

**(2006) 02 GAU CK 0069**  
**In the Gauhati High Court**  
**Case No : Civil Rule No. 3131 of 1998**

Smt. Phulo Bala Das

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision : 16-02-2006**

**Acts Referred:**

Armed Forces (Assam and Manipur) Special Powers Act, 1958 — Section 4, 5  
Constitution of India, 1950 — Article 21, 226  
Penal Code, 1860 (IPC) — Section 302

**Citation :** (2006) CriLJ 3051 : (2007) 1 GLR 369 : (2007) 2 GLT 465

**Hon'ble Judges :** Aftab H. Saikia, J

**Bench :** Single Bench

**Advocate :** B.C. Pathak, for the Appellant; D.C. Chakraborty, CGC, for the Respondent

**Final Decision :** Allowed

## **Judgement**

A.H. Saikia, J.—Heard Mr. B. C. Pathak, learned Counsel for the petitioner, Mr. D. C. Chakraborty, learned Central Govt. Counsel (for short "CGC") appearing for the Union of India-Army/Respondent Nos. 1 to 3 and Mr. H. K. Mahanta, learned State counsel appearing for the State Respondents.

2. By means of this writ petition presented under Article 226 of the Constitution of India, the petitioner, the mother of the deceased Late Rubul Pal Das who was alleged to have been killed by the Army, has basically sought for a writ of Mandamus with a direction to the respondents to pay, as a compensation, a sum of Rs. 3,00,000 (Rupees three lacs) only to her for the death of her son in custody of the Army.

3. The brief facts of the case, as emerged from the pleadings of the parties, are that the petitioner's son Late Rubul Pal Das, at the relevant time, was a student of Tamulpur Commerce College and preparing for his final examination of 1st paper Degree Course. He was actively associated with the activities relating to the students welfare as he was the former General Secretary of the said college.

On the fateful night, i.e., on 24-12-97, while her son went to participate in the celebration of "Nam-Party", a religious discourse and singing of religious songs, in the house of one Shri Chandra Das alias Chandra Patowary of village Gandhibari, a neighbouring village of the petitioner, a group of army men numbering 12/14 belonging to JEKLI Regiment, camping at nearby Gandhibari village, suddenly arrived there and picked up the petitioner's son. Thereafter, in the wee hours of 25-12-97, the Army handed over the dead body of the petitioner's son to the Tamulpur Police Station. The dead body, after post-mortem, was handed over to the family members for cremation on 26-12-97.

4. Immediately, after the incident, a Magisterial enquiry was ordered and accordingly the Addl. District Magistrate Nalbari conducted the enquiry and submitted his report dated 24-3-98 to the District Magistrate, Nalbari.

5. On perusal of the said report which has been annexed to the Misc. application i.e. Misc. Case No. 2666/05 filed by the Army, it appears that in the Magisterial enquiry as many as 7 witnesses including the Officer-in-Charge of the Tamulpur Police Station and two Army personnel one Major Rohit Bhatra and Nayak Subedar Manjur of 13 JEKLI Regiment were examined. From their examination, the Magistrate found that all the statements made by those witnesses were contradictory because from the statements of the witnesses from the side of the petitioner revealed that there was no encounter on that relevant day. On the other hand, Army claimed that though no encounter took place that night, they sought for encounter only after getting the information about the hiding of some militants in the bamboo grove and after locating them therein, they ordered to stop them but instead the militants ran away from the place as a result of which firing had to be resorted to and one militant was killed who was later on identified as Rubul Pal Das. No finding whatsoever was placed on the record in the said Magisterial enquiry. Hence this writ petition.

6. This Court, on 26-6-98, while admitting this writ petition Issued notices to all the Respondents with a direction to the Superintendent of Police, Nalbari to submit a report as to the progress of the investigation of Tamulpur P. S. Case No. 23/97. After that, this Court, again by order dated 21-5-03, after taking into account the report submitted by the SP, Nalbari, as directed by this Court earlier, and on perusal of the Magisterial enquiry report as mentioned above, held that the report of the learned Addl. District Magistrate, failed to give any finding either supporting the case of the petitioner or against the petitioner and accordingly felt it necessary that the matter needed to be enquired into by the Judicial Officer for which the learned District Judge, Nalbari was directed to hold the enquiry and submit his report within four months giving liberty to all the parties to adduce the respective evidence in support of this case, if so desired.

