
(2006) 08 GAU CK 0019
In the Gauhati High Court

Sukhato Sema, Nagaland

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-08-2006

Acts Referred:

Citation : (2006) 08 GAU CK 0019

Hon'ble Judges : M.B.K.Singh, J

Bench : Single Bench

Advocate : Wilkinson, S.Nepolean Singh, Mark Kapai, C.Komal, Advocates
appearing for Parties

Judgement

1. This Writ petition has been filed alleging arrest of Mr. Tokhuvi Sema, a Member of National Socialist Council of Nagaland and two others by the Army personnel on 11.4.97 at about 10.30 P.M. from the residence of Mr. MC. Malungchang of Tribal Colony Imphal and causing death of the said Tokhuvi Sema after some days of the arrest while in the Army custody and praying for directing the concerned respondents for payment of compensation of Rs. 5 lakhs in respect of the said custodial death and also for prosecution of the concerned Army personnel involved in causing the said death.

2. I have heard Mr. Wilkinson, Advocate assisted by Mr. Mark Kapai, Advocate appearing on behalf of the petitioner, Mr. C. Komal, learned Sr. counsel appearing on behalf of the respondents 1,2,4 and 5 and Mr. S. Nepolean, Advocate appearing on behalf of the Government respondents. The materials before the Court are also perused.

3. There is no dispute that the said Mr. Tokhuvi Sema is no more. There is also no dispute that he was with some Army personnel at the time of his death. However, there are disputes regarding the facts and circumstances under which he died and also regarding the facts as to when he was arrested/ picked up by the Army personnel. According to the petitioner, the said Tokhuvi Sema was arrested on 11.4.97 at about 10.30 P.M. from the home of MC Malungchang at

Tribal Colony Imphal along with one Y. Yuimi and the said MC Malungchang by some Army personnel and on 13.4.97, the said MC Malungchang was released but the other two arrested persons were not released. Further, according to the petitioner, despite direction of this Court in C.R. (HC) No.14 of 1997 on 21.4.97, in effect, for releasing the said arrested two persons, the said Y. Yuimi only was handed over to Imphal P.S. on 24.4.97, but the said Tokhuvi Sema was not released and he died while he was in the illegal detention of the Army personnel. On the other hand, as per counter affidavit filed on behalf of the respondents 1, 2, 4 and 5, the said Tokhuvi Sema was picked up for questioning by the Army from the general area of village, Songsang on 3.5.97 at 0630 hrs. and he was S.S. Sergeant Major, NSCN (IM). It was ascertained that the said Tokhuvi Sema had sustained a gun shot wound on his right arm during a clash with another insurgent group, P.L.A., in the first week of April, 1997. Further, according to the respondents 1, 2, 4 and 5, the said Tokhuvi Sema agreed to guide the Army Column to the route of infiltration used by underground groups and on 4.5.97 at about 0345 hrs, while he was leading some personnel of the Army at 2 ? Km south of village, Diyalkhai in Churachandpur, the party was attacked by some U.G. and in the exchange of firing in between unknown U.G. and the personnel of the army in the said party, he received bullet injuries leading to his death at the spot. Respondents 1, 2, 4 and 5 stated in their counter affidavit that the dead body of the said Tokhuvi Sema was handed over to the O.C. Thanlon P.S. on 5.5.97 and that FIR case No.3 (5)97 Thanlon P.S. was registered.

4. In respect of the disputed questions of facts, this Court, vide order dated 4.6.03, directed the concerned District Judge to make an enquiry about the matter and submit a report. The learned District Judge, Manipur West submitted her report dated 30.4.05. Copies of the said report were furnished to both sides with direction for filing their objections/comments, if any, to the said report within 4(four) weeks. None of the parties filed any objection/comment.

5. It is ascertained that 6 PWs were examined on the said of the petitioner. However, no witness was produced on the side of the respondents 1, 2, 4 and 5 to substantiate their case. On the basis of the materials before her, the learned District Judge, Manipur West, held to the effect that the deceased Tokhuvi Sema had been apprehended by the Army personnel from the house of MC Malungchang at Tribal Colony Imphal on 11.4.97 and that he had not been picked up by the Army personnel from general area of village, Songsang Churachandpur. The learned District Judge, Manipur West was of the opinion that the death of the said Tokhuvi Sema had been caused by the Army personnel on 4.5.97 in their custody. Since the above said findings were made on the basis of the materials produced in the inquiry and since none of the parties has filed any objection/comment in respect of the said findings of the learned District Judge, Manipur West, despite having due knowledge about the said findings, the said findings are accepted as correct.

