

(2014) 08 TP CK 0016
In the Tripura High Court
Case No : W.P. (C) No. 86 of 2008

Khokan Mahishya Das VsThe Union of India

Date of Decision : 25-08-2014

Acts Referred:

Constitution of India, 1950 — Article 21
Penal Code, 1860 (IPC) — Section 302, 307, 326

Citation : AIR 2015 Tripura 9

Hon'ble Judges : S. Talapatra, J

Bench : Single Bench

Advocate : R. Purkayastha, Advocate for the Appellant; P.K. Biswas, Asstt. SGI and P. Majumder, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

S. Talapatra, J.—The petitioner is the husband of Sandhya Rani Mahishya Das and father of Suparna Mahishya Das. Sandhya Rani Mahishya Das along with Suparna Mahishya Das and Malay Mahishya Das were proceeding towards their home from one place of Indian territory to the other place in the Indian territory along the international border with Bangladesh but without crossing it. All on a sudden the BSF personnel belonging to 18 Bn. BSF at Ranibari at about 1900 hours on 03.03.2006 fired 10 rounds of bullets from their Insas rifles. On that day itself one FIR was filed to the Officer-in-Charge of Kadamtala Police Outpost stating that, "At 1900 hrs above B/Amb comprising coy Cdr & HC surrender Kumar with two others observed/heard hassling and cracking sound of leaves. Followed by silhouette of men carrying long "Dah" when these intruder were challenged, they changed the party and in self-defence party member Ct. S.N. Yadav fired 10 rds from his Insas No. 571".

2. In the said FIR it has been further disclosed that two persons namely Sundara Masu (sic) Das and Suparna Masu (sic) Das had bullet injuries on their person. But in the FIR they stated that on so called questioning the injured persons admitted that they were returning from Bangladesh. From them, it has been disclosed that, some Bangladeshi currency notes, audio cassette, cosmetics,

cigarette etc. were recovered. But the petitioner has stated that the said version of the BSF has nothing to do with the real state of affairs. According to him while his wife and children were returning from the house of a relative on 03.03.2006 after dusk, BSF personnel opened fire on them unprovoked. His injured wife and daughter were taken to Kadamtala Primary Health Centre at the instance of the BSF personnel and thereafter they were taken to the Kailashahar District Hospital. But Sandhya Rani Mahishya Das, his wife died on 06.03.2006 succumbing to the bullet injuries. But his daughter was released after treatment. At the instance of Malay Mahishya Das, son of the petitioner, Churaibari PS Case No. 12 of 2006 u/s 326 added with Sections 307 and 302 of the IPC was registered and taken up for investigation.

3. After investigation however the final police form was submitted without chargesheeting anyone. But on the basis of the FIR as lodged by the BSF, another case was registered u/s 6(1) of the Indian Passport (Entry into India) Act, 1950. After due investigation the Officer-in-Charge, Kadamtala Outpost submitted the prosecution report against Suparna Mahishya Das and Malay Mahishya Das for committing offence punishable u/s 6(1) of the Indian Passport Rule (Entry into India) Act, 1950

4. Based on the said police report, a case being CR 231 of 2006 was registered. After the statement of accusation was read over and denied by the accused Malay Mahishya Das, the trial commenced but for wanting of any evidence he was acquitted. From the judgment and order dated 05.02.2007 delivered in CR No. 231 of 2006 by the Judicial Magistrate, 1st Class, Dharmanagar, North Tripura it transpired that the accused Malay Mahishya Das is an Indian National and in support of this he submitted some documents which were found fully reliable. It has also appeared that the place where the occurrence took place was dark and the BSF personnel fired on the accused persons without alert. For such unwarranted firing, Sandhya Rani Mahishya Das had expired and her daughter sustained bullet injury on her person. PW-3, Satyanarayan Yadav, a constable of 18 Bn. BSF of Ranibari BOP has also admitted that on the relevant date, time and place he fired on the accused persons. He has further admitted the fact that the BSF personnel fired the mother and sister of the accused person, Malay Mahishya Das and due to the said firing Sandhya Rani Mahishya Das, mother of the accused person died at the G.B. Hospital, Agartala. From a bare reading of the said judgment and order it appears that the seizure from the deceased and others was not proved and the seized articles were not identified by the independent witnesses. The trial court has further observed that

"Moreover B.S.F. personnel also did not seize any weapons of offence which were used by the accused persons. However B.S.F. personnel fired them without any reasonable cause and due to the said fired the mother of the accused died at G.B. Hospital, Agartala due to the said injury".

[Emphasis added]

5. The petitioner by means of this writ petition has urged for compensation for death of Sandhya Rani Mahishya Das, his wife and the injuries of Suparna Mahishya Das, his daughter to the extent of rupees eight lakh.

6. Ms. R. Purkayastha, learned counsel appearing for the petitioner has drawn attention of this Court to the final police report dated 24.11.2007. It has been recorded there as under:

"Hence it is revealed that on 03/03/06 at about 1800 hrs the BSF personnel opened fire during discharging of their duties at Indo-Bangladesh border, specially to protect and prevent the activities of the members of the PLA but by mistake said Sandhya Rani Mahisya Das and Suparna Mahisya Das hit by fired bullet and Sandhya Rani Mahisya Das succumbed to her injuries at GB hospital on 6/3/06 at 1450 hrs."