7. In pursuance of the said direction, the learned District and Sessions Judge, Nalbari conducted the enquiry and submitted his report dated 21-8-03 before this Court by communication dated 25-8-03. On perusal of the report, it transpires that the learned District & Sessions Judge, Nalbari in his finding

recorded that it was crystal clear that, deceased Rubul Paul Das was picked up by the Army Personnel from the house of Chandra Kanta Das while he was enjoying "Nagara Nam" and later on he was killed in a fake encounter and there was no evidence on record to hold that, the deceased was killed in an encounter in the early morning of 25-12-97 at the Baraliapur as asserted by the Army Major R. Bhatra and his witnesses.

8. After submission of the said report by the learned District Judge, the Union of India/Army approached this Court by filing a Misc. application being MC No. 1249/03 complaining that since their Unit was, by the relevant time, shifted from their Ghandhibari Camp to Sikkim, they could not participate in the enquiry and as such by the time when they approached the learned District and Sessions Judge, the said enquiry was already conducted ex-parte and even the report was also submitted and accordingly, a request was made to allow them to participate in the enquiry leading their evidence so as to prove the actual and correct fact situation. Conceding to such request, this Court, by order dated 19-9-03, remitted the matter again before the learned District and Sessions Judge, Nalbari to hold an enquiry afresh allowing the Army/Union of India to participate in the enquiry and lead evidence, if they so desired and if the Union of India desired to cross-examine the witnesses, opportunity should be given to them to do so. Accordingly, both the parties were directed to appear before the learned District Judge on 14th October, 2003 and thereafter the learned Judge should fix a date of hearing and submit the report within a period of 75 days.

9. In compliance of this direction as aforesaid, the learned District Judge again conducted a fresh enquiry allowing extensive participations of the Army/Union of India in the said enquiry. During the course of conducting the enquiry, the parties were allowed to lead their evidences and in this process the learned District Judge examined as many as 6 witnesses on behalf of the petitioner namely, the petitioner herself as P. W. 1, P. W. 2, Mantu Kalita, P. W. 3, Hemanta Das, who was present at "Nagara Nam", P. W. 4, Putul Kalita, who deposed that the "Nam Party" was arranged in the house of one Chakra Kanta Das, P. W. 5, Chandra Kanta Das, who arranged a "Nagara Nam" at his house and P. W. 6, Dr. Banikanta Baishya, Superintendent of Nalbari Civil Hospital who performed the post-mortem on the dead body of late Rubul Paul Das. All these witnesses were examined and also cross-examined by the Respondents. On the other hand, the Union of India/Army examined D. W. 1, Major Rohit Bhatra, D. W. 2, Nirmal Kr. Barua, D. W. 3, Bhuban Cha. Gohain, Officer-in-Charge of Tamulpur Police Station and D. W. 4, Parveen S. Singh, Hawaldar. Those witnesses were also cross-examined by the side of the petitioner.

10. On proper appreciation of those evidence of the witnesses recorded in the course of the enquiry, learned District and Sessions Judge by his report dated 30-6-05 arrived at the following findings:

Under the findings as discussed above, I find and hold that Rubul Pal Das was picked up by Army personnel from the "Namparty" held in the house of Chandra

Patowary of Ghandhibari in the night of 24-12-97 and was killed by bullet injuries by Army personnel of 13 JAKLI camped at Ghandibari and his dead body was returned to his family members.

11. In coming to the conclusion of the findings aforesaid, the learned Judge discussed and appreciated extensively the evidence of the witnesses so adduced on behalf of both the parties. All the witnesses of the petitioner's side were categorical in their deposition that the son of the petitioner was picked up by the Army Personnel belonging to 13 JEKLI during the night of 24-12-97 and he was killed in their custody. It was also the finding of the learned Judge that there was no information on record as regards any encounter carried out by the Army during the period as mentioned. It has come on the record from the evidence of D. W. 3, the concerned police officer who was the In-charge of the Tamulpur Police Station in the relevant period and the deposition of D. W. 1 i.e., Major R. Bhatra that the information as regards the killing of the deceased Rubul Paul Das was given to the police only for the first time at 9.30 a.m. in the morning of 25-8-97 and there was no information whatsoever with regard to any army encounter in that area on that night. In his deposition, D. W. 1 categorically testified that under the scheme of Unified Command Structure framed under the Armed Forces (Assam and Manipur) Special Powers Act, 1958, (for short "the Act") the Army required to take help of the civil administration or police whenever they proceed for any operation. He admitted that in the particular case, there was no police representative as there was no police station near the vicinity of his activity nor was there sufficient time to approach police officials.

