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**(2016) 03 GAU CK 0040**  
**In the Gauhati High Court**  
**Case No : Writ Petition (C) No. 149(K) of 2010**

Smti Tokhuli

APPELLANT

Vs

Union of India and others

RESPONDENT

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**Date of Decision :** 22-03-2016

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2016) 162 AIC 757 : (2016) AIR(Gauhati) 112

**Hon'ble Judges :** Ajit Singh, C.J. and N. Chaudhury, J.

**Bench :** Division Bench

**Advocate :** A. Zho, Advocate, for the Appellant; Yangerwati, C.G.C, for the Respondent

**Final Decision :** Dismissed

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## Judgement

N. Chaudhury, J. (Oral) - The petitioner in this case has approached this Court for an appropriate direction directing the respondent Union of India to make payment of Rs.10 lakhs as compensation against death of her son by army. It is the case of the writ petitioner that Army Personnel of 5th Bihar Regiment based at Diphu in the State of Assam opened fire at the son of the petitioner on 31.10.2007 at about 5.00 P.M. at Burma Camp, Lotha Colony, Dimapur, Nagaland causing death of her 21 years old son Imkongtemsu and injury on her son-in-law.

2. It is alleged that on the fateful day, the deceased was travelling with Shri Akato Sema, aged about 32 years in a Gypsy bearing registration number NL 07-3557 from Diphu to Dimapur after completing some personal business there. Army Personnel chased them from behind on mere suspicion that they were NSCN(IM) rebels and were involved in transshipment and smuggling of weapons in general area of Kathkati. After reaching Burma Camp, Lotha Colony, Dimapur, Army personnel stopped their vehicle for frisking and then they opened fire from close range resulting in death of Imkongtemsu and injury to Shri Akato Sema. Shri Akato Sema suffered bullet injuries on his both legs as well as on his right palm and he was taken to Dimapur Hospital. Dimapur East P.S. Case

No.202/2007 under section 302/34 IPC was registered in respect to the incident. The police released the dead body of Imkongtemsus to the petitioner on the same day. In course of enquiry in the aforesaid Dimapur East Police Station case, it came to light that some Army personnel along with some persons in civilian dress were seen near the place of occurrence and one person identified himself as Major Nitin Kumar of 5th Bihar Regiment based at Diphu. Two empty cases of AK-47 were seized from the vehicle from the place of occurrence. The Superintendent of Police Dimapur wrote a letter to the Judicial Magistrate, Dimapur Court, Dimapur in Dimapur East P.S. Case No.202/07 under Section 302/34 IPC for requisitioning appearance of Major Nitin Kumar of 5th Bihar Regiment, however, to no avail. On the other hand, Army asserted that they received information from reliable sources of Army intelligence unit about transshipment and smuggling of weapons in general area Khatkhathi for which they held an operation. Having spotted a Maruti Gypsy bearing registration No.NL-07-3557, they made a hot chase but when they came closer, they encountered fires and so had to return fire for defence. One No.4279230 Sepoy Santosh Singh was injured on his left arm and right lower abdomen. He was shifted to Military Hospital at Dimapur and he was treated there. In course of exchange of fire, one person Imkongtemsus died and other person was injured who was also shifted to the same hospital. According to the Army, the deceased Imkongtemsus and Shri Akato Sema belonged to NSCN (IM) cadre. On 20.09.2009, the Sub-Inspector J. Konyak submitted his Final Report vide No.121/09 stating that despite requisition given by him to examine the drivers of the Army personnel during investigation, they were not produced, for which the I.O. returned the police case for final report due to insufficient evidence. Under such circumstances, the writ petition has been filed by the mother of the deceased asking for compensation against killing of her son by the Army Personnel of 5th Bihar Regiment.

