordingly and direct the Respondent No. 1, the Union of India to pay a sum of Rs. 4,00,000/- (Rupees four lakhs) by Account Payee cheques in the name of each of the writ petitioners. The aforesaid cheques are directed to be deposited with the Registrar General of this Court. After receiving the compensation, as directed, the Registrar General will disburse the amount to the two Petitioners after due identification.

This payment shall be made within a period of 8 weeks from the date of receipt of this Court's order.

20. Before parting with the records, we must also express our concern about the manner in which the Army Authorities had tried to cover up the incident where two innocents had lost their lives. It is admitted by Lieutenant Sartaj Mehta in the FIR filed and in his deposition in the enquiry that it is he, who had fired at the two detained persons and on such firing the detenues lost their lives. But he claims to have shot and killed them as a retaliatory measure, which version had not been accepted by us. Therefore, considering the circumstances leading to the death of the detenues and our declared difficulty in accepting the version given by the Army Officer, we deem it justified to, direct the Army Authorities to initiate appropriate action by treating the case of custodial death of the two detenues as a case of murder, and to initiate appropriate action under the Army Act and other relevant laws for such deaths, to prosecute their officer Sartaj Mehta of 62 Field Regiment, u/s 302 of the Indian Penal Code and such other relevant penal provisions, as may be found to be warranted.

21. Both the writ petitions are allowed and disposed off in terms of the above directions.