6. It is, thus, established that the said Tokhuvi Sema was arrested by the Army

personnel on 11.4.97 from the house of MC Malungchang. There is nothing to show that he was produced before the concerned Judicial Magistrate within 24 hours of the arrest. Nothing was produced on behalf of the respondents^{1,2, 4} and 5 to establish/prove their allegations that the said Tokhuvi Sema had been picked up for questioning by the Army from general area of Village, Songsang on 3.5.1997 at 0630 hrs. and that he had agreed to guide the Army Column to the route of infiltration used by U.G. groups. No evidence was produced to prove that the said Tokhuvi Sema had voluntarily stayed in the custody of the Army and that while he was leading a party of Army personnel, he received bullet injuries as a result of an attack made by some unknown U.Gs. leading to his death. On the basis of the said findings of the learned District Judge, Manipur West, the said Tokhuvi Sema was arrested by the Army personnel on 11.4.97, he was detained illegally in the custody of the Army personnel and his death was caused on 4.5.97 by the said Army personnel in their custody.

7. In the light of the above findings, I have no hesitation in concluding that the acts done by the said Army personnel were acts done in flagrant and gross violation of the fundamental rights of the said Tokhuvi Sema under Articles 21 and 22 of the Constitution of India. It is to be noted that the powers conferred under the Armed Forces (Assam & Manipur) Special Powers Act, 1958 only provide for cognizance of offences, search, seizure, arrest, destruction or armed dumps, shelter and structures used as training camps or as hide outs for armed gangs. The other functions have to be attended to by the State Criminal Justice Machinery, viz, the police, the Magistrate, the Prosecuting Agency, the Courts and the Jail etc. In Naga People's Movement of Human Rights Vs Union of India, 1998 (2) SCC 109, the Apex Court held that the powers that have been conferred u/s 4 of the Act do not enable the Armed forces of the Union to supplant or act as substitute for the civil power of the State and the said Act only enables the Armed Forces to assist the civil power of the State in dealing with the disturbed conditions affecting the maintenance of public order in the disturbed area. While considering the question of Constitutional validity or otherwise of section 4 (c) of the Act, the Apex Court held at para 49 of the judgment as under:

¶49. Under clause (c) of Section 4 power has been conferred to arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and the officer concerned is empowered to use such force as may be necessary to effect the arrest. The said power is not very different from the power which has been conferred on a police officer under Section 41 Cr.PC. Clause (c) has to be read with Section 5 of the Central Act which requires that any person arrested and taken into custody shall be made over to the officer incharge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest. It has been urged that there is nothing in Section 5 to indicate that the officer exercising the power of arrest under Section 4(c) is obliged to comply with the requirements of clauses

(a) and (2) of Article 22 of the Constitution. There is no basis for this contention. The power conferred under Section 4(c) read with Section 5 has to be exercised in consonance with the overriding requirements of clauses (1) and (2) of Article 22 of the Constitution which means that the person who is arrested by an officer specified in Section 4 has to be made over to the officer incharge of the nearest police station together with a report of the circumstances occasioning the arrest with the least possible delay so that the person arrested can be produced before the nearest Magistrate within a period of twentyfour hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person can be detained in custody beyond the said period without the authority of a Magistrate.?

8. The facts and circumstances have been established that the said Army personnel did not act in accordance with the relevant law and that they were fully responsible for the death of the said Tokhuvi Sema. The right to life of a citizen was deprived of after putting him to illegal detention. For the actions of the said Army personnel, the respondents 1, 2, 4 and 5 are vicariously liable.

