
(2004) 03 GAU CK 0034
In the Gauhati High Court
Case No : WP (C) No. 2201 of 1999

Lilabati Baisya

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Citation : (2004) 3 GLR 540 : (2004) 2 GLT 1366

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : G. Uzir, N. Ahmed and S.K. Medhi, for the Appellant; P.M. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—In the Hindu Dharmshtras, the wife is known as Jaya, because one's own self is begotten on her. According to the Mahabharata by cherishing women one but virtually worships the Goddess of prosperity herself. By afflicting her one but affix the Goddess of prosperity. Aman's half is his wife; the wife is her husband's best friend; the wife is the source of Dharma, Artha and karma and she is also the source of Moksha, In the Ramayana the wife is said to be the very soul of her husband, she is Grahini (the lady of the house) in her husband's household, sachiva (wise counsellor), Sakhi (confidence) to her husband and dearest discipline of her husband in the pursuit of a Art. She is . also Griha-lakshmi and Ardhangini. She is the Samrajyi (Queen) in the household of her husband. Side by side with this idolize picture of woman, the institution of Rape has also flourished and has rather come to stay in the society. The Apex Court has described rape as follows :

"Rape is a crime not only against the person of a woman, it is crime against the entire society. It destroys the entire psychology of a woman as pushes her into deep emotional crises, Rape is, therefore, the most hated crime. It is a crime against basic human rights and is violative of the victim's most cherished right,

namely, right to life which includes right to live with human dignity contained in Article 21. Shri Bodhisattwa Gautam Vs. Miss Subhra Chakraborty,

2. The petitioner in this writ proceeding is the victim of rape by none other than Army Personnel. She was so raped by two Army Personnel belonging to 313, Field Regiment. The incident occurred on 16.6.90, Three Army Personnel entered the residential premises of the petitioner and at the first instance assaulted the husband of the petitioner and thereafter he was kept at gunpoint at the courtyard of the petitioners residence. Thereafter, two Army Personnel physically assaulted the petitioner, which resulted injury to her. The husband of the petitioner also sustained injuries. It would have been another thing had the matter rested thus. Unfortunately it was not to be so. The dignity of the petitioner was at stake. The two Army Personnel raped her.

3. The husband of the petitioner lodged an FIR on 17.6.98 at Nalbari Police Station on receipt of which a Criminal Case being Nalbari P.S. Case No. 101/98 u/s 448/325/376/324/34 of the IPC was registered. The petitioner was also medically examined on 17.6.98 by the Medical & Health Officer, Civil Hospital, Nalbari, which detected 5 injuries on the body of the petitioner. The Medical & Health Officer submitted his report on 18.6.93 reflecting the injuries. This was followed by necessary forensic examination, which confirmed rape on the petitioner. Thereafter the police took up the matter with the Army Authority. Accordingly a Test Identification Parade was conducted and the petitioner could identify the two rapists belonging to the aforesaid Regiment camped at Nalbari. The said two Army Personnel were identified as No. 15124292 N. Gunner (Washer man) A Ramalingam and No. 14487667 Y. Gunner Rangiram.

4. After the aforesaid incident, the two Army Personnel were prosecuted by Court Martial proceeding and were found guilty of assault and rape and were punished in accordance with law. Presently they are undergoing imprisonment as awarded by the Court Martial. The petitioner by instituting the present writ proceeding inter alia has prayed for adequate compensation apart from a direction for suitable criminal prosecution against the officers of the Army who were at the helm of affairs at the relevant point of time when the most heinous crime against the petitioner was committed.

5. The respondent have filed their affidavit admitting the fact of committing rape by the said two Army Personnel but have taken a plea that they committed the crime in their personal capacity without the knowledge of the superior officers. They have stated that the two Army Personnel have been prosecuted in accordance with law and have been sent to civil prisons to undergo their sentence and they have been dismissed from their services, which naturally resulted in forfeiture of their pensionary benefits that would have otherwise accrued to them. A further stand has been taken that the respondents are not vicariously liable for the action of the said two Army Persons inasmuch as the incident did not take place towards performand of any official duty by the said Army Personnel. In paragraph 4(b) of the affidavit, a stand has been taken that

the Army Personnel were not in the performance of duties for which the official respondents had employed them. However, in the same breath they have made the following statements in paragraph 4(c) (d) and (e) which are quote below:

"(c). "That on the date of the incident at about 1900 hrs or 7 p.m., a party from the answering respondent was detailed from the Ghagrapar column under command of a JCO to bring a clerk from the Divisional Head quarters, Rangiya, to the Regimental Headquarters at Jatimangla.

(d) That on return to Ghagrapar on completion of the administrative task, the party halted at paikarkuchi, when it was split into two groups where the group under the said JCO left for Balikuchi for a separate associated assigned task and the remaining group which included the two convicted accused and two others remained near village Paikarkuchi, That the JCO in-charge before leaving specifically gave explicit orders to the group about security related aspects and forbade from venturing out to the nearby village.