[Emphasis added]

It has been also recorded in the said police report that the Churaibari PS Case No. 12 of 2007 u/s 326 of the IPC and added Section 302 of the IPC was closed. It is to be noted that the said observation has been made by the investigating officer of Churaibari P.S. Case No. 12 of 2007 which case was registered at the instance of Shri Malay Mahishya Das.

7. Ms. Purkayastha, learned counsel for the petitioner has further submitted that in the judgment and order dated 05.02.2007 it has been categorically observed that the seizure of weapon or a dao was not proved. As such, the story that the BSF was apprehensive that they might be attacked does not lend any credibility. That story has been woven to cover up the irresponsible act of the BSF personnel.

8. From the other side, Mr. Biswas, learned Asstt. SGI has produced a copy of the seizure list without affirmation where it is found that along with Bangladeshi currency notes, a dao was recovered "from the nearby area". But whether the seized materials were seized from any of the victim or not, is not available from the seizure list as produced by the learned Asstt. SGI. Mr. Biswas, learned Asstt. SGI has further contended that the BSF was on alert as they received a secret information that a contingent of PLA insurgents had gathered across the border to enter into Indian territory from Bangladesh. When they saw the group of 5/6 men they started firing. As a result, there had been the casualty.

9. From the counter affidavit filed by the respondents it appears that the respondents have not disputed the fact that Sandhya Rani Mahishya Das and Suparna Mahishya Das received bullet injuries from the said occurrence. They have also not disputed that Sandhya Rani Mahishya Das died out of the said bullet injury. However, they have categorically stated that those persons along with 3/4 persons had entered into India from Bangladesh territory without the passport and they were suspected to be the PLA insurgents on the basis of the earlier information. What has surprised this Court is that even the BSF personnel nowhere murmured that they had challenged that group at the first sight before

they opened fire. When they opened fire the group got scattered here and there. After search they recovered injured Sandhya Rani Mahishya Das and Suparna Mahishya Das. No materials such as the official recording as to receiving of the secret information or that the Bangladeshi currency notes and other materials were recovered from the injured Sandhya Rani Mahishya Das and her daughter Suparna Mahishya Das. Moreover, this court cannot lightly brush aside the observation of the Judicial Magistrate, Dharmanagar, North Tripura as made in the judgment and order dated 05.02.2007 delivered in CR 231 of 2006 that the BSF personnel could not seize any weapon of offence which was allegedly used by the accused persons. According to the record, the BSF personnel fired without any reasonable cause. The said judgment and order dated 05.02.2007 was neither challenged by the State or by the informant and as such the said finding/ observation has reached its finality and any finding contrary thereto cannot be accepted by this Court. However, from making the assessment of the materials from entirely a different angle whether the injured persons had really perpetrated any offence or not this Court has safely reached to an inference that no material is available before this court to hold that the injured persons were the perpetrators of any offence including the offence punishable u/s 6(1) of the Indian Passport (Entry into India) Act, 1950. Moreover, the petitioner has said that his wife and children were returning from a relative's house and they had nothing to do with crossing of the international border. The firing was entirely unprovoked and an irresponsible act from the part of the BSF jawans. Ms. Purkayastha, learned counsel for the petitioner has referred a decision in Sutendra Debbarma Vs. Union of India (UOI) and Others, . But that case cannot have any manner of application in the present context inasmuch as against the BSF personnel who opened fire the BSF itself proceeded against by constituting Security Force Court in that case. He was awarded sentence for 10 years imprisonment and he was also dismissed from service. The law is well settled that if from the materials placed before this Court it transpires that life has been taken away by the functionaries of State unconstitutionally, be it in the custody or otherwise, it violates the fundamental rights guaranteed by Article 21 of the Constitution of India. The Court in its public law jurisdiction can penalise and award compensation without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is thus, in addition to the traditional remedies and not in derogation of them. What has irresistibly surfaced in this case is that there is no acceptable explanation for opening the fire and of the manner the fire was opened.

10. Having held that the said act which resulted in the death of Sandhya Rani Mahishya Das and injury of her daughter Suparna Mahishya Das is par se

violation of the fundamental right guaranteed under Article 21 of the Constitution of India. For the said act the State cannot enjoy any immunity from its strict liability which arises due to the violation of the fundamental right to life and personal liberty. The State is therefore liable to adequately compensate the petitioner for the wrong as stated irrespective of the fact that was done by its functionaries while they were discharging the sovereign function of the State such as guarding the international border. Hence, the respondent Nos. 1 to 5 are directed to pay a sum of Rs. 4,00,000/- (Rupees four lakh) to the petitioner as compensation without prejudice to the other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The said amount shall be paid to the petitioner within a period of three months from today else the said amount shall carry interest @ 12% per annum from today.

In the result, the writ petition is allowed to the extent as indicated above. However, in the facts and circumstances of the case, there shall be no order as to costs.