

(1998) 04 GAU CK 0017
In the Gauhati High Court
Case No : Civil Rule No. 614 of 1994

Kusumkamini Singha

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-04-1998

Acts Referred:

Arms Act, 1959 — Section 4, 5
Constitution of India, 1950 — Article 142, 21, 226, 32, 9
Penal Code, 1860 (IPC) — Section 302, 325, 34, 342, 354

Citation : (1999) 2 GLT 361

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya, M. Singh, K. Agarwal, T.C. Chutia, G. Singh, E. Kakati, A. Deb Roy and H.K. Mahanta, for the Appellant; D.K. Das, R.P. Kakaty, for the Respondent

Final Decision : Allowed

Judgement

D.N. Chowdhury, J.—This is an application under Article 226 of the Constitution of India praying for a Writ of Mandamus or any other Writ or direction of like nature for initiating a judicial Enquiry relating to death of Debajit Singha @ Kenny to fix the responsibility on the person concerned and for a direction commanding the Respondents to pay compensation to the Petitioner for alleged violation of fundamental right of the Petitioner under Article 21 of the Constitution of India.

2. The Petitioner is the mother of deceased Debajit Singha @ Kenny who was died at the hand of Army Authority on the intervening night of 31.10.1993 and 1.11.1993. At the time of death the deceased was only 23 years of age. After passing the Pre-University (Arts) examination he went to prosecute his studies for B.A. in Imphal but unfortunately he could not complete his studies and returned to Silchar. At Silchar he completed his diploma course in Type Writing and thereafter he was in search of Government job. For a few days he was also

employed on the daily wages basis by the Election Office, Silchar in the year 1989.

3. According to the Petitioner on 31.10.1993 the family members of the Petitioner including deceased Debajit Singha @ Kenny after their dinner went to bed and about 1.30 AM some Military/Army personnel entered into the Petitioner's house by breaking upon the gate and door and started banging the doors and windows of the side walls of their dwelling house. The Petitioner opened her front door and as soon as the door was opened the Military/Army personnel forcibly entered the house and assaulted her. Thereafter they started shouting loudly saying that "Hatiyar Nikalo". They also started ransacking the house and the son and daughters of the Petitioner's objected on their behaviour and the Military/Army personnel forcibly took away the Petitioner's eldest son. Debajit Singha by tying his hand and covering his face with cloth. After a while Petitioner and her family members heard the sound of gun shots and cry of late Debajit Singha and as soon as the Petitioner and her family members were in search of Debajit Singha but they found some blood mark at a little distance from their house. On the further enquiry of the Petitioner and her family members they could know that deceased Debajit Singha was admitted by the Army personnel in injured condition in Silchar Medical College and accordingly they, went to see Debajit Singha @ Kenny in the Silchar Medical College and found deceased Debajit dead with bullet injury. The Petitioner was informed by the concerned doctor that deceased Debajit Singha was admitted in the Silchar Medical College Hospital with gunshot injury by the Army personnel and the doctor submitted his report on 1.11.1993 at 3.40 am at the Ghungoor Out Post. The said report was addressed to the O.C. on duty Ghungoor Police Out Post, Silchar 14-Cachar, Assam which reads as follows along with the endorsement:

Sir,

With due respect I like to inform you that a patient admitted with history of shot-gun injury today at 03.5 am on 01.11.93 patient brought with injury position patient expired at 3.10 am dt 01.11.93.

This is for your kind information and necessary action.

Thanking you. Your faithfully, Sd/-Dr. Sunil Kr. Hajong 01/11/93 3.40 am Patient particulars, Kenny alias Kennedy 30 years M/11 HWP 46709 Date of admission 02/11/93. Address:- Unknown. Escorted by Army-Maj. Harjeet Singh (42Field Regt.) C/O 99A.P.O. ?.

Post Mortem report which was enclosed with the Petitioner discloses that deceased Debajit Singh @ Kenny succumbed to bullet injury caused by fire arm and homicide in nature. The husband of the Petitioner lodged F.I.R. which was numbered and registered as Silchar Police Station Case No. 1202/93. The Civil Administration also caused magisterial inquiry through the Additional Magistrate, Cachar Respondent No. 7, Major Harjeet Singh who was impleaded as party respondent also lodged F.I.R. before the Ghungoor Police Out Post, Silchar which

reads as follows:

92 Field Regiment C/099AP0 Nov 93 210201/OPH/FIR/10/0 SHO Police Station Ghungoor, Silchar FIR

1. On receiving information from our source at Silchar a party was sent to apprehend of Kenny alias Kennedy who is a hardcore PLA militant, responsible for extortion of tax for the PLA, murder of civilians and armed attacks on security forces.

2. The FIR pertains to Kenny alias Kennedy aged around 30, address not known as keeps changing his residence very often. To apprehend this militant a cordon has been established around the house of one Mr. H. Singha near the fly-over bridge in Silchar around 0200 hrs on 01 Nov 1993. On establishment of the cordon a representative was being sent to the Police Station for obtaining police assistance for carrying out search of the house to apprehend the militant Kenny alias Kennedy. The cordon was established early to eliminate any change of information of the security forces coming for the operation reaching Kenny from outside.

