

(2003) 05 GAU CK 0024

In the Gauhati High Court

Case No : Civil Rule (HC) No. 79 of 1998

Khargeswar Nath

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-05-2003

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 5

Citation : (2004) 1 GLR 518

Hon'ble Judges : P.P. Naolekar, C.J.; Iqbal Ahmed Ansari, J

Bench : Division Bench

Advocate : A.C. Borbora and P.K. Barman, for the Appellant; N. Choudhury, Addl CGSC and Anima Hazarika, G.A., for the Respondent

Judgement

I. A. Ansari, J.—By making this application under Article 226 of the Constitution of India, the petitioner, who is father of deceased Cheniram Nath, has approached this Court seeking, inter alia, issuance of appropriate Writ or Writ(s) declaring the arrest and detention of the said deceased in the army custody as illegal and commanding the Central Bureau of Investigation (CBI) to enquire into/ investigate the circumstances in which the said deceased was apprehended and detained and what led to his death and also seeking the remedy of adequate compensation for the family members of the said deceased.

2. In a nutshell, the case of the petitioner runs as follows : - Deceased Cheniram Nath, a registered contractor in the Public Health Department, Govt. of Assam, was an active social worker and President of Manab Adhikar Sangram Samittee (MASS) of Hatichung Anchalik, Nagaon. On 30.5.1997, while the said deceased was present at the house of his co-villager and brother-in-law to have his dinner, where the said deceased stood invited, army personnel entered into the house at about 9.30 P.M. and ransacked the house in the absence of the brother-in-law of the said deceased, picked up the deceased Cheniram Nath in their vehicle and took him away to some undisclosed place. On the following day, i.e., 31.5.1997, in the morning, some of the friends and near relatives of the

petitioner went to their nearest Police Station Jajori and reported about the incident. While the petitioner was awaiting the arrival of his son, Cheniram Nath, he was informed, on 1.6.1997 at about 7/8 A.M., that Cheniram Nath had been killed and his dead body was lying at Nagaon Police Station, whereupon the petitioner and many others reached the said Police Station and found Cheniram's dead body lying in a military Van kept within the compound of Nagaon Police Station. The petitioner also noticed that apart from various bruises and injuries, which were visible on the body of the said deceased, his skull had been blown off and his right hand was tied by an iron chain. After postmortem examination was performed on the dead body of the said deceased, the same was cremated in the evening of 1.6.1997. Terming the arrest and detention of the said deceased as illegal and holding the army personnel responsible for killing the said deceased, the petitioner has, as indicated hereinabove, approached this Court, with the help of the present writ application.

3. This case has been contested by Respondent Nos. 1, 3 and 4, namely Union of India, and the Army by filing their affidavit-in-opposition. No affidavit-in-opposition has, however, been filed on behalf of Respondent No. 2, namely, State of Assam and also Respondent Nos. 5, 6, 7, 8 and 9.

4. The case of the Respondent Nos. 1, 3 and 4 may, in brief, be stated thus : The said deceased was a hardcore member of the banned ULFA Organisation, He was the link-man and co-ordinator of ULFA and MASS activists in Jamuguri, Babejia and Raha area. In course of an army operation, a letter containing the monogram of the MASS was recovered, which gave an indication that the letter was sent by the President "of the Hatichung Regional Committee, MASS. This letter was recovered from two members of the ULFA cadre, namely, Robin Saikia and Dhul Saikia. By this letter, ULFA had asked all Nagaon District Committees of MASS to cease all direct uncontrolled contacts between the MASS and ULFA cadre. It was further suggested in the said letter that the contact between the two organisations be established through one Swadhinata Phukan only. On 30th May, 1997, at around 8 P.M., an operational column of the army reached Jamuguri village on specific information that Cheniram Nath alias Mama was present in the village. Though Cheniram Nath was not found in his house, he was, during the course of the search operation, found at the house of his co-villager and brother-in-law at about 2 A.M. on 31st May, 1997. When he was so apprehended, he was found to have an injury on his right leg and he was, thereafter, given medical aid. While apprehending the said deceased, the persons present at the house from where the said deceased was arrested were duly informed that Cheniram Nath was being taken to Mukhuli, i.e., Army Camp for interrogation. On 1.6.1997, an FIR in this regard was lodged by the army. On a joint interrogation of Cheniram conducted by the army personnel and local police, between 10.45 A.M. and 12.45 P.M. on 31st May, 1997, it surfaced that Cheniram Nath was involved in the shoot-out between the ULFA militants and the column of army personnel at village Jamuguri on 15.4.1997, wherein one of the officers and one person of the rank had received gun shot injuries. Cheniram