3. This Court issued notice and thereupon, the respondent Union of India submitted an affidavit-in-opposition on 20.06.2011. The affidavit was sworn in by one Colonel Yogesh Kumar Gautam of the 5th Bihar Regiment. He stated that during the aforesaid operation, the army intercepted a white Maruti Gypsy bearing Registration No.NL-07-3557 in the general area Khatkhathi, but the occupants resorted to firing at Army for which the Army also had to open fire in self defence. In the process, one Shri Akato Sema was injured and Imkongtemsus died. Similarly, Sepoy Santosh Singh was also injured by the shots fired by the militants sitting in the aforesaid Gypsy. The injured Sepoy Santosh Singh and Shri Akato Sema were evacuated to Military Hospital at Dimapur. Dimapur Police confiscated the dead body and the white Maruti Gypsy bearing registration No.NL-07-3557 and evacuated Shri Akato Sema without arresting him. It is further stated by the Army that they recovered one 9mm pistol, one country made sten gun with two live rounds of 9mm and empty cases of 9mm rounds fired by terrorists. According to them, the place of occurrence is covered by the provisions Section 3 of the Armed Forces Special Powers Act, 1958 and the Army

personnel were acting well within the purview of Section 4(a) of the said Act.

4. The petitioner, thereafter, filed an affidavit-in-reply reiterating her stand that her son was killed by the members of the 5th Bihar Regiment although her son was not an extremist and was a student at the time of his death. The averments made in the affidavit-in-opposition in regard to fire and encounter was also denied.

5. It is to be noted here that this Court passed an order on 11.02.2014 directing the Deputy Commissioner/District Judge, Karbi Anglong, Assam to conduct an enquiry in regard to the aforesaid incident after giving opportunity to both the parties to lead evidence. The Deputy Commissioner/District Judge, Karbi Anglong by his letter dated 8th December, 2014 informed the Registry of this Court that although the police case was registered at Bokajan Police Station vide No.275/2007 under Section 120(B)/326/307 IPC read with Section 25(1-b)(a)/27 Arms Act, but the said case was subsequently transferred to Dimapur East Police Station as the place of occurrence falls under the jurisdiction of Dimapur East Police Station. The Deputy Commissioner, therefore, expressed his inability to make any inquiry into the matter. Thereafter, this Court passed a fresh order on 18.05.2015 directing the District and Sessions Judge, Dimapur to conduct an enquiry in connection with the incident of Dimapur East Police Station Case No.202/2007 after giving opportunity to both the parties to lead evidence and, thereafter, to submit a report to the High Court. The learned District Judge was also directed to permit the parties to appear through their counsel to examine and cross-examine the witnesses. The District Judge was also directed to permit the parties to submit documentary evidence.

6. On the basis of the direction given by this Court on 18.05.2015, the District and Sessions Judge held an enquiry and submitted a report. In his report dated 1.9.2015, the District Judge held the view that I.O. J. Konyak was the investigating officer in the case. He deposed that Imkongtemsu Ao, aged about 21 years, was shot dead by the Army Personnel of 5th Bihar Regiment posted at Diphu on 31.10.2007. ASI Zachamo lodged the FIR and claimed to have rushed to the place of occurrence after getting information. He found the dead body of Imkongtemsu Ao inside the Gypsy. According to him, he died due to bullet fired upon by the Army personnel who were travelling in Tata Spacio NL-07T-0151 and Tata Sumo AS-01Y-8048 which were found at the spot. Ext-A is the FIR lodged by ASI Zachamo. Ext.B is the inquest report submitted by the I.O. and Ext. C is the document for handing over the dead body of the deceased. The learned District and Sessions Judge held that Shri Akato Sema was a cadre of NSCN-IM Civil setup and he was together with the deceased in the Maruti Gypsy No.NL-07-3557. Ext.P-1 is the final report of the I.O. and Ext. F is the identify card of the deceased. With these findings, the learned District and Sessions Judge recommended that deceased died in the encounter committed by the 5th Bihar Regiment on 31.10.2007. No affidavit was filed by the respondent Army Personnel before the Learned District Judge and they had not cooperated in the

course of enquiry. It was further held that deceased Imkongtemsu Ao was a member of an underground element.

7. We have heard Mr. A.Zho, learned counsel for the petitioner and Mr. Yangerwati, learned Central Government Counsel, appearing for the respondent Union of India.