3. At that moment Kenny slipped away from the roof and ran out into the security cordon. The sentries in the cordon gave a shot of warning to stop. At the instant "he pointed towards the sentry a pointed object and threw a grenade like object towards the sentries while (illegible) In self defence the sentries fired at the militant" who was hit and fell on the ground. On hearing the shots the party closed in and the source recognised him as Kenny alias Kennedy. This was also confirmed by the militant during his short interrogation while he was being taken to the hospital.

4. Kenny was taken to Silchar Medical Hospital for medical aid where he succumbed to his injuries at about 030h.

5. The individual was a hardcore PLA militant as has been confirmed by the source and the previously apprehended PLA Cadre.

Received vide Ghungoor O.P. GDE No. 6L/01-11-93 and Forwarded dt. O/C SLC Ps for taking necessary action.

Sd/ (Harjeet Singh) Major Adjutant For Commanding officer ?.

It appears that a press release was also made by Captain, C.S. Satyanarayana, General Staff Officer-3 for Commander, 57 Mountain Artillery Brigade which was published in a local newspaper dated 6.11.93 which is extracted below:

... Press release: Army Action in Silchar 1. On 31 Oct 93 at about 11 pm information was received that a hardcore PLA activists named Kenny Code named Kennedy was staying in a house near fly-over in Silchar. The security forces launched operation to capture him and by about 2 am., the cordon around his house was completed. The door was knocked and the inmates of the house were told to come out of the house, since the Security Forces would like to

search the house. The inmates replied that they will come out of the home after setting red dy.

2. In the meantime, Mr. Kenny sensing the danger tried to escape through the rear door. On sensing the sentry standing outside, he immediately closed the door and tried to escape through the roof top. He jumped from one roof to another, till he spotted by the security persons. He was asked to stop but paid no heed to the orders. The security men, therefore, fired at him and he was injured. He was immediately given first aid and was evacuated to Hospital. Subsequently succumbed to his injuries. The body was handed over to police and FIR was lodged.

Sd/-C.S. Satyanarayana. Captain, General Staff Officer-3 for Commander 57 Mountain Artillery Brigade.

4. The Petitioner thus moved this Court for an appropriate order of direction under Article 226 of the Constitution of India.

5. Major Harjeet Singh, Respondent No. 7 filed his affidavit and on behalf of Respondent Nos. 1, 2, 8, 9 and 10 denying and disputing the allegations. The Army Authority stated that only on 8.9.1993 they received an intelligence report about the proposed meeting to be held by name. Militants of Peoples Liberation Army (A militant organisation of Manipur) at village Ranpur Part-II, Cachar conducted a cordon and search operation the Army could apprehend 4 (four) hardcore and rests managed to flee. On interrogation the militaris disclosed that one dreaded hardcore militant namely PLA activist was known as Kennedy operating in and around Silchar and all PLA activists in that area were conducted under his direction. The above information was confirmed by Sri Arun Singh and Sri Shyam Singh alleged to be PLA activists. On receipt of the above information the army started to gather more information about Kennedy @ Kenny and accordingly activated its own sources of intelligence and entrusted certain local sources to get more information about him (Kenny). It was further disclosed in the affidavit that after having receipt information about Kenny the Army authorities considered for immediate apprehension of Kenny alive. The relevant averments from the affidavit is bodily lifted below:

... On 31.10.93(at about 2300 hrs.) a Civil Source of the Army had reported to the above unit Head Quarter (92 field regiment) about the presence of Kennedy in a particular house. The said civil source had confirmed that he recognised Kennedy. The information was cross checked about Kennedy with the said source and on being convinced that the information was genuine the commanding Officer of the Unit has sought permission from the Head quarter 24 Mountain Bridge to launch an operation. The permission was granted by the headquarter and the direction was given to capture Kennedy alive. Accordingly a quick Reaction Team (QRT) consisting of one Officer, 2 JCO's and 25 other ranks was launched. The QRT was briefed by the QRT Commander in presence of the Commanding Officer and while briefing it was stressed that Kennedy should be

capture alive.

The QRT according to the direction given by the above mentioned civil source reach village Tarapur by about 0150 hrs. The area around the particular house where Kennedy was started to have been available in the evening by the said civil source was reconnoitered by the QRT Commander and then the troops were deployed in two tires, one inner cardon and one outer cardon. The inner cordon was within 5 to 8 metes from the house and the outer Cordon was at all outlets and byelanes leading away from the house. The cordon was established earliest to maintain utmost secrecy so that the militant would not get a tip off from outside source including the Police Station. The cordons were established by about 0200 hrs. At that moment a JCO was ordered to go to the Police outpost at Tarapur to get a police representative to carry out the search of the house. Thereafter the door of the house was knocked to request the people in the house to come out and identify themselves. The door was not opened, ligths inside the house came on for a few moments and then the house was in total darkness. A lot of movements inside the house was taking place and at this time at an exit in the rear of the house some movement was heard and also in the northern side of the house.

The movement ceased when the troops in the inner cordon shouted a caution to stop any movement. Light on the outside the front of the house came on and again some movement took place in the rear of the house. The stop sentry in the inner cordon immediately gave a shout of warning KAUN HAI" which alerted the other stops/sentries in the inner cordon as well as outer cordon. No bullet was fired keeping the proximity of houses and safety of the civilians in mind.