(e) That despite the clear cut executive order, the two offenders went to the said village Paikarkuchi and committed the offence against the petitioner. That this act of disobedience of executive order given by the legitimate superior officer was committed by the accused unilaterally independently and in defiance of the superior authority. The as such this action is deemed to be the persons responsible action of the convicted accused as the executive order related to the performance of duties during the administrative move was clearly violated.

6. In a nutshell it is the case of the respondent that the two Army Personnel committed the crime unilaterally and independently in their personal capacity in defiance of the lawful order of the superior authority. Such action on the part of the two Army Personnel should be deemed to be their personal responsibility. They having been meted out with exemplary punishment, no further stand has been taken that some extra judicial interested persons have coaxed and tutored the petitioner to initiate the present proceedings after careful planning to put the respondents in embarrassment. They reiterated that the acts of an individual while in service cannot be said to be act of the service per-se and ipso facto.

7. Mr. G Uzir, learned counsel appearing for the petitioner submitted that the crime committed by the two Army Personnel is shocking to the judicial conscience and unparallel inasmuch as the saviours of the society became the dragons. He submitted that no amount of punishment to the culprits and no amount of compensation can return the dignity and honour to the petitioner which she has lost on the fateful day. However, he submitted that compensation needs to be awarded against the respondents, which will send a message to the authorities towards reminding their duties and cautions approach in such matter. He placed reliance on the following decisions :

(i) 1988 (1) GLR 489 (Judicially into gang rape)

(ii) 2003 (3) GLT 592 (Kamala Begum (Musstt) v. State of Assam and Ors.)

(iii) D.K. Basu Vs. State of West Bengal,

(iv) (2003) 10 SCC 597 (Union of India v. Lt. Col. Bhagat Singh)

8. Mr. P.N. Choudhury, learned Addl. CGSC Adopting the stand in the affidavit reiterated that the respondents and for that matter the Union of India are immune from any action on account of wrong committed by the said two Army Personnel. According to him the concept of vicarious liability is not applicable in the instant case. Pressing into service the principle involving relating to common intention as envisaged u/s 34 of the IPC. Mr. Choudhury submitted that such element is missing so as to rope the respondents with any culpability. To bring home his point on this issue, he relied upon a decision of the Apex Court as reported in Lallan Rai and Others Vs. State of Bihar,

9. The facts are not in dispute and have been admitted by the respondents. Only question to be decided is as to whether the official respondents and for that matter the Union of India can claim immunity from their responsibility on account of the action committed by its employees and if the answer is in the affirmative, what should be the amount of compensation to be awarded to the petitioner.

10. The Apex Court in the case of D.K. Basu (supra) reiterated that the expression "life or personal liberty" in Article 21 of the Constitution of India includes within itself a guarantee against torture and assault by the State or its functionaries. Any form of torture or cruel, inhuman or degrading treatment would fail within the inhibition of Article 21. The Apex Court observed that if the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. It further observed that no civilized nation can permit that to happen. Torture, rape, death in police custody infringes Article 21 as well as basic human right and strikes a blow at rule of law. Torture of any kind involves not only physical suffering but also mental agony. It is naked violation of human dignity and destructive of human personality.

11. In the case of Lt. Col. Bhagat Singh (supra), the Apex Court did not interfere with the award of compensation against the Government on account of damage claimed for death consequential to head injuries received by pillion rider in an accident on account of damaged road which lacked proper repair and no signs to indicate the danger. In Judicial Enquiry into gang rape case (supra), a Division Bench of this court initiated suo motu notice and Rule in public interest to the State functionaries relating to the incident of gang rape by the police personnel and granted rehabilitation grant to the injured or alleged ravished women. In the said decision, the Division Bench held that the High Court awarded competent and has jurisdiction to allow such rehabilitation grant to the injured families. In the Case of Kamala Begum (supra), this court awarded compensation to the tune of Rs. 1 lakh to the wife of the deceased who died while in police custody. In that case a plea was advanced that the deceased having committed suicide while in

jail custody, the State authorities were not responsible for his death, Rejecting such a plea this court held that such plea was not tenable and available to the State authorities under whose custody the deceased was in and his well being during such custody was the enjoined duty of the State authorities.