8. Drawing attention of the Court to the report submitted by the learned Sessions Judge, Dimapur, Mr. A. Zho, learned counsel for the petitioner would argue that deceased Imkongtemsu Ao was a student of ITI. He was travelling in a Maruti Gypsy along with his brother-in-law. He had no connection whatsoever with any terrorist organization, but the personnel of 5th Bihar Regiment killed him in cold blood without there being any rhyme or reason. The Army Personnel did not lead any evidence before the District and Sessions Judge to show that there was any reason for opening fire at an innocent and unarmed civilian and so it is a fit case for granting compensation to the tune of Rs.10 lakhs to the mother of the deceased.

9. Per contra, Mr. Yangerwati, learned Central Government Counsel would submit that final report submitted by Mr. J. Konyak, Sub-Inspector of Police, who is the I.O. of the aforesaid case goes to show that army had recovered one country made 9mm pistol with live rounds and a country made stengun. The Army personnel lodged FIR with Assam Police at Bokajan Police, which is only about 10 kilometres away from the place of occurrence. Bokajan Police Station Case No.275/07 under Section 120(B)/326/307 IPC read with Section 25(1-B-(a))/27 Arms Act was registered thereby. Assam Police seized the aforesaid arms and ammunitions on being produced by the Army Personnel and the same were sent to C.O. 9AP BN Brohompur, Nagaon to ascertain whether any shot was fired from the seized arms. He also urged that I.O. of the case had not ruled out the possibility of involvement in underground activities by the deceased. He further argued from the affidavit-in-opposition that Sepoy Santosh Singh was injured by firing made by the occupants of the aforesaid Gypsy, but for which the Army had to open fire in self defence. Injured Sepoy Santosh Singh and injured Akato Sema were admitted to Military Hospital at Dimapur and so it is clear that Army had to open fire to defend themselves. According to him, there is nothing on record to suggest that there was no encounter at all. On these arguments, he claimed that there are disputed question of facts involved in the matter and so it is not possible to ascertain as to whether the deceased was really innocent or not.

10. Having heard the learned counsel for the parties and on consideration of the materials annexed to the report submitted by the District and Sessions Judge, Dimapur, it appears that there was an incident of firing on 31.10.2007 at about 5.00 P.M. near Burma Camp area of Dimapur. Immediately after the incident had taken place, one ASI Zachamo of East Dimapur Police Station rushed to the spot. He went there only after obtaining telephonic information from the Police Control Room that there was a firing incident at Burma Camp, Lotha Colony at Dimapur. He along with IRB Patrolling party rushed to the place of occurrence and found a

dead body inside a Gypsy B/R No.NL-07-3557. According to him, the firing was done by the army personnel travelling in Tata Spacio NL-97T-0151 and Tata Sumo AS-01-Y-8048 which were found at the spot. On the basis of the aforesaid FIR, Dimapur East Police Station Case No.202/2007 under Section 302/34 IPC was registered and, ultimately, final report was submitted by SI J. Konyak of the same police station. This I.O. stated in his final report dated 20.09.2003 as follows :-

"During the course of investigation the complainant as well as witness were examined and ascertained that the injured person is Shri Akato S/O Shiniho and the deceased was Imkongtemsu S/I Chubasashi V/O Longkum. The deceased was also the brother-in-law of the injured person. The deceased was handed over to the relative and injured Akato was shifted to Civil Hospital Dimapur for treatment. Further ascertained that Akato is a cadre of NSCN(I-M) Civil set up. It was ascertained that the Army involved in the firing is none other than 5 Bihar Regiment based at Diphu. They have also recovered one country made 9mm pistol with two live rounds and a country made stengun and later lodged an FIR with Assam police. Subsequently, Bokajan PS registered a case vide No.275/07 U/S 120(B)/326/307 IPC R/W 25(1-B)(a)/27 Arms Act, although the P.O. falls within Nagaland. The Assam police had also seized the above noted arm on being produced by the army personnel. The said arms were sent to C.O. 9AP BN Brohompur, Nagaon to ascertain whether any shot was fired from the seized arms. On the other hand, when the P.O. was visited, a vehicle NL-07-3557 Gypsy and 2 (two) nos of AK-47 empty shell were recovered and seized. However, the seized vehicle NL07-3557 as released on zimma vide zimma order dated 19/11/07 issued by Shri Mangyang Lima ADC (JUDL) Dimapur, Nagaland. Meanwhile, certificate from local authorities stating that the deceased Imkongtemsu S/O Chubasashi V/O Longkhum acknowledging that he was a computer student and not involved in any underground groups. However, when he was found together with UG activities Akato his involvement in the set-up can not be ruled out."