Nath used to give shelter to militants and he was at link-man between the ULFA and MASS and he used to harbour the extremists and he also used to organize and co-ordinate meetings of LLFA in the Jamuguri area with the activists of MASS. He also used to act as a courier for delivery of weapons to various ULFA cadres. Based on the information so received, the Army took the petitioner to his house at Jamuguri on 31.5.1997 and several incriminating documents, such as, ULFA journals and live rounds of AK 47 ammunition were recovered from there. The detainee also revealed that two hardcore ULFA militants, namely, Suresh Bora and Makhan Das were moving about clandestinely in the jungle areas of Babejia and volunteered to guide the army column to their hide-outs." On receipt of this information, the operational column of army left the camp. Approximately a Km. ahead of a Railway crossing on NH 37, a Civil truck approached the army column from the opposite direction at a rapid speed and the driver of the army convoy had to slow down the vehicle in order to let the speeding truck pass. Taking advantage of the situation, the detainee, Cheniram, all of a sudden jumped out of the slow moving army vehicle and made a bid to flee away taking advantage of the cover of heavy plantation and bamboo groves. Immediately, alarms were raised by the army, convoy halted, army personnel from the column chased the fleeing detainee firing warning shots in the air using spot-lights. However, as the detainee did not stop, he was fired at in a running condition and the bullets hit him in his leg below the knee and also in his head. Thereafter, the body of the said deceased was brought to Nagaon Police Station at about 2.45 A.M. on 1.6.1997 and handed over to the police. At not point of time, the said deceased was tortured by the army. The detainee was to be handed over to the police, when the joint operation would have been over. The respondents had no intention to detain the deceased for more than 24 hours and it was only on the basis of the information received by the detainee himself that the respondents tried to bring other militants to book with the help that had been promised by the detainee, but the detainee betrayed himself.

5. The petitioner filed his affidavit-in-reply, wherein it has been contended, inter alia, that the said deceased was not involved with any militant activities directly or indirectly and there is no nexus between the MASS and ULFA. No incriminating material was seized from the possession of the detainee. The said Cheniram Nath was killed in a fake encounter by the army and the persons responsible are liable for prosecution and the petitioner is entitled to compensation for the custodial death if his said son.

6. By an order, dated 14.9.1999, passed in this case District Judge, Nagaon, was directed to make an enquiry and submit his report regarding the allegations made in the writ application. Accordingly, an enquiry was held by the learned District Judge, Nagaon. During the course of the enquiry, both sides adduced evidence and on holding the enquiry, the learned District Judge reached the following findings :

"(a) None of witness for the petitioner could give any detailed information about

the manner under which the deceased was taken into custody by the Army. Their evidence is staggering and confusing, but fact remains that there is no dispute of Cheniram being taken into custody by army on the date, at the time and from the place as mentioned in the writ petition. The only question posed by the writ petitioner is that the killing was not justified and there was possibilities of alternate method for apprehending him alive even if he tried to escape as contended by the army.

(b) On an interrogation of Cheniram by local S.P., commanding officer of the Army and they detected an injury mark on the right leg of Cheniram and Cheniram told them that it was an old sore. After interrogation Cheniram was once again taken back to his house and asked by the Army to hand over all papers, weapons, ammunition, etc., to the Army and accordingly Cheniram handed over to them ammunitions, A.K. 47 and some books, banners and posters in connection with ULFA activities and they returned to the Army camp thereafter.

(c) I find that there is no statement from the side of the petitioner to say how Cheniram was killed, although it is an admitted position that Cheniram was taken into custody by army, on 30.5.1997 and he was fired at during the night (may be after 10 P.M.) on 31.5.1997 near Bebejia as a result of which he died at the spot.

(d) Concluding I find that if the Army officer is believed then it is found that deceased Cheniram tried to run away from the custody of Army when he was shot at by the army apprehending danger and I find from materials on record that there is nothing to disbelieve totally the version forwarded by the Army. The seizure of the incriminating materials, although not produced during inquiry, there is equally no challenge to such act of seizure.

