

(1998) 07 OHC CK 0045

In the Orissa High Court

Case No : Criminal Jur. Case No. 14338 of 1996

Smt. Savitri Behera

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-07-1998

Acts Referred:

Evidence Act, 1872 — Section 108

Penal Code, 1860 (IPC) — Section 34, 343, 379, 380, 457

Citation : (1998) 86 CLT 570 : (1998) CriLJ 4716

Hon'ble Judges : S.N. Phukan, C.J.;C.R. Pal, J

Bench : Division Bench

Advocate : M.S. Panda, for the Appellant; P.K. Ray, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.N. Phukan, C.J.—The petitioner is a lady belonging to the scheduled caste community. She was residing with her husband, three sons and two daughters. She comes from a poor family. Her eldest son Umakanta Behera was the only earning member of her family. He started hotel business near Kacheri compound, Boudh, in the year 1968. He prospered and in 1974 his earning was about Rs. 150/- per day. All the members of the family were dependent on him. It has been alleged that police falsely implicated him and other two, persons in two criminal cases, one under Sections 457/380/34, I.P.C. and the other u/s 379/34, I.P.C. The cases were registered in the Court of the Sub-Divisional Judicial Magistrate, Boudh, being G.R. Case Nos. 190/70 and 67/71. Umakanta was released on bail by the S.D.J.M., Boudh on 26-4-1974 in both the cases. But, he was again taken to jail custody on 5-6-1974 as an under trial prisoner in G.R. Case No. 190/70. It has been alleged that he was harassed and tortured by police. He could not withstand and tolerate such mental torture and harassment and gradually developed insanity.

2. The learned S.D.J.M., Boudh, finding Umakanta to be a lunatic, sent him to

the Circle Jail, Cuttack, on 24-2-1975 under police protection through the S.D.J.M., Sadar, Cuttack, vide his letter No. 522 dated 24-2-1975 (Annexure 1). The Superintendent, Circle Jail, Cuttack was also informed and the Additional Superintendent, Mental Health Institute, S.C.B. Medical College, Cuttack, was moved for giving treatment to Umakanta. At the relevant time, Umakanta was 21 years of age. In the aforesaid letter, the learned S.D.J.M., Boudh requested the S.D.J.M., Sadar, Cuttack, to remand Umakanta to jail custody from time to time till his recovery and also requested the Superintendent, Circle Jail, Cuttack, to intimate the fact of recovery.

3. In the above circumstances, the family members of the petitioner could not run the hotel business. Therefore, they were deprived to have a square meal a day. Due to poverty, the father of Umakanta also could not go to Cuttack and enquire about his whereabouts. As Umakanta did not return, several requests were made to the S.D.J.M., Boudh to ascertain the present state of affairs. Though the S.D.J.M., Boudh by his letter dated 7-3-1978 (Annexure 2) made enquiries from the S.D.J.M., Sadar, Cuttack regarding Umakanta, no reply was received. A letter was addressed to the Chief Justice for judicial intervention, but a reply was sent by the Deputy Registrar of this Court that Umakanta had been released on bail by the S.D.J.M., Sadar, Cuttack, on 22-3-1978. According to the petitioner, Umakanta did not return home nor was he heard of since 24-2-1975, when he was sent to Cuttack from the Special Sub-Jail, Boudh.

4. Though it has been stated that Umakanta was released on bail by the S.D.J.M., Sadar, Cuttack on 22-3-1978, no records are available. It is submitted that the S.D.J.M., Sadar, Cuttack was only requested to remand Umakanta to jail custody from time to time till his recovery from lunacy and thereafter send him back to the S.D.J.M., Boudh. Therefore, the S.D.J.M., Sadar, Cuttack was not competent to release Umakanta on bail without any intimation either to the Superintendent, Special Sub Jail, Boudh, or to the S.D.J.M., Boudh. According to the petitioner, Umakanta was a stranger in Cuttack and so nobody could have offered himself to stand as bailor/surety; and no one from Boudh had come to Cuttack to stand as bailor. Therefore, it has been alleged that release of Umakanta on bail from the Circle Jail, Cuttack, is false and not acceptable. In this writ petition, the petitioner has prayed for issuance of a writ of habeas corpus, or, in the alternative, a direction for payment of compensation of Rs. 6,00,000/- with interest at the rate of 18% per annum from the date of transfer of Umakanta to Cuttack Circle Jail.

