
(1995) 03 GAU CK 0014
In the Gauhati High Court
Case No : Civil Rule No. 20 (HC) of 1993

Rajen Gogoi

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-03-1995

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 5
Constitution of India, 1950 — Article 226, 32
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 4

Citation : (1996) ACJ 310

Hon'ble Judges : D.N. Baruah, J;Anup Deb, J

Bench : Division Bench

Advocate : A.C. Borborah and R. Borborah, for the Appellant; K.N. Choudhury, C.G. Standing Counsel and B.C. Das, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anup Deb, J.—this application under Article 226 of the Constitution of India, petitioner prays for issuance of a writ in the nature of habeas corpus and/ or the appropriate writ or direction for production of the detenu Manik Gogoi and also for his release.

2. The facts of the case are as follows:

The army personnel arrested Manik Gogoi and another in Guwahati and took the detenus with them in their vehicle. Since the whereabouts of the detenus could not be ascertained and that the detenus were not produced before any magistrate or handed over to the police, the petitioner apprehended that the detenus might have been inflicted with inhuman treatment and severe torture by the army. The petitioner or the members of the family did not hear anything about them. Hence the present petition.

3. By an order dated 2.4.1993 this court issued rule, notice was accepted on behalf of the respondents. The court further directed that the army authority

should make over the detenus to the nearest police station, if not already been made over and that the civil police should produce the detenus before the Registrar of the court within 24 hours. On 5.4.1993 Mr. A.C. Borborah, learned counsel for the petitioner, produced a copy of daily newspaper "The Sentinel" dated 5.4.1993 and submitted that dead body of Manik Gogoi, the detenu No. 1, was received by his parents. The court directed the Chief Judicial Magistrate, Dibrugarh, to obtain a copy of post-mortem reports and the inquest reports of the deceased and to send the same to this court. Post-mortem and inquest report were received by this court on 30.4.1993.

4. The respondent Nos. 2 to 4 filed affidavits-in-opposition and also reply affidavit. Similarly, respondent Nos. 5 to 8 also filed affidavit-in-opposition. The father of deceased Manik Gogoi, thereafter, filed reply affidavits.

5. The respondent Nos. 2 to 5 in their affidavit-in-opposition stated, inter alia, that on getting information about ULFA hard-core terrorist the army personnel apprehended Manik Gogoi at about 3 a.m. of 3.4.1993 from the house of Prasanta Dawara, Bank Colony, Dispur, Guwahati. He was first taken to Lekhapani and from Lekhapani he was taken to Duliajan Police Station but on way at about 11 p.m. he tried to escape from the army custody by jumping from the vehicle on which he was taken. As a result he sustained injuries. He was overpowered by army. Thereafter, the army personnel wanted to take him to Assam Medical College, Dibrugarh, for treatment. But before reaching Army (Sic. Assam) Medical College, Manik Gogoi was handed over to Dibrugarh Police Station. These respondents further stated that injuries sustained by Manik Gogoi were because of his jumping from the vehicle on way to Duliajan Police Station. Naib Subedar gave a similar story in Annexure I of the aforesaid affidavit-in-opposition. Naik Subedar Madan Lal also informed the Officer-in-charge of Duliajan Police Station regarding the injury sustained by Manik Gogoi as per Annexure 2 to the said affidavit-in-opposition. We quote relevant portion of his report.

On 3.4.1993, Manik Gogoi was sent to Duliajan Police Station for handing over with escort party at about 21.00 hours from Lekhapani in a vehicle. Approximately 18 km. short of Duliajan on Digboi-Duliajan Road, ULFA terrorist Manik Gogoi suddenly jumped out of the vehicle and tried to escape towards Saraipong Reserve Forest but was chased by the escort party and overpowered after scuffle and again put back into the vehicle. In the process of scuffle and overpowering he appeared to have sustained injury somewhere and became unconscious. Sensing his serious condition the party rushed with the vehicle and Manik Gogoi for Assam Medical College Hospital, Dibrugarh, but unfortunately near Lahowal around 23.30 hours he expired and his dead body was handed over to Dibrugarh Police Station around 01.30 hours on 4.4.1993, for necessary action.