The door was thereafter opened and the occupants which included the father, mother, brother, a relative and sister of late Debajit @ Kennedy cam out of the house. On inquiring about Kennedy being present in the house the Petitioner replied that she had only one son who was serving soldier. At this moment Abhijit Singha produced his identity card which showed that he was enrolled in the Assam Regiment. The family was not asked any other question nor was the house searched as the JCO who had gone to the Police authorities to arrange for a representative to conduct the search had not returned. At this point of time gun shots were heard from the direction of the railway line which is approximately 50 to 60 yards from the house. The time then was around 0210 hours. A JCO who was questioning the inmates of the house want to investigate at the site of the shooting immediately. On investigation it was revealed that at that point of time. A young man was suddenly seen running towards the railway station very fast by attempting to break the outer cordon. The sentry posted at the outlet challenged him by shouting to stop. The other sentries also got alerted and shouted a warning for the running man to stop by shouting: "RUK JAO NAHI TO GOLI MAR DUNGA." However, as the. man did not stop the sentry concerned fired few rounds in the air to warn him. The running man thereafter suddenly pointed a pistol type object at the sentry which had taken the sentry a back for a

while and the man immediately tried to flee from the outer cordon by running very fast. Few rounds were again fired in the air to warn him. Then suddenly the man throw a grenade like object towards the sentiy while running. This act of the man made the sentiy to react and in self-defence he immediately fired at him aiming at his legs. On hearing the firing, the man tried to duck and as a result the round which was aimed at his legs hit him in the lower back region. He fell down being injured under the over bridge next to the Railway line. The sentries went close to him and one of the sentries who could speak Manipuri had talked to him and the injured man confirmed that he was Kenny and his PLA name was Kennedy. Ihe civil Source who was present with the QRT was also called forward who recognised the injured man to be Kennedy.

From the above I became quite clear that Debajit Singha @ Kennedy was present in the house and managed to give the slip to the sentries of the inner cordon who had got blinded by the sudden switching on the light bulbs on the outside of the house. The rear portion of the house was in total darkness. It was presumed that Kennedy might have managed to escape through the roof and by using the bye lane in the rear of an adjacent house which was under construction at the relevant time he ran towards the railway line.

Kennedy was thereafter immediately taken. to the nearest hospital who directed the injured to Silchar Medical College and Hospital which is approximately 10 kms from Silchar. Kennedy was got examined by the doctor on duty by around 0230 hours. Kennedy succumbed to his injuries at 0315 hours. Information about the incident was telephonically given to the SSP Silchar Mr. Shany at 0240 hours who directed his ASI to take over the case as Kennedy was confirmed PLA cadre. An FIR was filed with Police Out Post Chungoor on 01 Nov 93.

6. The Respondent No. 7 contradicted the statement of the Petitioner to the effect that Late Debajit Singha was killed by the Army personnel and reiterated that it was a case relating to counter insurgency.

7. As regards the Magistrate Enquiry the Respondent stated that the District of Cachar since was declared as the Disturbed area by the State Government, the State Government was not competent to involve the Army in any enquiry. The Respondent No. 7 maintained silence as regards the assistance of the civil authority as was earlier maintained by him in his FIR.

8. By an order dated 6.11.97 the Court directed the CBI to make an enquiry as to the death Debajit Singha, the son of the Petitioner. The CBI on completion of the enquiry submitted its report before this Court. The CBI during the enquiry examined 25 civilian witnessed including the officials as well as 31 Army personnel. The CBI also obtained report from C.F.S.K. The father of the deceased Phani Bhusan Singha stated during the enquiry that on the night of 31.10.1993 at 1.30 am some military/Army personnel entered into the house of the Petitioner by breaking open the gate and door. The Army personnel caught hold of the Petitioner and assaulted her and shouted loudly saying that "Hatiyar

Nikalo-Hatiyar Nikalo" and they forcibly took away the Petitioner's eldest son Debjit Singha. The Petitioner heard the sound of gun shot and the cry of his son and found her son dead with bullet injury in the Silchar Medical College Hospital. Thereafter the Petitioner's husband lodged an FIR in the Silchar Police Station accusing Major Haijeet Singh and his men under his command. The police registered a case Under Sections 457/427/342/325/354/302/34 IPC and took up investigation. During the investigation the I/O examined Head constable Dharendra Das and Cons. No. 910 Abdul Fatah Choudhury of Tarapur O.P. who were on the night petrol duty at the Railway Station. They heard 3 rounds of gun fire sound. They reached the site and encountered some army personnel, who informed that they were on operation duty and civil police were not allowed. They were asked to go back. The above two constables found that the army personnel were dressed in dark cloth covering their head and mouth and were armed. On returning they informed Tarapur Town O.P. over telephone about the matter at 2 A.M. of 1.11.93 . On receipt of the above information Shri B.B. Choudhury S.I./C of Tarapur Town O.P. informed the matter to the S.P. Cachar, Silchar and O/C, Silchar PS over phone. He on enquiry found that on the said night, i.e. 31.10.93 some army personnel conducted raid in the house of Fani Bhusan Singha and apprehended one Debajit Singha @ Kenny, the eldest son of Fani Bhusan Singha. During the enquiry it was found that one major Haijeet Singh/Adj. of the Comdt. office C/o 99 APO submitted a report to I/C Ghungoor police O.P. on 1.11.93 that as per source information one Kenny, a hardcore PLA extremist was present in the house of one Mr. B. Singha at Railway Gate No. 1 near Railway over-bridge. To apprehend the said Kenny a group of army personnel was sent on the night of 31.10.93 During search, Kenny slipped away from the roof and ran away. The sentries in the Qrdon had given a shout of warning to stop. At that point Kenny pointed towards the sentry a pistol like object threw a grenade while running. In self defence, the sentry fired at the militant who was hit and fell on the ground. Kenny was taken to Medical College Hospital but he succumbed to the injury at 3.10 a.m.