5. In the counter-affidavit filed by the Superintendent, Circle Jail, Cuttack, opposite party No. 2, it is not disputed that Umakanta was transferred to the Court of S.D.J.M., Sadar, Cuttack, by orders of the S.D.J.M., Boudh, vide letter No. 522 dated 24-2-1975. It is also admitted that from 25-2-1975 upto 22-3-1978, Umakanta was an under-trial prisoner in the jail. It has been stated that he was sent to the Court of S.D.J.M., Sadar, Cuttack with police escort on 22-3-1978. On that day, he was released on bail by the said Court. The jail

records would show that Umakanta did not return on 22-3-1978. The police authorities have made several efforts to know the whereabouts of Umakanta. One Sub-Assistant Jailor of the Circle Jail, Cuttack was deputed to the Court of S.D.J.M., Cuttack, in order to know about the details. It was ascertained from the Judge-in-charge, Record Section, Cuttack, that the cases relate to the Court of the S.D.J.M., Boudh and they would not be available as the said cases had not been disposed of by the S.D.J.M., Sadar, Cuttack. It has been pleaded that after releasing Umakanta, records might have been sent to the Court of S.D.J.M., Boudh.

6. We find that the petitioner moved before the Human Rights Commission and records were called for from the Director of Prisons. The facts were apprised to the Human Rights Commission and the Commission was pleased to accept the report. According to the deponent, since the petitioner's son is neither in jail nor was he subjected to any untoward happening and as the records show that he was released on bail and did not return to jail from Court on 22-3-1978, the jail authorities are in no way responsible for his disappearance.

7. Heard Mr. M.S. Panda, for the petitioner and Mr. P.K. Ray, learned Addl. Govt. Advocate for the State.

8. The only question to be determined on the factual aspect is whether Umakanta Behera, son of the present petitioner disappeared while in the custody of the jail authorities. It is not disputed that Umakanta was accused in two cases namely, G.R. Case No. 190 of 1970 and G.R. Case No. 67 of 1971, which were pending in the Court of S.D.J.M., Boudh. The records of both the cases have been called for. We find that by order dated 1-11-73 passed in G.R. Case No. 67 of 1971, the Court recorded that accused Umakanta made incoherent answers. When questions were put to him he tried to weep and laugh. Therefore, the S.D.J.M., came to the finding that he was of unsound mind and incapable of making his defence and therefore, an enquiry is necessary. Direction was issued to the doctors to examine and report. His bail bond was cancelled and he was remanded to jail custody. He was however released on bail by order dated 26-4-1974. We may record here that no report of the Chief District Medical Officer, Phulbani was received. By order dated 18-5-1974, the Court recorded that accused Umakanta became insane. Therefore, the case was split up. Judgment in this case as against the other two accused persons was pronounced on 9-7-1974. In G.R. Case No. 67 of 1971 also the case against accused Umakanta was split up and numbered as G.R. Case No. 67/ 1971-A. The order dated 24-2-1975 shows that accused Umakanta was transferred to Cuttack Jail with escort party. A letter was sent, being letter No. 522 dated 24-2-1975, from S.D.J.M., Boudh to S.D.J.M. (Sadar), Cuttack informing him that Umakanta, who was involved in the above two cases, was having mental disorder and he was to be kept under proper supervision and advise of the Addl. Superintendent, Mental Health Institute, S.C.B. Medical College, Cuttack. It was further requested to remand him from time to time till his recovery. The letter is also available in the

records of G.R. Case No. 190 of 1970.

9. Subsequently, the brother of accused Umakanta filed a petition on 26-6-91 before the learned S.D.J.M. for production of accused Umakanta. Various orders were passed by the S.D.J.M., Boudh, including issuing production warrant and also letter to S.D.J.M., Cuttack but accused Umakanta was not produced. On the above facts, the mother of accused Umakanta has filed the present petition.

10. Though the jail authorities has taken the plea that accused Umakanta was released on bail by the learned S.D.J.M., Cuttack, not a single piece of paper has been produced. The custody warrant and the Jail Register have not been produced to show that Umakanta was released on bail. These documents would have shown whether Umakanta was released on bail or not. In the counter, it has been stated that on 22-3-1973 accused Umakanta did not come back to jail and therefore, it has been shown that he was released on bail. It has also been stated in the counter that one Sub-Assistant Jailor of Circle Jail was deputed to the Court of S.D.J.M., Cuttack in order to know the details of the fact and it was ascertained from the Judge-in-charge, Record Section, Cuttack that the above two cases related to the Court of S.D.J.M., Boudh and therefore, records would not be available in the Court of S.D.J.M., Sadar, Cuttack.

