
(1996) 11 OHC CK 0011
In the Orissa High Court
Case No : O.J.C. No. 7991 of 1994

Smt. Chanchala Swain

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 14-11-1996

Acts Referred:

Constitution of India, 1950 — Article 21, 22(5), 226

Citation : (1997) 84 CLT 86 : (1997) 1 OLR 384

Hon'ble Judges : S.N. Phukan, C.J.;A. Pasayat, J

Bench : Division Bench

Advocate : A.K. Nanda, for the Appellant; Advocate General for Opp. Party Nos. 1 to 4 and 11, G.D. Tripathy, R.K. Nayak and G.C. Mishra for Opp. Party No. 7, B.N. Panda, D. Das, D. Panda, Dillip Dash and S.K. Lenka for Opp. party Nos. 8 and 9, for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—In this petition for a Writ of habeas corpus under Article 226 of the Constitution of India, 19.0 (in short,"the Constitution"), Chanchala Swain, wife of Rabinarayan Swain, has moved to secure release of her husband, who was allegedly taken to custody by police officials in connivance with others.

2. The prayer for release of Rabinarayan has bean on the following background:

One Bijay Kumar Bal. nephew of Rabinarayan fell in love with the daughter of Harekrushna Nayak (opp. party No. 7). Both the girl and the boy left their village and went to Rajgangpur where Rabinarayan was serving as a teacher in Model Upper Primary School, in which Sudhir Kumar Moharana (opp party No. 10) is the Headmaster. After staying in the house of Rabinarayan for nearly one month, Bijay and the girl left for Burdwan. Akshaya Kumar Behera, A.S.I, of Police, Kudanagiri Out Post (opp. party No. 5), Nimain Charan Rout Constable of the said Out Post (opp. party No. 6) and Harekrushna Nayak, father of the girl along with the Headmaster (PW, 10) arrived in the school where Rabinarayan was teaching on 3-10-1994 Opp, party No.5. addressed a letter to the District

Inspector of Schools, Rajgangpur requesting him to direct Rabinarayan for assisting in investigation of P. S. Case No.162 of 1994 of Patakura Police, Station instituted on the basis of information given by opp. party No. 7 that Bijay had kidnapped his minor daughter. The Headmaster requested Rabinarayan to assist in investigation. Opp. party Nos. 5, 6, 7 and 10 took Rabinarayan with them in a jeep with promise to the Headmaster that Rabinarayan would be sent back after interrogation. Thereafter whereabouts of Rabinarayan remained in mystery. The Headmaster sent a telegram to Durga Charan brother of Rabinarayan on 6-10-1994 about absence of Rabinarayan. Another telegram was sent on 15-10-1984, which was received by Durgacharan. In the first telegram intimation was given about Rabinarayan being taken for interrogation, and in the second a request was made to give information regarding whereabouts of Rabinarayan, Durga Charan got in touch with the Headmaster. As Rabinarayan could not be traced, enquiries were taken up by Patakura police and Kudanagari out Post, but nothing material could be elicited. Petitioner being apprehensive of danger to her husband's life, moved the Superintendent of Police, Kendrapara. But since Rabinarayan's whereabouts continued to be in mystery, this Court has been moved.

3. Several counter-affidavits have been filed by the opposite parties, more particularly Superintendent of Police, Kendrapara (opp. party No. 3). Stand has been taken that though for some time Rabinarayan was accompanying, the Assistant Sub-Inspector and the Constable, thereafter he managed to escape giving a slip to the police officials. Station diary entries have been made that Rabinarayan accompanied the police officials. Rabinarayan with ulterior motive is moving from place to place, and though he was reported to be seen at several places outside the State, i.e., at Surat and Calcutta, getting scent of likely arrival of police officials, he has managed to move away. On two occasions this Court expressed displeasure for the manner in which the investigation was being conducted, and the casual and light manner in which it was being dealt with by the police officials. "Evasive stands taken by the police officials was disapproved. During pendency of the writ application, information was lodged by the petitioner to the effect that she believes that her husband has lost his life, for which the police officials are responsible, and on the basis of such information a police case (Patakura P. S. case No. 228 dated 7-9-1996) has been instituted.

4. Learned counsel for the petitioner submitted that carelessness of the police officials is apparent and they have taken a frivolous plea that Rabinarayan slipped from their company, and in spite of ample time granted to them, there has been no production of Rabinarayan. Falsity of their plea about escape of Rabinarayan has been proved amply and unmistakably. Death of Rabinarayan has impliedly been accepted as police case has been instituted on the basis of information given by the petitioner.

Learned Advocate-General appearing for the opp. party Nos. 1 to 4 and 11 on the other hand submitted that Rabinarayan was never under arrest, and therefore,

question of police officials being responsible for his safe custody does not arise. All possible attempts have been made to trace Rabinarayan, and in fact investigation revealed that he was alive and was carrying on business at Surat and Calcutta. With ulterior motive to get compensation, present writ application has been filed. Petitioner having not come to Court with clean hands does not deserve any sympathy and the writ application deserves dismissal.