9. During enquiry it was found that the deceased Debajit Singha @ Kenny at the time of death was 29 years old and was a student of Cachar College (P.U. Arts) for the year 1987-88. He took migration certificate to study in Regional College of Social Science at Imphal, Manipur in the year 1989 from where he took certificate of P.U. Arts. He participated in sports. He waited and looked for jobs. For few days he was employed in Election Office, Silchar. The CBI in its enquiry referred to the post mortem report which was conducted by Dr. S.I. Barbhuiya, MD, Asstt. Prof, of Forensic Laboratory and Hons, which reads as follows:

1. Performing wound (entry wound) 0.5 X 0.5 cm in size with invert margine and abrasion collar, present in the lower part of the back in the midline 40 cm below the 7th Corvical vertebra.

The wound has passed through the bone spinal cord and bladder, has perforated, the peritoneum and intestine at places and has gone out of the body through the

abdominal wall (injury No. 2 exist wound). Perforating wound. (Exit wound) 6 X 4 cm in size, with ever led and irregular margines present on the front of the abdomen, 3 cm below and slightly to the right of the umbilicys. Portions of fat intestine, etc., are protruding out of the wound.

2. The direction of the wound is found back to front below upward and left to right.

3. Abrassion 1.5 X 1 cm present over the right knee.

4. Abrassion 1 X 1 cm present 3 cm below injury No. 3.

5. Abrassion 4 X 2.5 cm, front of the left knee.

6. Abrassion 3 X 1 cm lateral aspect of left ankle.

7. Abrassion 2.5X1 cm present 4 cm above injury No. 6.

8. Nine small abrasion present on front and lateral aspect of left knee joint.

As per the opinion of the Medical Officer the death was due to shocken haemorrhage resulting from the injuries. The injury Nos. 1 and 2 were caused by rifle firing and homicidal in nature.

10. The CBI also examined the mother of the deceased, the father, younger brother and sister and cousin brother which revealed that on 31.10.93 the army personnel entered their house in search of Kenny @ Kennedy. After assaulting and using indecent language they cried "Hatiar Nikalo" and forcibly took away Debajit Singha by tieing his hand and covering his face with cloth. After sometime they heard sound of gun fire and crying sound of Debajit Singha. When the army personnel left, they searched for Debajit Singha and below the over-bridge Gate No. 1 by the side of Railway line they found some blood stain. The statement of Akhil Chandra Deb, revealed that on the said night while he was on his way to his house he came across some army personnel at Railway Gate No. 1. He was threatened by the army personnel. However, he reached his house and while taking his meal he heard sound of 2/3 round gun fire. The CBI also examined some other persons the Hd. Constable, Harendra Ch. Das, constable Abdul Fateh Choudhury, S.I. B.B. Choudhury. The report of CFSL also was noted by the CBI which read as follows:

Report of CFSL, CBI, Vide No CFSL/96/F-880 Dated: 31.10.95

This report proves that bullet could have been fired from 7.62 mm self loading rifle(SLR) from a distance of within 100 yards or so.

The CBI could not trace out the spent bullet. The CBI also dealt with the statement of Lt. Col. Harjeet Singh. As per the version of Haijit Singh who stated before the CBI about their going to the house of Debajit Singha on receiving information that one Kenny @ Kennedy, a hardcore PLA extremist was in the said house. He made two cordon outside the house and after making such arrangement 1Mb. Kulwant Singh knocked the door of the house and gave his

identity to search the house. The inmates of the house did not open the door immediately. On hearing movement sound inside the house the sentry of inner cordon gave warning and the door was opened. The mother, father, brother, sister and relative of the inmates of the house came out. At that point of time gun shot was heard over 15/16 yards away and on reaching the spot he found that a man in injured condition was lying on the ground below Railway over-bridge Gate No. 1. Immediate arrangement was made for shifting the injured person to the nearest hospital and on reaching Silchar Medical College and Hospital the injured Debajit Singha @ Kenny @ Kennedy was examined, however, he succumbed to his injury and was declared dead.

11. According to the CBI the said Major Harjit Singh did not make any immediate enquiry of the shooting. However, later on he could learnt from sentry Shri Gowande and Makhan Singh and B.S. Singh, that they intercepted Kennedy and asked him to stop but instead he started running towards Railway line pointing apistol like thing towards Makhan Singh. Shri Gowande fired few rounds in the air warning him to stop, but the man threw a grenade like thing, as such in self-defence they fired aiming at his leg but as Kennedy tried to duck, the bullet instead of hitting him on his leg hit him in the lower back region. A categorical statement had been made from the side army personnel that Debajit Singha was not brought out from the house rather Debajit Singha @ Kenny slipped away from the inner cordon and was running towards the Railway trace. Said Maj. Harjeet Singh also maintained that Kenny could have escaped through the roof-top. Investigation further revealed that Kenny @ Debajit Singha was injured by the rifle used by one B.S. Singh on the said night. An attempt was made to interrogate B.S. Singh. However, it was reported that said B.S. Singha died in separate incident at Manipur.

