

(2008) 12 GAU CK 0001
In the Gauhati High Court
Case No : Writ Petition (C) No. 1469 of 2005

Manika Nath

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 4 GLT 520

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : B.K. Mahajan, A. Choudhury and N. Das, for the Appellant; C. Baruah and A. Sarma, for the Respondent

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—This writ petition under Article 226 of the Constitution of India has been filed seeking monetary compensation for the death of Petitioner's husband allegedly in a fake encounter.

2. I have heard Sri B.K. Mahajan, learned Counsel for the Petitioner. The Union of India and its officers (R 1 to R 4) were represented by Sri C. Baruah, learned CGC. The State of Assam and its officers were represented by Sri A. Sarma, learned Government counsel. Also perused the pleadings of both the sides as well as the report submitted by the District and Sessions Judge, Nalbari.

3. To appreciate the disputed facts whether the deceased was kidnapped and killed by the Army personnel and whether the Petitioner is entitled to monetary compensation and if so, to what extent, it is necessary to have a cursory look on the facts and evidence which are as follows:

3.1 On 19.5.2001, the Petitioner's husband went to Nalbari town to repair a water pump. When the Petitioner's husband did not return home in the night she informed it to her brother-in-law who in turn searched for the deceased in the town as well as in the Police Station. However, the deceased could not be traced

out. Since at the relevant time, Army operation was on in the area the family members of the deceased suspected that the deceased Boloram Nath might have been picked up or killed by the Army personnel. Accordingly, a habeas corpus writ petition was filed in this Court which was registered as W.P.(Cril) No. 22 of 2001. The said writ petition was closed primarily on the ground that a Magisterial enquiry was going on to ascertain the actual fact. Within next two days of filing of the habeas corpus petition the Petitioner came to know that her husband met with an unnatural death and his dead body was lying at Ghagrapar Police Station. Thereafter, the Petitioner and her family members visited the Police Station and identified the dead body and also looking at the number and sites of wounds they drew an inference that the person was intentionally killed by the Army personnel. However, they waited for the outcome of the Magisterial enquiry. Since the Magisterial enquiry failed to give a conclusive finding as to who killed the Petitioner's husband, this writ petition was filed on 22.2.2005.

4. The Union of India disputed the allegations made in the writ petition and projected the following counter story:

7. The deponent begs to state that on 25th May 2001 at about 0200 hours on receipt of specific information about move of ULFA militants, a specific operation was launched in general area Kundergaon. At approximately 0410 hrs the Army personnel noticed two individuals approaching on a motor cycle, who on seeing the Army personnel tried to turn back and flee. While turning, the pillion rider got imbalanced and fell down. On being challenged by Army personnel he tried to escape in the nearby fields, while doing so he threw a grenade at the chasing Army personnel, who in self defence opened fire. The individual got killed in the encounter. During search certain arms and ammunition were also recovered from the body. An FIR dated 25th May 2001 was lodged with Police Station Ghagrapar. The dead body along with arms and ammunition recovered were handed over to Police on 25th May 2001. It is submitted that the identity of the deceased came to knowledge of the Army only on evening of 25th May 2001.

5. In view of the two conflicting stories from the side of the Petitioner and the Respondents this Court felt it necessary to obtain a fact finding report from the District and Sessions Judge. Accordingly, learned District and Sessions Judge, Nalbari was directed on 10.4.2006 to "conduct an enquiry with regard to the circumstances leading to the death of Boloram Nath."

6. In pursuance of the aforesaid direction the learned District Judge conducted an enquiry by way of recording statements of witnesses proffered on behalf of the Petitioner as well as the Union of India. At the same time, the learned District Judge also summoned few persons as Court witnesses.

7. Only two witnesses were examined on behalf of the prosecution. On behalf of the Central Government only one witness, namely, Hav. Karan Singh was examined as D.W.1. Thereafter, the Court also recorded the statements of 12 Court witnesses including the deposition of autopsy Doctor. It may also be

mentioned here that the evidence of Hav. Karan Singh was also recorded as Court witness as well as by the Executive Magistrate.

8. After the enquiry the learned District Judge came to a conclusion that the deceased Boloram Nath was not picked up by the Army personnel and in fact he was killed in an encounter. The material portion of the findings are extracted below:

37. The allegation of writ Petitioner that deceased Boloram Nath was picked up by military from near Hari Mandir of Nalbari Town gets no support from any sort of evidence. On the other hand, the version of Hav. Karan Singh, informant that Boloram Nath was killed by bullet injuries when military opened fire on him when Boloram Nath after falling from the motorcycle ran towards the bamboo grove in the field and threw a grenade towards the military personnel gets support from the evidence and the circumstances as brought forward by the witnesses.