12. It would be relevant to refer to the deposition of the D. W. 1 and D. W. 3 as recorded by the learned Judge in his report which reads as follows:

DW-1, Major Rohit Bhatara stated in his evidence that the deployment of 13 JAKLI came into effect to prevent unlawful activities of the insurgents under the Armed Forces (Special Power) Act, 1958 and he was incharge of army Unit of Uttar Ghandhibari. On the night of incident between 24/25-12-1997 he got an information from his source that three persons were taking shelter in a bamboo grove at about 1.5 k.m. away from Lotibari towards Baralia River. Immediately he activated the term comprising one officer, one JCO and 15 other Ranks and proceeded towards Lotibari. At about 4 a.m. he move towards bamboo grove. His scout Md. Lotif heard some noise from bamboo grove where militants were hiding. D. W.-1 ordered Nayak Subedar Manjur Ahmed to quadroon the bamboo grove. At about 5 a.m. three persons ran from the bamboo grove towards the Baralia River. The party led by Majur Ahmed shouted to stop, but they continued running Nayak Prabin Singh fired a round in the air. D. W. 1 also fired a round in the air.

Hearing the shots the militants lied down on the ground. While Army started to proceed towards them the militants got up and started running towards the river. One of them brought out his arms and turned back towards the army. The army chasing them fired upon him. The militant getting bullet injuries fell down and

died who as identified as Rubul Pal Das.

DW-1 added that one 22 Revolver with 4 rounds of live cartridges and some incriminating documents of banned ULFA were found with him. D. W. 1 added that he lodged the FIR and handed over the dead body to Tamulpur Police station.

DW-1 stated that under the scheme of United Command Structure, help of Civil Administration or police is required to be taken for operation. But admittedly no help of Civil Administration or police was taken by the Army for the operation. The distance between Army camp and Tamulpur Police Station was 8 k.m.

D. W. 3, Bhuban Ch. Gohain, Officer in charge of Tamulpur police station at the relevant time stated that on the FIR filed by Major R. Bhatara of 13 JAKLI he registered a case being Tamulpur PS Case No. 219/97 and took up investigation and examined witnesses. He seized 22 Bore revolver on being produced by Ranjit Manki of 13 JAKLI in the case by Ext. 4 and some incriminating documents by Ext. 5.

DW-3 received Army camp at 1.30 p.m. of 25-12-97 and found the dead body. He visited the place of occurrence at about 3.45 p.m. He did not find any socket of revolver at the place of occurrence. DW-3 found that there were 10/12 persons present at the area of place of occurrence. He examined Uttam Das as witness from the locality.

DW-3 stated that the dead body was identified to be of Rubul Pal Das S/o. Siba Pal Das. But the dead body was of Rubul Pal Das S/o. Mohan Pal Das. R. Bhatara submitted FIR at 10.55 a.m. of 25-12-97. On that date at 12 noon DW-3 submitted FIR of UD case No, 23/97. On 26-12-97 Siba Pal Das submitted FIR in Tamulpur PS and a case u/s 302 of IPC was registered being Tamulpur PS case No. 220/97. When he was in the PS, the case was under investigation. After his transfer, he did not know about the result of the case.

13. The Army/the Union of India, being aggrieved by this report has filed a Miscellaneous Application being MC No. 2666/06, by way of an objection against the enquiry report so submitted by the learned District Judge, Nalbari as directed by this Court. In the said application, the enquiry report has been challenged on the grounds, inter alia, that (i) the vital witnesses including Gayan Bharali and Kanak Mahanta were not examined; (ii) all the six witnesses adduced from the petitioner's side were tutored; (iii) the statements adduced on behalf of the Army/respondents and infirmities found in the cross-examination were totally ignored by the learned enquiry officer and (iv) that report submitted by the enquiry officer was absolutely perverse, illegal, partial, erroneous and displayed lack of application of mind.

14. After carefully going through the enquiry report so placed by the learned District Judge and on close examination of the contentions and submissions made in the Misc. application filed by the Army/respondents challenging the enquiry report as well as on scrutiny of the testimony of the witnesses of both

the parties to which attention of this Court was drawn by the learned CGC, it transpires that the evidence of all the witnesses is found to be corroborative, consistent and most importantly credible and trustworthy. Except P. W. 1, the mother of the deceased, others all were independent witnesses and this Court does not find any infirmity or irregularity to doubt their veracity and genuineness.