11. Learned District and Sessions Judge, Dimapur recorded the statement of Shri J. Konyak, Sub-Inspector of Police who held the investigation, but evidence of ASI Zachamo was not recorded. It is this ASI Zachamo who had rushed to the spot immediately after receiving the telephonic information from the Police Control Room after the firing had taken place. It is his version that the aforesaid two vehicles of the Army personnel were found at the spot of firing. He alone could have said as to whether Major Nitin Kumar was present at the place of occurrence or not. Once he had come forward to depose, the respondents could have cross-examined him to verify the content of the FIR.

12. It is also found from the final report of the I.O. that immediately after the incident had taken place, the army personnel submitted FIR before the Bokajan Police Station leading to registration of Bokajan PS registered a case vide No.275/07 U/S 120(B)/326/307 IPC R/W 25(1-B)(a)/27 Arms Act. It is

specifically mentioned in this report that arms recovered were one country made 9mm pistol along with two live rounds and a country made sten gun. It came to light from the report submitted by the Deputy Commissioner, Karbi Anglong that records of Bokajan P.S. Case No.275/07 was handed over to Dimapur East Police Station for enquiry. The final report submitted by the I.O. J. Konyak is silent about the outcome of enquiry in regard to recovery of weapons from the deceased and his companion. Rather, it is this I.O. who had not ruled out the possibility of underground connection of the deceased. These materials were very much there before the learned Sessions Judge, but he did not make any discussion whatsoever in the report. Although the final report dated 20.09.2009 and the deposition of the two witnesses were annexed to the report, but he did not consider as to whether there was sufficient materials to hold that deceased had no connection with underground extremist when there is an allegation that country made pistol and country made sten gun were recovered from their possession.

13. Having considered the report submitted by the then Deputy Commissioner, Karbi Anglong and the then District and Sessions Judge, Diphu, it does not conclusively emerge that the army had opened fire on the deceased and his companion without there being any provocation. It cannot be ignored that when firing was made on the two occupants of the Gypsy, one Sepoy Santosh Singh was also injured. If the occupants of the Gypsy had not fired shots, in that event, there would have been no reason for injury on the body of one Sepoy Santosh Singh of the 5th Bihar Regiment. Injured Sepoy Santosh Singh and injured Shri Akato Sema were both admitted to Military Hospital at Dimapur. The final report submitted by the police does not show anything as to when were these two persons admitted to Military Hospital and as to were when they released. Since there is an injury on the side of the army as well, there was a reason to believe that there was an encounter between the two occupants of the Gypsy on the one side and the members of the 5th Bihar Regiment on the other. It does not indicate that the encounter was fake. Moreover, it is to be noted that Shri Akato Sema, who is described to be a member of NSCN(I-M) civil set-up, both by the learned District Judge as well as the I.O., did not make any grievance for the injury sustained by him in the same firing incident. He has also not made any claim for compensation and for punishment of the Army Personnel because of opening fire on him.

14. This, coupled with the recovery of arms from the possession of the injured Akato Sema and the deceased Imkongtemsu Ao, fortifies the possibilities that there was an encounter between the Army and the occupants of the Gypsy. Unless there is specific and clear evidence, it cannot be held that Army opened fire without any provocation. It is not a case of custodial death or killing of innocent person by army. It is a case of injuries on both sides. It cannot be lost sight of the fact that the place of occurrence where army had opened fire is a disturbed area within the meaning of Section 3 of the Armed Forces Special Power Act, 1958 and is plagued by extremist activities. Since disputed questions

of fact are apparent in the present case, we do not feel that this is a case for giving direction to pay compensation under writ jurisdiction.

15. The writ petition being devoid of merit is, accordingly, dismissed.

16. No order as to cost.