(e) The fact that the deceased Cheniram was a member of MASS is an admitted fact."

7. We have heard Mr. A. C. Borbora, learned counsel for the petitioner, Mr. P.N. Choudhury, learned Addl. CGSC appearing on behalf of the Union of India, and also Mrs. Anima Hazarika, learned Govt. Advocate, Assam.

8. It has been pointed out by Mr. Borbora that the inquest report reveals that the said deceased bore an injury on his leg and he stood hand-cuffed, when he received injury on his head. These facts clearly show, according to Mr. Borbora, that the death of the said deceased Cheniram was caused by the army personnel intentionally inasmuch the injury on Cheniram's leg would not have allowed him to make a bid to escape and since he stood hand-cuffed, he remained in the control and custody of the army personnel. Mr. Borbora has pointed out that u/s 5 of the Armed Forces (Special Powers) Act, 1958, if a person is arrested and taken into custody under the Act, he shall be made over to the Officer-in-Charge of the nearest Police Station with least possible delay together with a report of the circumstances occasioning the arrest. In the light of the provisions of Section 5, contends Mr. Borbora, Cheniram ought to have been handed over to the

nearest Police Station by the army on the night of 30.5.1997 itself, when the deceased was taken into custody, but it was his dead body, which was handed over, points out Mr. Borbora, to the police more than 48 hours after the deceased was, admittedly, taken into custody by the army. Hence, the respondents are liable, submits Mr. Borbora, to pay compensation to the petitioner for the custodial death of his said son. It is also submitted by Mr. Borbora that the learned District Judge had shifted the onus on the petitioner to prove as to how Cheniram had died, whereas the army having, admittedly, taken Cheniram into the custody, had the responsibility to prove as to how Cheniram had died. In this regard, contends Mr. Borbora, the evidence adduced by the respondents is wholly inadequate and misleading and did not prove at all that the detainee, in question, made any bid to escape and/or died accidentally. Far from this, points out Mr. Borbora, the injury on the leg of the deceased and the fact that he had handcuff on his hands are indicative of the fact that the stand taken by the respondents that the Cheniram had made an abortive attempt to escape and got accidentally killed, when the army opened fire to stop him from fleeing away, is a fake story.

9. Controverting the above submissions made on behalf of the petitioner, Mr. Choudhury, learned Addl. CGSC has pointed out that though the inquest report mentions that the detainee, in question, was hand-cuffed, the evidence of witness No. 3, i.e., Sankar Bandu Obale, a Lance Naik of 13 Mohar Regiment, shows that the detainee, in question, was not really hand-cuffed, but one of his hands was tied with a rope and the other end of the rope was held by Sankar Bandhu Obale so as to stop Cheniram from escaping, but taking advantage of the slowing down of the vehicle in which the detainee was travelling, the detainee jumped out of the vehicle and ran away, but he was chased and ultimately, when the army column was trying to prevent him from running away, he was accidentally killed inasmuch as it was not possible for any one to clearly see at night the detainee running away on account of difficult terrains. The death of the said deceased was, thus, according to learned Addl. CGSC, unintentional and for reasons beyond the control of the respondents. It is also pointed out by Mr. Choudhury that from the evidence of Witness No. 3 aforementioned, it is clear that Cheniram was taken into custody on the late hours of the night of 30.5.1997 and on the following day, in the morning, the local Superintendent of Police and the Commanding Officer of the army had interrogated the deceased. This had happened, points out Mr. Choudhury, in terms of the policies of the Unified Command and the detainee could not be handed over to the police as he had promised to lead the army in their bid to apprehend two more dreaded militants. In such a situation, contends Mr. Choudhury, the delay in handing over the custody of the detainee to the nearest Police Station was not unjustified and/or unexplained inasmuch as the police were aware about the detention of the Cheniram in army custody, the progress of interrogation of the detainee and also about the factum of recovery of incriminating materials and Cheniram's promise to lead the army to the apprehension of other militants.