11. Normally, if an accused person is released on bail by another Court, bail bond accepted is sent to the Court where the case is pending. In the case in hand, no bail bond is available. We have also failed to understand why one Sub-Assistant Jailor was deputed to find out the whereabouts of accused Umakanta if the authorities were satisfied that accused Umakanta was released on bail. Though a plea has been taken that bail was granted by the S.D.J.M., Sadar, Cuttack but order of the S.D.J.M., Boudh is very clear that S.D.J.M., Sadar, Cuttack was only to remand him during the period of treatment of accused Umakanta. Therefore, we are of the opinion that accused Umakanta disappeared while in the custody of the jail authorities.

12. In this connection, we may refer to Section 108 of the Indian Evidence Act which, provides that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

13. In the case in hand, the prosecution has not been able to show that accused Umakanta is alive. Although production warrant was issued, it has not been executed. For the reasons stated above, we hold that accused Umakanta died while he was in the custody of the jail authorities.

14. The Apex Court in Sebastian M. Hongray Vs. Union of India (UOI), held that where Supreme Court by a writ of habeas corpus required the Government of India to produce two persons and Government eventually failed to produce them expressing its inability to do so and the assertion of the Government that the persons left certain camp near which a certain army regiment was stationed alive

was untenable and incorrect, the Government would be guilty of civil contempt because of the wilful disobedience to the writ. The Apex Court keeping in view the torture, agony and mental oppression of the family members of such persons, directed payment of cost of Rs. 1 lakh each.

In *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, the Apex Court held that violation of human rights by the State should be compensated and writ of compensation is maintainable. It further held that sovereign immunity is not applicable in case of violation of fundamental rights.

In a recent decision of the Supreme Court in *People's Union for Civil Liberties Vs. Union of India* and another, which was a case from Manipur, a disturbed area, in which case there was a fake encounter and two persons alleged to be terrorists were seized by police, taken to a distant place and shot at causing their death it was held that such administrative liquidation cannot be permitted and interference of the Court is called for. The Apex Court awarded a compensation of Rs. 1 lakh to families of each of the deceased.

In a recent decision of this Court in *Smt. Chanchala Swain v. State of Orissa* 1997(1) OLR 384, this Court considered the entire aspect including the law laid down by the Privy Council and awarded compensation of Rs. 1,50,000/-. The Division Bench held that the person detained was last seen under the surveillance, control and command of the detaining authority, burden is on the police officials to make good proof of the stand taken.

15. In the case in hand, the opposite parties have taken a clear stand that accused Umakanta was released on bail by the Cuttack Court. In fact, letter of the S.D.J.M., Boudh to Cuttack Court was only for remand. Of course, we will not say that Cuttack Court had no power to release a person on bail. But normally in such case, bail bond and other connected papers would have been sent to the trial Court. It was not so done in the case in hand. We have perused the record and we find that the S.D.J.M., Boudh wrote several letters to the S.D.J.M., Sadar, Cuttack but without any reply. That apart, the S.D.J.M., Boudh issued production warrant against accused Umakanta, but it has not been executed. As stated above, one officer from Jail went to Court to find out the whereabouts of accused Umakanta and that shows that the Jailor was not sure whether the accused Umakanta was released on bail or not. The custody warrant and jail records which would have proved conclusively that accused Umakanta was released on bail, have not been produced. Therefore, we have no hesitation to hold that accused Umakanta died or disappeared while in jail custody and, as such, it is a fit case to award compensation.

16. Though the petitioner has claimed a compensation of Rs. 6,00,000/-, we are of the opinion that it is on the higher side. Considering the entire aspect of the case, we direct the opposite parties to deposit a sum of Rs. 1,50,000/- as compensation before Registrar (Judicial) of this Court. Out of the said sum of Rs. 1,50,000/-. Rs. 20,000/- shall be immediately released by Account Payee cheque

to the petitioner and balance amount shall be kept in fixed deposit and quarterly interest shall be paid to the petitioner for maintenance.

The writ petition is allowed to the above extent. No costs.

C.K. PAL, J.:-

17. I agree.