9. At the outset of his argument, learned CGSC raised a technical objection submitting that since the enquiry report findings are against the Petitioner the same ought to have been challenged by the Petitioner and having not done so, the findings of the District Judge should be treated as undisputed conclusions. In my opinion, the submission of learned CGSC has no force inasmuch as the basic idea to obtain the enquiry report was to get first hand account of the witnesses from the scene. Besides this, I am of the view that this Court is not bound by the findings of the District Judge. At best, the report and the materials collected by the Enquiry Officer (District Judge) can be considered as a whole to arrive at a just conclusion whether the allegations made by the Petitioner can be accepted. At the same time, in a given occasion the writ petition of this nature can also be decided without basing on the enquiry report. Above all, I am of the view that the writ petition cannot be thrown overboard on such technical ground.

10. As noted at the outset of the judgment a habeas corpus petition was also filed for the same incident alleging picking up of the deceased by the Army. Since this writ petition was filed three days prior to the incident of death, the allegation of picking up and killing by the Army assumes significance. However, the learned District Judge has totally ignored this aspect in his enquiry report. Had it been a case of the Respondents that the person was killed by some unknown miscreants and that too prior to the filing of the habeas corpus petition, the situation would have been different. In other words, it is difficult to believe that the Petitioner had visualized killing of her husband by the Army prior to the actual killing. On this score alone, the conclusions arrived at by the learned District Judge have to be rejected. However, the evidence and materials collected during the enquiry can be looked into and considered for deciding this writ petition.

11. It is true that there is no direct evidence to prove that the deceased was actually picked up by the Army personnel. However, since the deceased was a surrendered militant (SULFA) there was every possibility of his visiting Army camps. Be that as it may, since the Respondents (Union of India) have admitted

in their affidavit-in-opposition that the deceased was killed in self-defence the burden shifts upon the Respondents to establish their plea.

12. Looking at the depositions of various witnesses and more particularly the sole witness of the Central Government, namely, Hav. Karan Singh, it appears to me that the defence story is not above question. I have also noted earlier that Hav. Karan Singh has given three statements, two before the District Judge and one before the Executive Magistrate. In his statement, this Army personnel (D.W. 1) has admitted the fact that the grenade thrown by the deceased had actually burst. However, the Police Investigating Officer, namely, SI Sushil Kumar Talukdar (C.W.4) has deposed in the cross-examination that during investigation there was no evidence of bursting of the grenade. The evidence of the Police officer has to be accepted since the FIR lodged by the Army Officer is also silent about the bursting of the grenade. The net result of this discrepancy is that the deceased was fired upon without throwing of any grenade or firing from the side of the deceased.

13. The other noticeable features wherefrom unjustified killing of the deceased can be inferred are that according to D.W.1 the deceased got injured due to bullet injury and even thereafter he attempted to flee away forcing the Army personnel to repeat the firing. From the evidence of I.O. (C.W. 4), it appears that the deceased was killed at distance 1/2 furlong from the road. According to P.W. 5, the distance was 100 mts. from PWD road. At the same time, according to C.W.5, the paddy field was full of rain water which was 1 ft. deep. In fact, Hav. Karan Singh has also admitted it in his evidence given before the District Judge on 6.8.2006. In my considered opinion, in view of the fact that the paddy field was full of water neither the deceased would have been in a position to throw a grenade nor was it possible for him to run away to a distance 1 1/2 furlong in injured condition, more so, being chased by more than one dozen Army personnel.

14. The autopsy Doctor has been examined as C.W. 6. Neither he was cross-examined by the parties nor the learned District Judge made any attempt to ascertain as to from which distance the person was fired upon. However, from the autopsy findings it can be gathered that the deceased was shot at random and at least five bullet injuries had directly hit the deceased and all the bullets had come out of the body. The exit of the bullets from the body can be one of the factors wherefrom it can be held that the person was shot at from close range. For easy reference, the medical findings with regard to the wounds are also extracted below:

Dead body of a male person, around 30 years, fair complexion, medium height, rigor mortis present, mouth closed, eye closed, bleeding from left nostril.

Entry: Oval shaped 3 in number around left nipple, 1 cm diameter each, deep and penetrating, margins are inverted.

Exit: Deep and penetrating wound over posterior aspect of left axilla 3 in number

everted margins, 3 mm each (approx.)