12. The petitioner is the victim of atrocious act perpetrated by the two Army Personnel who were under deep and pervasive control of their employer, the official respondents. They were the members of the disciplined force. They were sent for law and order duty under the command of the official respondents. They became the lawbreakers. They committed the most heinous crime by way of raping the petitioner by keeping, her husband at gunpoint. In such a situation the mental agony and trauma experienced by the petitioner and her husband and its persisting effect can well be imagined. The question arises for consideration is as to whether the official respondents and for that matter the Union of India are vicariously liable or not. A similar question came up for consideration before the Apex Court in the case of *The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others*, The observation of the Apex Court in this regard which will answer the plea of the respondents about the non-liability of the official respondents and for that matter the Union of India are quoted below :

"38. Learned counsel for the appellants then contended that the Central Government cannot be held vicariously liable for the offence of rape committed by the employees of the railways. It was contended that the liability under, the law of torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Government would not be liable and is contrary to the law settled by this court on the question of various liability in its various decisions.

39. In *State of Rajasthan v. Vidhyawati* it was held that the Government will be vicariously liable for the tortuous act of its employees. This was a case where a claim for damages was made by the heirs of a person government vehicle. Reference may also be made to the decisions of this Court in *State of Gujarat v. Memon Mahomed Haji Hasam and Basawa Kom Dyamangouda Patil v. State of Mysore*, These principles were reiterated in *N Nagendra Rao & Co. v. State of A.P.* and again in *State of Maharashtra v. Kanchanmiala Vijaysing Shirke*.

41. The theory of sovereign power which was propounded in *Kasturi Lal* case has yielded to new theories and is no longer available in a welfare State. It may be pointed out that functions of the Government in a welfare State are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to sovereign power."

13. In the said case a Bangladeshi lady was gang raped by employees of the Railways. Referring to its various earlier decisions, the Apex Court also dealt with

the question of vicarious liability on the touchstone of the same very plea as has been raised in the instant case and held that the Union of India and for that matter its instrumentalities are liable for the acts committed by their employees, it observed that the function of the State not only relate to the deference of the country or the administration of justice, but they extend to many other spheres which cannot be said to be related to sovereign power.

14. It is no longer *res intergra* that rape amounts to violation of the fundamental right guaranteed to a woman under Article 21 of the Constitution of India. The Apex Court in the case of *Shri Bodhisattwa Gautam Vs. Miss Subhra Chakraborty*, recorded the emotional crisis, which is suffered by the woman who is the victim of rape. It observed that it is a crime against the entire society. In paragraph 10 of the said judgment, the Apex Court observed as follows:

"10. Rape is thus only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will-power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also volatile of the victim's most cherished of the Fundamental Rights, namely, the Right of Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating woman. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects."

15. By various judicial pronouncements rape has been unequivocally condemned and the need has been emphasized for protection of lives and liberties of womenfolk. As regards the payment of compensation, it has been held that claim in public law for compensation for unconstitutional deprivation of fundamental right and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortuous acts of the public servants. Public law proceedings served a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure citizens that they live under a legal system where in their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction for penalizing the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

16. After having discussed as above and holding that the Union of India and its instrumentalities are vicariously liable of the commission and omission on the

part of its employees, it is now to be decided as to what should the amount of compensation and/or ex-gratia to be paid to the petitioner. The Division Bench of this court in the case of Judicial Enquiry in to gang rape while agreeing to the submission made by the learned counsel observed that compensation in a rape case is adding insult to injury. It further observed that payment of money in the form of compensation is wholly misconceived and would rather be undermining the honour of the ravished family. In that case ex-gratia payment was ordered in favour of the victim girls. However, in the case of Chandrima Das (supra), the Apex Court upheld the awarding of compensation to the victim woman. While it is true that no amount of compensation would restore the honour and dignity of the petitioner which she has lost the hands of the criminals who incidentally were the employees under the respondents, but awarding of the some amount of compensation in whatever manner it is described would restore back some of her pride, dignity and honour so much so the petitioner is bound to feel her deep rooted emotional crisis ventilated and met in the hands of justice.

17. Although the petitioner has prayed for realization of the amount of compensation as may be paid to her from the dues payable to the Army Personnel who committed the crime, but it is found that the Army Personnel have already been dismissed from service resulting in forfeiture of all their dues including pensionary benefits. Even otherwise also after having held that the respondents and for that matter the Union of India in the Ministry of Defence is vicariously liable, the amount of compensation/ex-gratia should be paid by it to the petitioner which I quantify at Rs. 1,00,000 (rupees one lakh). The respondents No. 6, 7, 8 and 9 on whose behalf the affidavit-in-opposition has been filed shall ensure payment of the said amount by personally deputing some responsible officer to the petitioner within a period of two months from the date of furnishing the certified copy of this judgment to them. Such payment shall be made by way of cheque drawn in favour of the petitioner. In the event of failure to pay the amount within the stipulated period, the amount will carry interest @ 9% p.a. Any amount of un-explained delay towards compliance of this direction will make the erring officials responsible for payment of interest from their pockets.

18. Writ proceeding is answered accordingly and the writ petition stands allowed awarding a cost of Rs. 5000 against the said respondents.