6. Respondent Nos. 5 to 8 also in their affidavit-in-opposition stated, inter alia, that the army picked up Manik Gogoi on 2.4.1993. His dead body was handed over by the army to Dibrugarh Police Station on 4.4.1993 at about 1.30 p.m. by

28 Punjab, C/o 99 APO which had a reference to Dibrugarh Police Station U/D Case No. 13 of 1993 and also Duliajan Police Station Case No. 41 of 1993 u/s 3/4, TADA (P) Act. The dead body of late Manik Gogoi was sent for post-mortem examination after the inquest. At the time of inquest no fatal external injury was noticed. As per the post-mortem report death of Manik Gogoi was caused due to shock and haemorrhage resulted from ante-mortem injuries and dislocation of the cervical vertebra. The abrasions and bruises were caused by blunt substances. The said respondents tried to justify the arrest by saying that the deceased Manik Gogoi was wanted in various cases of Duliajan Police Station and that he was active member of ULFA.

7. In reply-affidavit the father of Manik Gogoi denied the averments made in the affidavit-in-opposition.

8. In view of the controversy relating to the cause of death of Manik Gogoi, this court directed the District and Sessions Judge, Dibrugarh, to make an enquiry in respect of circumstances leading to the death of Manik Gogoi. It was also made clear that the District and Sessions Judge, Dibrugarh, should keep in view the circumstances from the date of arrest till the dead body of the detenu was handed over to the civil police.

9. The enquiry report was submitted by District and Sessions Judge, Dibrugarh, on 25.3.1994. The District and Sessions Judge, Dibrugarh, examined the doctor and other witnesses and thereafter, submitted his report. In his report he stated, inter alia, as follows:

Manik Gogoi was handed over to the army at Lekhapani in Tinsukia District. There was no injury till he was handed over to the army at Lekhapani. On the way, according to the statement of witness No. 5, the said Manik Gogoi jumped out from the vehicle and thereafter he was escorted towards Assam Medical College, Dibrugarh, but on the way at Lahowal the injured expired and dead body was handed over to the police. The evidence put forward by witness No. 1 along with the inquest report and the deposition of the doctor, witness No. 4, can be stated. Witness No. 1 specifically stated that he marked injury on the dead body of the deceased and I have already stated the number of injuries and the portion of the body where the injury was caused. Witness No. 4, in the course of his statement before the enquiry, specifically opined that the death was due to shock and haemorrhage that resulted from the ante-mortem injury and dislocation of cervical vertebra. The abrasions and bruises are simple injuries and caused by blunt force impaction. Time since death 12/14 hours (approx.) and age of the injury 12/14 hours. In his opinion injuries cannot be caused by simple fall from a moving vehicle. The injury "fracture of the second cervical vertebra and dislocation" caused haemorrhage and the spinal cord contused and swollen. The injury can be caused by a blow of hard substance and forcible bending of the neck. In the inquest report the Executive Magistrate also found flood (Sic. blood) oozing out from the nose. There was abrasion over the left side of the chest and blood spot over the left side of the abdomen. The belly was also found blood

spotted but there was no injury on the head. In this respect, it is to be noted that the person who accompanied the deceased in the vehicle at that time named Gyan Sonar is conspicuous by his absence in spite of receipt of notice. These are the facts and circumstances occasioning the death of the late Manik Gogoi.

10. The army authority, respondent Nos. 2 to 4 filed an additional affidavit on 17.2.1995. They challenged the inquiry report submitted by the District and Sessions Judge. According to them, the report could not be relied upon as it suffered from serious infirmities.

11. Heard Mr. A.C. Borborah, the learned counsel appearing on behalf of the petitioner and Mr. K.N. Choudhury, the learned Senior Central Government Standing Counsel appearing on behalf of the respondent Nos. 1 to 4 and Mr. B.C. Das, the learned Government Advocate, appearing on behalf of the respondent Nos. 5 to 8.

The petitioner as well as on behalf of Krishna Kanta Gogoi, thereafter, filed an application stating, inter alia, that at the time of filing of the writ petition, the petitioner did not know about the death of Manik Gogoi. Only after filing of the petition, the petitioner could come to know about his death. From the facts available to the petitioner he could know that death occurred in custody because of torture. Therefore, he prayed for compensation for custodial death and also for an order to fix responsibility on the officers and other employees of the Government and to take appropriate action. The said petition was registered as Misc. Case No. ... of 1995. We disposed of the miscellaneous case with a direction to treat the petition as part of this writ petition.