Entry: Oval shaped deep and penetrating wound 1 1/2, cm diameter each, inverted margins in between the scapula slightly left to the midline, 2 in number.

Exit: Deep and penetrating 3 cm diameter irregular wound above left clavicle, 2 in number, everted margin.

Entry: One oval shaped irregular margin inverted, deep and penetrating wound at left arm and anteriorly.

Exit: Everted margin posteriorly deep penetrating wound one in number.

Bleeding from left nostril present. Circular abrasion around the right ankle joint anteriorly, 0.5 cm wide x 8 cm (approx.) resembling like a ligature mark. On dissection beneath the ligature mark permeation of the tissue beneath the ligature mark seen along with haemorrhagic spots. Injuries are antemortem. In my opinion, death is due to haemorrhage and shock resulting from injury to vital organs caused by bullet injury.

15. From the doctor's evidence which is by and large corroborated by other Inquest witnesses it can be gathered that at least 4 bullets were fired on vital organs of the body like chest and axilla. In my considered opinion, if the Army personnel would have bona fide intention to capture the surrendered militant they should have stopped after making the person physically incapable to run and for this purpose one bullet injury would have been enough. It is in evidence of D.W. 1 that the deceased was once seen in injured condition before spraying rounds of bullets. Besides this, as many as 5 bullet injuries were inflicted and atleast 3 bullets hit the same area of the body i.e. around left nipple. From these facts also, it can be held that the Army personnel had exceeded their right of acting in self-defence.

16. Sri Mahajan, learned Counsel for the Petitioner also assailed the defence version by submitting that Army did not go out at the wee hours on 25.5.2001 on patrol duty to apprehend the militants. Referring to the judgment of the Hon'ble Supreme Court rendered in the case of Naga Peoples Movement of Human Rights v. Union of India reported in 1997 (3) GLT (SC) 53 : AIR 1998 SC 431, it was submitted that the Army Officers were duty bound to report the fact of such operation at the nearest Police Station and they should have been accompanied by at least a Police personnel. However, the Respondents failed to show that the Army personnel were in search operation with due notice to the Police.

17. C.W. 2 is the Officer-in-charge of Ghagrapar Police Station. In the cross-examination this witness has admitted that on the relevant night no Police from the Ghagrapar Police Station had accompanied the Army in their operation nor was there any intimation of any such operation in the area. C.W. 1 is another Police Officer from this Police Station. He has also admitted the fact that no officer accompanied the military in the alleged operation. On the other hand, the

Respondents had also failed to produce any documentary evidence before the learned District Judge to show that the Army Officers had intimidated the nearest Police Station about the search operation. Hence, the defence story is also unbelievable on this count.

18. There are many other aspects which also cast doubt on the veracity of the defence story. However, for brevity of the judgment I refrain from discussing the remaining discrepancies. In the result, I disagree with the report of the learned District Judge that the deceased was killed when the Army had to resort to firing when the deceased was trying to flee away from the scene. On the other hand, the evidence and materials suggest that Army personnel had killed the Petitioner's husband by way of excess use of their power. Hence, I hold that the Petitioner is entitled to compensation as public law remedy.

19. The Hon'ble Supreme Court in a catena of decisions has authoritatively declared that pecuniary compensation can be awarded to the victims as a remedy and redress to the infringement of their fundamental rights by public servants. This view was initially taken in the case of Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, . This legal plea was further elaborated and re-stated in the case D.K. Basu Vs. State of West Bengal, Besides this, there are umpteen number of judgments from this Court as well.

20. Now the question is what amount of compensation can be awarded in the present case.

21. Admittedly, there is no evidence about the income of the deceased. The only materials which are available before me to assess the compensation is that the deceased was working as a helper of a carpenter and that the deceased is survived by his wife and a two years old child and that the deceased was merely 37 years old. Keeping in mind all these aspects and also the guidelines laid down under Motor Vehicles Act, 1988 for determination of compensation in case of unnatural death in vehicular accident, I hereby grant compensation of Rs. 2.5 lakhs (rupees two lakh and fifty thousand) only to the writ Petitioner. Since the deceased had admittedly died at the hands of Army personnel, the Central Government, more particularly, the Respondent Nos. 1, 2, 3 and 4 are liable to pay the compensation.

22. In the result, the writ petition stands allowed. The Respondent Nos. 1, 2, 3 and 4 are directed to pay compensation of Rs. 2.5 lakh to the writ Petitioner Smt. Manika Nath within a period of four months from the date of receipt of a copy of this judgment and order. If the payment is not made within this period, the amount shall carry interest @ 10% per annum from today.