12. The CBI further examined Shri Makhan Singh in detail alongwith Narendra Gowande who revealed that they found a man running in front of them on the Railway track. They challenged him to stop. However, the man started running pointing a pistol like object towards them. The man threw a grenade like object towards them, on this B.S. Singh fired at the man injuring him.

13. The statement of other 25 army personnel who were present during the raid operation were examined which revealed that Kenny @ Kennedy @ Debajit Singha was injured below the over-bridge at Railway Gate No. 1 near railway track.

14. The findings of the CBI reads as follows:

From the above, it is found that during the army raid, Dist. Magistrate-Supdt. of Police were not informed before carrying out the said raid. Nor the army authorities took the presence of civil police or Magistrate during the said raid at that hour of the night.

The enquiry into the matter relating to above said petition filed in the Hon''ble Gauhati High Court by Smt. Kushum Kamini Singha have been made on all the

areas and all possible evidence have been taken into account from which following findings can be laid down:

(i) The Army Party under the command of Major Harjit Singh organised the raid in the night of 31.10 93 and 1.11.93 on receipt of source information to apprehend one Kenny @ Kennedy, a hardcore PLA militant, suspected to be hiding in the house of one M Singh of Tarapur, there is no dispute about Kenny @ Kennedy, who was a hardcore PLA militant and was wanted in connection with various crimes. This warranted immediate raid without waste of time and as such there was no occasion left for the formal" verification and taking into confidence the local authority for organising such raids. Thus, the raid conducted by the party of army was legitimate as required by the circumstances and no prejudice can be attributed for their acts.

(ii) It has come on record that deceased Debajit Singh was hurt with bullet of fire arm but the spot at which he was hurt is in dispute. The Press Release issued by Major C.S. Satyanarayan shows that deceased was hurt on the rooftop of the house whereas the statement of inmates of the house as well as army personnel show that he was hurt near Railway line under Railway over-bridge near Gate No. 1 This version is well supported with the CFSL opinion. Thus, it can be concluded that deceased Debajit Singha was hurt near the Railway over-bridge Gate No. 1 where father and mother of die deceased alongwith other inmates found blood spots. This finding is also supported by the evidence of two police officials who were on night patrol and were actually chance witnesses. This their evidence cannot be dis-believed.

(iii) Although the fire bullet could not be recovered either during police investigation or during CBI inquiry but from the opinion of CFSL expert it is established that the bullet was fired from self-loading Rifle. There is also evidence in the form of statement of S.K.T. Narinder Gowande and NK. Makhan Singh that the bullet fired by one Shri Nk B.S. Singh and caused the injury to the deceased but unfortunately he was not available for examination since expired.

(iv) An enquiry was conducted by Shri B.K. Dutta, ACS Addl. District Magistrate, Cachar into the matter and circumstances of army firing resulting the death of Kenny @ Debajit Singha. In the said enquiry he observed that "it would have been in the fitness of things for the army under the circumstances to contact District Magistrate/Suptd. of Police before carrying out the raid in a highly congested urban agglomeration like that Silchar town". He also observed that "from all these evidence it could be concluded that Kenny was not a fugitive and it was perhaps not difficult to apprehend him for interrogation."

(v) The army personnel have stated during enquiry that deceased had pointed out a pistol like object to them. How could they see in dark midnight the pistol in the hand of the deceased remains a mystery. The army did not seize any such pistol like object after the firing and before their withdrawal from the place of firing which raised serious doubt about the claim.

(vi) According to the version of army the deceased had thrown a grenade like object. The army did not seize the unexploded grenade. Had it been exploded its impact would have been devastating. But the army neither seized the splinters nor any of them suffered any injury due to explosion of the grenade. This also raises serious doubt about their claim.

(vii) The bullet pierced the deceased from the backside. Had it been fired upon him at the time of attack probably this would not have been the case.

(viii) The army personnel has confirmed that the firing upon the deceased was done by Nk B.S. Singh who was detailed near the Railway over-bridge Gate No. 1 but he could not be examined during enquiry since he was reportedly killed in an encounter with undergrounds on 02.08.95.

(ix) During the enquiry, no adverse record against the deceased Debajit Singha was available with the local police as well as with the Manipur Police.

(x) From the evidence brought on record from the CBI enquiry it can be said that this incident was an out-come of mis-identity where unfortunately deceased Debajit Singha also known as Kenny a name of the terrorist. The manner and circumstances under which @ Kenny Debajit Singha was killed could not be conclusively proved.

15. Mr. A.K. Bhattacharyya, learned senior Counsel appearing on behalf of the Petitioner submitted that it is out and out case of custodial death at the hand of the Army authorities. Mr. Bhattacharyya took pains to invite my attention to all the materials facts from the record and submitted that in the instant case the instrumentality of the State behaved in a high-handedness and lawless manner and encroached upon the most precious human rights of an innocent young individual. The learned senior Counsel pointed out to the inaccuracies and inherent contradictions those were reflected in the stand of the Respondents. The authority blatantly transgressed upon the constitutional right of life and liberty. The learned Counsel in support of his case referred to the decision of the Supreme Court in *Rudul Sah Vs. State of Bihar and Another*, *Shobasian M Hungrey v. Union of India*, reported in (1984) 1 SCC 339. *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, and *D.K. Basu Vs. State of West Bengal*,

16. Mr. A.R. Barhakur, learned Advocate General, Nagaland appearing on behalf of the Union of India on the other hand placed reliance on its affidavit and submitted that the army authority at all relevant time acted lawfully and within its jurisdiction. Mr. Barhakur, the learned senior Counsel submitted that the army authority at the relevant time was acting on the strength of the Armed forces (Special Powers) Act, 1958 as amended and Assam Disturbed Areas Act, 1955. Mr Barhakur, the learned senior Counsel submitted that at all relevant time the army authority acted bona fide and with utmost restraint despite the stress and strain.