Mr. Borborah submitted that deceased Manik Gogoi was arrested by the army at Kharghuli, Guwahati and he was not handed over to the nearest police station (Paltan Bazar Police Station) as required u/s 5 of the Armed Forces (Special Power) Act, 1958 (28 of 1958).

Mr. Borborah further submitted that the death occasioned in the custody of the army. He relied upon the post-mortem report, depositions of the witnesses and enquiry report submitted by the learned District and Sessions Judge, Dibrugarh. Learned counsel further submitted that the parents of the deceased were entitled to monetary compensation for custodial death of their son, Manik Gogoi, caused by torture by way of payment of exemplary damages. The army authority should have taken appropriate action against the officer or officers responsible for custodial death of Manik Gogoi. During course of argument Mr. Borborah produced a certificate bearing No. IR/RR/23/94 dated June, 1994, issued by one D.D. Khaund showing the total emoluments as on the last day of the service of Manik Gogoi.

12. Mr. K.N. Choudhury, the learned counsel, vehemently opposed the prayer for compensation by way of special damages. He had drawn our attention to the affidavit-in-opposition. He also submitted that the army arrested Manik Gogoi on

receipt of information from sources that he was an extremist ULFA and wanted in Duliajan Police Station case. The deceased was, therefore, taken to Duliajan Police Station and, therefore, the action of the respondent Nos. 1 to 4 was fully justified. The learned counsel further submitted that as it was not a case of custodial death, question of payment of compensation did not arise. He further submitted that even in case of payment of such compensation, it would be the obligation of the State of Assam as army was deployed at the instance of the Government of Assam. Mr. B.C. Das, learned Government Advocate, supported the action of the respondent Nos. 2 to 4. He further submitted that if any compensation was required to be paid, it would be by respondent Nos. 2 to 4 as State Government never directed the army to act contrary to law.

13. We perused all the materials on record. On perusal of record and hearing of the counsel for the parties the following questions fall for determination:

(1) Whether the deceased Manik Gogoi died in custody due to torture and lack of proper medical care?

(2) If so, whether any compensation is payable to the petitioner?

Point No. 1

14. u/s 5 of the Armed Forces (Special Power) Act, 1958, persons arrested and taken into custody by the army authority are required to be handed over to the Officer-in-charge of the nearest police station with least possible delay. We quote Section 5.

Arrested person to be made over to the police.-Any person arrested and taken into custody under this Act shall be made over to the Officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning his arrest.

Deceased Manik Gogoi was arrested in Guwahati. He was, however, not handed over to the Officer-in-charge of the nearest police station. He was taken to Lekhapani on the ground that he was wanted by the Duliajan Police Station. Mr. Choudhury, the learned Senior Central Government Standing Counsel, could not produce anything to show why Manik Gogoi was not handed over to the nearest police station at Guwahati. He was also not in a position to show anything that at the time of taking Manik Gogoi from Guwahati to Lekhapani any case was registered against Manik Gogoi by Duliajan Police Station. Mr. Choudhury candidly submitted that the cases might have been registered after the death of Manik Gogoi. From the affidavits-in-opposition filed by the Union of India and others as well as the deposition of Puspinder Singh, Punjab Regiment, it appears that Manik Gogoi was apprehended at Dispur, Guwahati, on the night of 2/3.4.1993 in the early morning at about 3 a.m. He was escorted to Lekhapani and was handed over to the Unit at 25 Regiment. He had no knowledge as to what happened thereafter but he subsequently mentioned that there was no injury whatsoever till Manik was handed over at Lekhapani. In the first

information report Naib Subedar Madan Lal stated that in the process of scuffle and overpowering the detenu appeared to have sustained injuries and became unconscious. Dr. M.N. Gogoi, in his deposition before Enquiry Officer (District and Sessions Judge), Dibrugarh, stated that he had found the following injuries:

- (1) One abrasion in the right ankle joint inner side of 3 cm. x 2 cm.
- (2) Multiple bruises in the chest wall and black colouration of the skin in the bruised areas.
- (3) One bruise of length 10 cm. x 2 cm. immediately below the left nipple in the left chest wall.
- (4) Both arms and forearms are swollen and bruised.
- (5) Both thighs and legs are swollen and bruised.
- (6) Multiple bruises in the abdominal wall with blackened colouration of the skin.
- (7) Multiple bruises in the lower part of the back of the body, i.e., loin and glutens regions.