10. Having heard learned counsel for the parties and upon perusal of the

materials on records, what we notice is that though the inquest report shows that the said deceased was in hand-cuffs, the evidence of DW 3 shows that a piece of rope was kept tied around the wrist of one of the hands of the detainee and the other end of rope was kept held by DW 3 in the vehicle in which the detainee was travelling with the army with a promise to show the hide-outs of the two militants aforementioned. There is no assertion in the cross-examination of DW 3 that the detainee, in question, had been put in hand-cuffs. It is also in the evidence of DW 3 that on the night of 30.5.1997, when Cheniram was apprehended from a house in his village, they had seen an injury on his right leg and on a query made by them, Cheniram told them that it was an old sore on his leg. This assertion too in the evidence of DW 3 remained undisputed by the petitioner and no question was put to DW 3 to show that this injury was caused by the army, while apprehending Cheniram or at any point of time after Cheniram had been taken into custody.

11. Coupled with the above, DW 3 has given a graphic description of the circumstances in which Cheniram was apprehended by the army, his evidence shows that on 30.5.1997, on information received, army searched a number of houses in Jamuguri village and, eventually, on being shown by a source, apprehended Cheniram Nath from the house in which he was staying. Though the petitioner has asserted in his writ petition that Cheniram Nath was not present in his house, but in a house of his co-villager and brother-in-law, where he had gone to have his dinner on being invited by the latter, the absence of Cheniram's brother-in-law from his house at such late hours of night (though he is said to have invited Cheniram) goes to show that this assertion made by the petitioner is false and Cheniram was actually staying not in his house but at the house of his brother-in-law and it was with great difficulty that the Army, as indicated by the evidence of DW 3, apprehended Cheniram from the said house. It also clearly follows from the unshaken evidence of DW 3 that on the following day in the morning, i.e., on 31.5.1997 at about 9 A.M., not only the Commanding Officer and other officers of the army, but also the local Superintendent of Police had interrogated Cheniram Nath in the army custody and when the Cheniram agreed to help in recovering some incriminating materials, the army, accompanied by Cheniram, visited Cheniram's house and it was here that Cheniram handed over some incriminating documents/materials and also ammunitions showing his links with ULFA. After the recovery, so made, Cheniram was again brought to the army camp for further interrogation and it was here that Cheniram gave the Army the information that two ULFA militants aforementioned were staying in jungles and promised to help the army to nab these two militants. Acting on this information, the army, accompanied by local police, went to nab the two militants from their hide-outs. At the request of Cheniram, Cheniram was allowed to wear commando dress so that he may not be identified by others. Near Bebejia, when the vehicle of the army was slowed down due to jerk, DW 3 fell on Cheniram, Cheniram too leaned forward and, then, Cheniram jumped out of the vehicle and ran. The Army switched on search-

lights and called Cheniram to stop, but Cheniram did not stop and as he did not stop, the army were ordered to fire at the legs and the army started firing and Cheniram fell down. The army personnel went near him and found that a part of his head was blown off with bullet injury. Then, the army decided to hand over his dead body to the police station.

12. From the evidence discussed above, it is clear that the army had substantial reasons for apprehending Cheniram Nath on the night of 30.5.1997 and since his interrogation had continued in the presence of the local Superintendent of Police, Cheniram could not be handed over to the nearest Police Station. Cheniram Nath led to the recovery of incriminating materials including the ammunitions for AK47 and while he was leading the army to the hide-out of two ULFA militants aforementioned, Cheniram made an abortive bid to run away from the army vehicle in the manner as has been described herein above, but he suffered bullet injury on his head and died.

13. From the materials on record, we are convinced that Cheniram was not intentionally put to death, but his death was accidental. The lapse, if any, on the part of the army was in not handing over the deceased to the nearest Police Station immediately after he was apprehended ; but in view of the fact that his interrogation, in the presence of local Superintendent of Police, had continued and recovery of incriminating materials had been made in pursuance of such interrogation and further operation had been launched by the army to nab the militants with the help of the promised made by Cheniram himself, the army had sufficient reasons for not immediately handing over Cheniram to the nearest Police Station.

14. Considering, therefore, the matter in its entirety, we are of the view that in the facts and circumstances of the case, the petitioner is not entitled to any substantial amount of compensation, but in the facts and circumstances of the case, a sum of Rs. 50,000 (Rupees fifty thousand) only will be adequate compensation for keeping the custody of Cheniram by the army personnel.

15. We, therefore, direct that the Respondent No. 1, namely, Union of India shall pay, within a period of 45 (forty five) days from today, a sum of Rs. 50,000 to the petitioner as compensation.

16. With the above observations and directions, this writ application shall stand disposed of. No order as to costs.