17. Mr. R.P. Kakaty, the learned Central Govt. Standing Counsel supplementing the argument of Mr. Barthakur submitted that the army in the instant case acted on a tip through its sources relating to appearance of dreaded insurgent Kenny in the area. According to the Respondents Kenny was a dreaded militant and the appearance of Kenny was of prime importance since PLA activities in the area were conducted under his direction who was in full control of the PLA operation. On receipt of the information the army activated its source of intelligence and obtained more information from the local source. On receipt of the information from the civilian source of the army and after cross checking and on obtaining valid permission from the Head quarter a Quick Reaction Team (QRT) proceeded to apprehend Kenny. Mr Kakaty submitted that despite all best efforts the army authority failed to capture Kenny @ Kennedy alive and it had never any intention to cause the death of Kenny. On the death of Kenny the Army authority lost source of valuable information. Mr Kakaty the learned Counsel submitted that it is not a case of custodial death and, therefore, the question of awarding of compensation against the army authority does not arise.

18. On analysing the events which led to the death of Kenny the following are certain admitted features which stare on the face of the record:

(1) The Civilian authority was kept away all throughout from the army operation. At no point of time the civil authority was taken into confidence. Virtually the army authority arrogated on the power of the civil authority.

(2) The army all alone reached the house of Kenny and entered into the residence of the Petitioner at dead of night without following the prescribed procedure provided by the Code of Criminal Procedure.

(3) The Pistol type object allegedly used by Kenny was neither seized nor produced at any stage nor any description of the item was made. No explanation as to what happened about the pistol type object after Kenny was shot at was made. Similarly, the grenade like object allegedly used by Kenny nor any splinter thereof was ever seized or produced at any stage.

19. The materials on record did not even prima facie establish that the deceased Kenny was involved in any sort of unlawful activity, not to speak of any militant activity. The Army authority desperately failed even to show the culpability of the deceased in any form of indictable acts. No endeavour whatsoever was made by the authority to check and ascertain the purported information about the antecedent and activities of the deceased Kenny before launching operation to arrest Kenny. No valid explanation came forth from the Respondent authority for not associating the civilian authority in such serious operation. The magisterial enquiry as well as the CBI enquiry on the other hand shows that deceased was not associated with any kind of militant activities. Wanton, reckless, over enthusiasm seems to out hero the Hero and in the process a young man had to give away his life for no fault of his own. Conflicting report of the Army authority regarding place of occurrence and desparate version from time to time only

creates doubt in the story sought to be built up by the Army authority. The Army authority in its alleged version came with a story that the deceased was sought at on the roof-top of his house. According to the latter version of the Army authority which finds support from civilian authority that the deceased Kenny was shot at near the railway line under the Railway over-bridge at Gate No. 1 the Magisterial enquiry relied upon by the CBI pointed out that the deceased Kenny was killed only after he was apprehended by the Army.

20. It is needless to state that those who feel that they are called upon to deprive other persons of their personal liberty in the discharge of what the authority concerned as a duty is strictly and scrupulously required to adhere to the norms as well as the forms of the rules of the game. It is a case where a person moved this Court challenging deprivation of life and personal liberty and Court is basically concerned as to whether such deprivation of life and liberty of a person was made. The object of Article 21 of the Constitution is to protect any individual from the encroachment of the personal liberty without sancitty of law. The doctrine of state necessity is not applicable in India. The onus in such a situation is always in the State that to show and establish that assault on the liberty of an individual was made on the strength of the authority of law. In the instant case the Petitioner has claimed for compensation for the excesses and negligence on the part of the executive authority which resulted the nullification of the personal liberty. The Court in such a matter is concerned with as to the type of relief that can be awarded to far back in 1964 a known statutory Scheme to provide compensation to those who suffered personal injuries was set up in the United Kingdom attributable to a crime of violence or to the arrest of an offender. Even in the absence of such a Scheme the Courts in India forego with new device to hold the State and its instrumentality liable for damages. In Rudul Sah Vs. State of Bihar and Another, the Court was confronted with an illegal detention of the Petitioner after acquittal in trial. In the said case the Supreme Court- in exercise of its jurisdiction under Article 32 of the Constitution passed order for payment of money in the nature of compensation for the deprivation of fundamental right of the life and liberty to the Petitioner. The following observation of the Supreme Court in the above case is cited below:

... We cannot resist this argument. We see no effective answer to it save the state and sterile objection that the Petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's Counsel has not raised that object. The Petitioner could have been relegated to the ordinary remedy of a "suit if his claim to compensation was factually controversial in the sense that a civil Court may or may not have upheld his claim. But we have no doubt that if the Petitioner files a suit to recover damages for his illegal detention a decree for damages would have to be passed in that suit, though it is not possible to predicate in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the Petitioner will be doing mere lipservice to his fundamental right to liberty which the State Government had so grossly

violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured is to mule its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringement of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that respect for the rights of individuals in the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the Petitioner's rights. It may have recourse against those officers....