On dissection over the bruised areas clotted blood in the tissues found.

On dissection of the neck region on the sides, front of the neck, clotted blood found in the tissues.

He gave his opinion. We quote the relevant portion of the opinion:

In my opinion, death was due to the shock and haemorrhages that resulted from the ante-mortem injuries and dislocation of the cervical vertebrae. The abrasions and bruises are simple injury and caused by blunt force impaction.

Time since death - 12/14 hours (approx.)

Age of the injury - 12/14 hours (approx.)

In my opinion, the injuries cannot be caused by simple fall from a moving vehicle. The injury as noted "fracture of the second cervical vertebra and dislocation" has caused haemorrhages and the spinal cord contused and swollen. The injury can be caused by a blow of hard substance and forcible bending of the neck.

In the enquiry report the Enquiry Officer stated that injury could be caused by a blow of hard substance and forcible bending of neck. The Executive Magistrate also found blood oozing from his nose. There was abrasion on the left side of the chest and blood spot over the left side of the abdomen. The belly was found blood spotted. There was no injury on the head. The person who was supposed to be present, namely, Gyan Sonar, remained absent during the enquiry. From the depositions of the witnesses examined by the Enquiry Officer (District and Sessions Judge), Dibrugarh and of the medical report, we find no difficulty in coming to the conclusion that the death of Manik Gogoi was caused due to

physical torture inflicted by the authority in custody. The case put up by the army that the inquiry (Sic. injury) was caused by simple fall cannot be accepted as reliable.

Point No. 2

15. As we have already held that Manik Gogoi died in custody because of physical torture inflicted upon him now it is to be seen whether the father of the deceased Manik Gogoi and other members of the family are entitled to any compensation, If so, to what amount? It is now well settled that in case of custodial death because of injuries inflicted by police personnel, etc., while in custody and also failure to take appropriate care of the detenu, liability of the Government for payment of compensation cannot be doubted. Mr. K.N. Choudhury, the learned counsel, does not dispute this legal position. Award of compensation in proceeding under Article 226 of the Constitution by this court is a remedy available in public law in an action based on tort.

In a recent judgment in *Nilabati Behera v. State of Orissa* 1993 ACJ 787 (SC), the Supreme Court observed thus:

...that "a claim in public law for compensation" for contravention of human rights and fundamental freedom, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made resorting to a constitutional remedy provided for the enforcement of a fundamental right is "distinct from, and in addition to, the remedy in private law for damages for the tort" resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah Vs. State of Bihar and Another*, and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.

Now in the case in hand deceased Manik Gogoi was an employee in Duliajan. He was 28 years of age as submitted by the counsel and his monthly income was Rs. 3,831.38 as indicated by the certificate produced by the counsel for the petitioner. The income in future could go up.

Therefore, considering all the aspects of the matter, in our opinion, a total sum of Rs. 2,50,000/- (Rupees two lakh fifty thousand) only would be the appropriate compensation to be awarded to Krishna Kanta Gogoi, village Duliajan, PO & PS

Duliajan, District Dibrugarh, father of the deceased Manik Gogoi. Accordingly, we direct that the Union of India, Ministry of Defence, New Delhi, shall pay a sum of Rs. 2,50,000/- to the said Krishna Kanta Gogoi along with a further sum of Rs. 3,000/- (Rupees three thousand) as costs.

We make it clear that the award of compensation will not affect any other liability of respondents or any other person emanating from the custodial death of Manik Gogoi. We hope and trust that the Union of India and the State of Assam would take necessary action in this behalf to ascertain and fix the responsibility of the individuals responsible for the custodial death of Manik Gogoi and take all available appropriate actions against each of them. This must be done as expeditiously as possible and, at any rate, within a period of six months from today.

Secretary to the Government of Assam, Home Department, Dispur, Guwahati, as well as Secretary, Home Department, shall inform regarding payment of the amount and the action taken as directed above to the Registrar (Judicial) of this court, within a period of three months from today.