15. It is admitted that one Rubul Paul Das, son of petitioner, died on that fateful day. Now the question to be decided herein is whether, he was killed by the army while keeping him in their custody on being picked up by them or there was an encounter on that night where he died as he was found to be a militant. After close scanning of the deposition of the above witnesses, this Court does find no indication or information as to hold him as militant. All the witnesses of the petitioners were categorical in their deposition that the deceased was picked up by the army personnel at about 10.00 p.m. on 24-12-97 and his dead body was handed over to the Tamulpur police station in the morning on 25-12-97, An FIR was lodged by D. W. 1 and D. W. 3 registered the case. D. W. 3, in his deposition, said that prior to handing over the said dead body, there was no information of any encounter by the Army during the fateful night. Coming to the deposition of the D. W. 1, Major Rohit Bhatra, it abundantly clear that he could not intimate the police, as required for such operation to inform the civil administration, due to the paucity of time as he had to take immediate action due to information that some militants were hiding in the bamboo groves and when he asked to stop them, they run away and ultimately firing had to be resorted to as a result of which one militant, who was later on identified as Rubul Paul Das was killed. There was no denial that before engaging themselves in such encounter with militants, the Army did not take the help and aid of civil administration nor had they informed the nearby police station that they were going for such operation, though the Army was well equipped with all modern scientific gadgetry to transmit quickest possible information.

16. The Apex Court as well this Court have, time and again laid down the principles pertaining to the scope of Army operation under the Act. Despite such guidelines and directions given by the Court, Army respondents are, it appears, not taking any appropriate action for compliance of the same. The Division Bench of this Court in a case of Anima Basumatary v. Union of India and Ors. reported in 2005 (1) GLJ 646, while dealing with the scope and powers of the Army under Sections 4 and 5 of the Act vis-a-vis Articles 21 and 226 of the Constitution of India, following a catena of decisions of both the Supreme Court and this Court, have held that the civil authorities and the armed forces have to work as hand in glove and not in suppression of any side. The Armed Forces have been conferred certain extraordinary powers under the Act with a view to aid the Civil Authority. Such powers have been conferred on the basis that the ground situation in a disturbed area is so bad/and chaotic and the law and order situation is so poor that Civil Authority cannot always be trusted to arrest persons who have committed cognizable offences or against whom reasonable suspicion exists that they have committed cognizable offences. Any death in the custody of the Army,

being a custodial death, shall be resulted in the infringement of the basic human right guaranteed under Article 21 of the Constitution. In the said case, this Court was pleased to grant monetary compensation of a sum of Rs. 1,75,000/-. In another case, this Court in Tekarongsen and Others Vs. Union of India (UOI) and Others, , after close perusal of the enquiry report of the learned Additional Deputy Commissioner who was directed by this Court to hold an enquiry, came to a finding that as per report of the learned A. D. C., it was proved that there was no encounter on that fateful night and a sum of Rs. 2.00 (two) lacs were awarded to the Petitioner No. 2 therein for killing of her son Late Kharichujang accordingly.

17. After going through the facts situation of the case as noticed hereinabove and having perused the entire materials available on record including the report of the learned District Judge and also having been guided the settled legal position propounded by the series of judicial authorities, this Court is of the view that the learned District Judge rightly conducted the enquiry and there was no illegality in the findings of the said enquiry and accordingly the same is accepted. The Army/Respondent are found responsible for picking up the son of the petitioner the Rubul Paul Das and he was killed in their custody which is evident from the testimony of the witnesses of both the sides. This Court has no hesitation to record that there was no satisfactory explanation given by the Army authority as to why they did not inform or seek any assistance or aid of the civil authorities or the police before adventuring in such encounter.

18. Since this case is squarely covered by the catena of decisions of the Supreme Court relating to the violation of Article 21 of the Constitution, this Court is of the view that petitioner is entitled to get monetary compensation, due to the loss of her young promising student son who involved in many social and educational activities of the college and accordingly the amount of compensation is quantified as Rs. 2,00,000/- (two lacs) only.

19. It is made clear that the entire compensation as quantified above, shall be deposited with this Registry through the bank draft within a period of three months from the date of receipt of this order and after being deposited the said amount, the Registry shall pay the amount to the petitioner-mother of the deceased son, if she is alive on her proper identification and in case of her death by this time, the amount shall be released to the legal heirs of the petitioner on production of such testimony issued by the competent authority for such purpose.

20. In the result, this writ petition stands allowed. However, there shall be no order as to costs.