The question again emerged in the case of Sebastian M Hongray v. Union of India reported in AIR 1984 SC 1026 . In the above case C Daniel, the retired Naik Subedar of Manipur Rifles and Headmaster of the Junior High School of Huining village and C Paul Assistant Pastor of Huining Baptist Church were taken away for interrogation and since then they were found missing. On an habeas corpus petition the Supreme Court directed the Union of India to produce these two persons which it failed and asserted that those two persons left the Army Camp. The Supreme Court refused to accept the plea to the Government as untenable. The Supreme Court did riot permit the Respondents to disown its responsibility in the above case, i.e. Apex Court imposed the Union of India a fine as a measure of exemplary cost. The Supreme Court following the decisions of Rudul Sah (Supra) Sebastian M Hongrary v. Union of India, Saheli a Women's Resources Centre Through State of Maharashtra and Others Vs. Ravikant S. Patil, Maharaj v. Attorney General of Trinidad and Tobago reported in 1978 2 All 670 , in Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others, held that in case of violation of fundamental right by the State and its instrumentality or servants, Court can direct the State to pay compensation to the victim or his heir by way of monetary amenus" and redressal and the principle of sovereign immunity inapplicable in such cases. The remedy in public law is permissible in addition to the private law remedy. The following observation of the Supreme Court in the above case is aptly recalled:

We respectfully concur with the view that a Court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, impose a constitutional obligation on this Court to forego such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not. merely render the Court

powerless and the constitutional guarantee a mirage, but may in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

We may also refer to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as under;

Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The above discussion indicates the principle on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in *Rudul Sah* and certain further observation therein averted to earlier, which may tend to minimise the effect of the principle indicated therein, do not really detract from the principle. This is how the decisions of this Court in *Rudul Sah* and others in that line have to be understood and *Kasturilal* distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceeding, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reaches, it is a clear case for award of compensation to the Petitioner for the custodial death of her son....

It is axiomatic that convicts, prisoners or under trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility of the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and,

therefore, his interest in the limited liberty left to him is rather previous. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law. I agree with Brother Verma, J that the defence of "sovereign immunity" in such cases is not available to the State and in fairness to Mr. Altaf Ahmed it may be recorded that he raised no such defence either....

This Court and the High Courts, being the protectors of the Civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen. Notwithstanding the rights of the citizen, to the remedy by way of civil suit or criminal proceedings. The State, of course has the right to be indemnified by and taken such action as may be available to it against the wrongdoer in accordance with law-through appropriate proceedings....

21. The Armed Forces (Special Powers) Act and for the matter the Assam Disturbed Area Act, 1955, as referred to by Mr. Barthakur, learned Senior Counsel appearing on behalf of the Respondents, do not in any way supplant the powers of the State Authority. The said Acts were enacted in aid of the civil power. The Armed Forces under the Union is to function in the State in concert with the State machinery to aid of the State power in restoring normalcy for which the Forces are deployed. Esprit de corps and team work is the key for attaining the object of restoration of the rule of law. The powers enshrined in the Acts mentioned above do not confer any arbitrary power on the officers to act in defiance of the provisions of the constitutional norms. The above provisions of law under the aforesaid two acts came up for consideration before a Constitutional Bench of the Supreme Court in *GLT SC Naga People's Movement of Human Rights v. Union of India*, reported in AIR 1998 SC 431 :1997 (111) GLT (SC) 50. The statutory Powers are meant for the use of the Force against person who is or are acting in contravention of any law or order in the area concerned and the said powers are not meant to be used against law abiding persons. Indiscriminate exercise of powers will only generate a feeling of alienation amongst the people for whose interest and protection the Armed Forces are deployed. In *Naga People's Movement of Human Rights (supra)* case, the Supreme Court delineated the provisions of the Act, the relevant portions of which are cited below:

The power to make a law providing for deployment of the Armed Forces of the union in aid of the civil power of a State does not include within its ambit the power to enact a law which would enable the Armed Forces of the Union to supplant or act as a substitute for the civil power in the State. The Armed Forces of the Union would operate in the State concerned in co-operation with the civil

administration so that the situation which has necessitated the deployment of Armed Forces is effectively dealt with and normalcy is restored.

The central Act does not enable the Armed Forces to supplant or act as substitute for civil power altera declaration has been made u/s 3 of the Central. Act. The power conferred under Clause (a) of Section 4 can be exercised only when any person is found acting in contravention of any law of order for the time being in force in the disturbed area prohibiting the assembly five or more persons for the carrying of weapons or of things capable of being used as weapons or fire-arms, ammunition or explosive substances. In other words, the said power is conditional upon the existence of a prohibitory order issued under a law e.g. Code of Criminal Procedure or the Arms Act, 1959. Such prohibitory orders can be issued only by the civil authorities of the State. In the absence of such a prohibitory order the power conferred under Clause (a) of Section 4 cannot be exercised. Similarly, u/s 5 of the Central Act there is a requirement that any person who is arrested and taken into custody in exercise of the power conferred by Clause (c) of Section 4 of the Act shall be made over to the officer incharge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. Maintenance of Public Order involves cognisance of offences, search, seizure and arrest followed by registration of reports of offences (FIRs) investigation, prosecution, trial and in the event of conviction, execution of sentences. The power conferred under the Central Act only provided for cognizance of offences, search, seizure and arrest and destruction of arms dump and shelters and structures used as training camps or as hideouts for armed gangs. The other functions have to be attended by the State criminal justice machinery, viz., the police, the Magistrates, the prosecution agency, the Courts, the jails, etc. This would show that the powers that have been conferred u/s 4 of the Central Act do not enable the Armed Forces, of the Union to supplant or act as substitute for civil power of the State and Central Act only enables the Armed Forces to assist the civil power of the State in dealing with the disturbed conditions affecting the maintenance of public order in the disturbed area.