From the counter-affidavit filed by the police officials, we find that the genesis of controversy is Patakura, P. S. Case No. 162 of 1994, registered in respect of alleged commission of offence under Sections. 366A and 109, Indian Penal Code. 1860 (in short. "IPC"). crucial question is whether Rabinarayan is alive. If the answer is in the negative, further question is whether it is custodial death, or, in any event, whether police officials are responsible for it. On 7-9-1996 petitioner had presented a written report before the Superintendent of Police, Kendrapara stating that she had reason to believe that Akshaya Kumar Behera, ex-ASI of Police of Kudanagari Out Post (opp. party No. 5), Constable Nimain Charari Rout (opp. party No. 6) and Harekrushna Nayek, father of the girl had killed her husband. On the basis of aforesaid report, a case was registered as Patakura P. S. case No. 228 dated 7-9-1996 u/s 302/94, IPC. as such offence was allegedly committed under the jurisdiction of Superintendent of Police, Rourkela the case was transferred to Police Station at Sector-7, Rourkela, and Sector-7 P. S. case No, 94 dated 14- 9-1996 was registered. The Crime Branch has taken charge of investigation and by order dated 21-9-1996, in exercise of powers conferred under Police Manual Rule 410-A, full control for investigation of said case has been taken up by the Crime Branch. While the petitioner alleged that it is a case of custodial death, the police officials have taken a definite stand that Rabinarayan being conscious of his involvement in a crime had run away to avoid prosecution.

6. In a petition for writ of habeas corpus the burden is on the police officials to make good their positive stand in response to the notice issued by the Court by offering proof of the stand taken, when it is shown that the person detained was last seen under the surveillance, control, and command of the detaining authority. (See *New Theatres (Carnatic Talkies) Ltd., Coimbatore Vs. N. Vajrapani Naidu*,).

7. Illegal detentions in police custody constitute violation of the rights guaranteed under Arts.21 and 22(5) of the Constitution Where the constitutional rights consist of deprivation of liberty otherwise than by due process of law, the claim for compensation is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. it is a claim in public law for compensation for deprivation of liberty alone. This position was succinctly stated by Lord Diplock in *Maharaj v. Attorney-General of Trinidad and Tobago* No.2), (1978) (2) All ER 670. The doctrine of sovereign immunity is not applicable to such cases. it is 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 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 Article 226 of the Constitution. This position was elaborately dealt with by the apex Court in Rudul Sah v. State of Behar : AIR 1983 SC 1080.

8. Article 9(5) of the International Covenant on Civil and Political Rights, 1966 indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Same reads as under :

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

9. A threadbare distinction is sought to be brought in by the police authorities taking the stand that there was no arrest as contemplated in law, and Rabinarayan was being taken for the purpose of interrogation. Even if it is accepted that there was no arrest as stated by the opposite parties, yet the fact that Rabinarayan was under the control of the police officials cannot be lost sight of. In fact there is an indirect admission to the effect that Rabinarayan wanted to take tea and with the permission of the police officials went to take tea and slipped away. No one would seek permission unless he is under control of another. That clearly shows that Rabinarayan was under the control of police officials. What happened next is the dispute.

10. The further question is whether Rabinarayan is alive as claimed by the Police or dead as claimed by the petitioner. From the records we find that the Police Officials have taken elaborate steps to trace Rabinarayan, and to produce him in Court if he is alive. Certainly . time would be necessary, If in reality Rabinarayan has run away from the police officials at the nick of the time. Learned Advocate General submitted that given reasonable time latest position so far as whereabouts of Rabinarayan are concerned can be brought on record. We feel it unnecessary to keep the matter pending. In the circumstances, keeping in view the guidelines and principles indicated by the Apex Court in Rudul Sah's case (supra), Sebastian M. Mongray's case (supra) and Nilabati Behera v. State of Orissa and Ors. : AIR 1993 SC 1900, we dispose of the writ application with the following directions and observations :

(1) A sum of Rs. 1,50,000/- (one lakh fifty thousand) shall be deposited by the State in this Court within six weeks from today. Out of the said amount, a sum of Rs. 25,000/-(twenty-five thousand) shall be released in favour of the petitioner on being identified by any of the learned counsel appearing for her.

(2) The balance sum shall be kept in a fixed deposit for a period of one year, but no withdrawal shall be permitted against it within the period of one year.

(3) The opposite parties are granted time till the end of October, 1997 to indicate the position whether Rahinarayan is alive. If so, where he is staying, and to produce him in this Court with due intimation to petitioner. If he is dead, the date of death and cause therefor.

(4) In case, within the stipulated time the police officials do not give definite information about Rabinarayan, balance amount shall be released in favour of petitioner on proper identification by any of the learned counsel appearing for her.

(5) An undertaking shall be filed by the petitioner at the time of withdrawal of any amount to the effect that if Rabinarayan is found alive and any of the averments about any of the opposite parties being responsible for death is found to be incorrect, appropriate action shall be taken against her.

(6) In case Rabinarayan is found alive, the amount paid to the petitioner shall be refunded by her within three months from the date of intimation by the opposite parties.

The writ application is allowed to the extent indicated above.

S.N. Phukan, C.J.

7. I agree.