The powers u/s 4(a) can be exercised only when (a) a prohibitory order of the nature specified in that clause is in force in the disturbed area (b) the officer exercising those powers forms the opinion that it is necessary to take action for maintenance of public order against the person/persons acting in contravention of such prohibitory order and (c) a due warning as the officer considers necessary is given before taking action. The laying down of these conditions gives an indication that while exercising the power the officer shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order. In the circumstances, it cannot be said that Clause (a) of Section 4 suffers from the vice of arbitrariness or is unreasonable.

The said decision also took note of the list of do's and don't required to be

followed by the Armed Forces.

22. The decisions as addumbrated earlier right from Rudul Sah (supra) to People's Union for Civil Liberties (supra), the Supreme Court consistently rehearsed the Constitutional obligation of the Courts. The Constitution of India invested on the Courts, more particularly on the Superior Judiciary, with the duties and functions for safeguarding the civil liberties of a citizen. The obligation encompasses the Higher Judiciary with the responsibility to provide necessary relief to the affected persons whose fundamental rights are eroded by the State action notwithstanding the remedy provided by the general law: Such reliefs, however, can only be provided by the Courts only when infraction of the fundamental rights guaranteed by the Constitution is absconded.

23. I have already referred to the report of the CBI which also mentions about inconsistency and contradiction of the Army version. The Magisterial enquiry relied upon by the CBI unerringly point out that the deceased Kenny was killed after he was apprehended by the Army. At any rate the Respondents failed to discharge their burden in establishing its case. It is a case of violation of fundamental right, to live peacefully by the deceased and the member of his family and burden lies on the resonpondents to show and establish that the life and liberty of Kenny was taken away by a procedure established by law that there was not encroachment on the fundamental rights of the Petitioner. Right to live peacefully is one of the basic human right as laid down in the U.N. Charter also as per the ethos of the Indian Constitution. The next point of issue now pertains to the palliative that is permissible in public law. The Respondents acted in a most high handedness manner without trying to ascertain the antecedents and identity of the deceased. In addition the following infirmities appear on the face of record:

1. The army authority did not make any endeavour to obtain any definite information about the activities of the deceased Kenny at any point of time.
2. No endeavour whatsoever was taken to associate any responsibility of any civilian.
3. There is no whisper of recovery of any arms or ammunition or any incriminating documents in the raid or from the possession of the deceased.
4. The Magisterial Enquiry as well as the CBI enquiry established beyond any shade of doubt that the deceased was not associated with any militant activity. Wanton recklessness, over enthusiasm seems to out heroded the Herod and in the process a young man had to give away his life without any fault.

24. On the overall assessment of the facts and the situations, the Petitioner succeeds in establishing the infringement of her fundamental rights guaranteed by the Constitution of India. The fact situations fully established that it the Respondent/Army authorities who is responsible for the "death of deceased Kenny (alias Debajit Singha). The right to life of a citizen was taken away in an

unauthorised manner and for the said act the Respondent No. 1 and 2 is vicariously liable for the action of the Respondent No. 7 and his associates. The point at issue now pertains to the that is permissible in public law.

25. The Supreme Court of India laid down the law for warding monetary compensation for contravention of the fundamental rights. Compensation in terms of monetary relief can, therefore, be granted for deprivation of fundamental rights of a person. Such compensations are required to be paid not only for the interest of the individual concerned but also to ensure the rule of law and to obligate the State and its functionaries to act within the framework of the Constitution which is meant for all.

26. I have given my anxious consideration on the matter and on overall assessment of the facts. I am of the view that the Petitioner is entitled for an award of compensation for the death of her son at the hands of the Armed Forces. Considering the age of the victim, woes and agonies of the family members of the deceased, the rash and negligent act of the Respondents and gravity of the wrong committed. I award a sum of Rs. 2,00,000 (two lakhs) only towards compensation, which I consider to be appropriate to palliate to some extent the anguish and distress of the grief stricken family. It is needless to state that the award of compensation in this proceeding would be taken into account for adjustment in the event of any other proceeding under the law taken for the recovery of compensation on the same ground.

27. Respondents No. 1 and 2 shall now take steps to deposit the said amount of Rs. 2,00,000 (rupees two lakhs) only before the District and Sessions Judge, Cachar, Silchar within two months from today. The learned District and Sessions Judge shall take necessary steps in this behalf and report compliance thereof to the Registrar General of this Court. I leave it to the concerned authority for initiating appropriate action under the law against the individuals responsible for the death of Debajit Singha alias Kenny.

28. The Petition is accordingly allowed with a cost of Rs. 1000 (one thousand) only.

Rule made absolute.