9. It is well settled that in public law, claim for compensation is a remedy available under Article 32 and 226 of the Constitution of India for the enforcement and protection of fundamental and human rights. It is also well settled that the Central Government must be held responsible for the unlawful acts of its officers and that it must repair the damage done to the citizen by its officers for violating their indefeasible fundamental rights of personal liberty without any authority of law in an absolutely high handed manner. The Apex Court, taking note of growing custodial deaths and violence, has expressed its deep concern about this disturbing factor in D.K. Basu Vs. State of West Bengal reported in AIR 1997 SC 610 the Apex Court at para 22 of the said judgment, observed :

?22.Custodial death is perhaps one of the worst crimes in a civilized society governed by the Rules of Law. The rights inherent in Articles 21 and 22 (1) of the Constitution require to be jealously and scrupulously protected. We cannot whisk away the problem. Any form of torture or cruel, inhuman and degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilized nation can permit that to happen. Does a citizen shed off his fundamental rights to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be emphatic "No." The precious right guaranteed by Art. 21 of the Constitution of India cannot be denied to convicts, under trials, detenus and other prisoners in custody, except

according to the procedure established by law by placing such reasonable restrictions as are permitted by laws.?

10. After examination of its earlier judgments reported in *Juginder Vs State of U.P.*, (1994) 4 SCC 260, *Nalibati Behera Vs State of Orissa*, (1993) 2 SCC 746, *State of M.P. vs Shyamsunder Trivedi* (1995) 4 SCC 262, *Rudul Saha vs State of Bihar*, (1983) 1 SCC 141, *Sabastian M. Hongray Vs Union of India*, 1984 1 SCC 339, *Bhim Singh Vs State of J & K*, 1984(Supp) SCC 504, *Saheli, A Women's Resources Centre Vs Commissioner of Police*, 1990 1 SCC 422, *Kasturilal Ralia Ram Jain Vs State of U.P.*, 1965 SC 1039, the Apex Court noted that, indeed no express provision in the Constitution of India for grant of compensation for violation of fundamental right to life, nonetheless, this Court as judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life, and find a way out for compensation for unconstitutional deprivation of fundamental right to life and liberty by holding at para 55 of the said judgment in *D. K. Basu* (supra):

¶55. Thus, to sum up, it is now a well accepted proposition in most of the jurisdiction, that monetary or pecuniary compensation is an appropriate and indeed an effective and some times perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait jacket formula can be evoked in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.?

11. Keeping in view the above said well settled principles of law, this Court has to determine the quantum of compensation payable to the legal heirs of the deceased. There will always be certain amount of guess work involved in

quantifying the amount of compensation. The petitioner's prayer is for compensation of Rs.5 lakhs. In Nilabati Bahera (supra) wherein the petitioner's son died in police custody, Supreme Court awarded a compensation of Rs. 1,50,000/ with cost of Rs.10,000/ In Bihar Timung Vs Union of India and Ors, 1993(2) GLR 347 and Smt. Geeta Sangma Vs State of Nagaland & Others, 1993(1) GLJ 340, this Court awarded 2 lakhs and Rs.1.50 lakh respectively as palliative. In Zekheli Sema Vs Union of India & Others, 1998(4) GLT 333, this Court directed the respondents to pay a sum of Rs.2 lakhs as compensation to the petitioner in the nature of palliative. In Achang Pong vs Union of India & Ors, 2003 (2) GLT 94 this Court in the matter of custodial death of the father of the petitioner who was picked up by army personnel and later on his dead body was handed over to police with marks of bullet injuries, the compensation awarded by the Court was Rs. 3 lakhs. In Smt. Kangujam Ongbi Thoibi Devi Vs State of Manipur & Ors, 1999 Cril. Law Journal, 3584, the amount awarded by the Court to the petitioner in connection with the custodial death of the petitioner's son was Rs. 3 lakhs. Similarly in Noklen Lemba Vs State of Nagaland & Ors, 2005(1) GLT 474, compensation of Rs. 3 lakhs with cost of Rs. 15,000/ was awarded in the matter of custodial death of the writ petitioner's son.

12. Accordingly, having regards to all the relevant considerations, I direct the respondent, Union of India, to pay a sum of Rs. 3,00,000/ (Rupees Three Lakhs) to the legal representatives of the deceased, Tokhuvi Sema, and a sum of Rs.10,000/ (Rupees Ten Thousand) to the petitioner as costs. The Union of India shall deposit the compensation amount of Rs. 3 lakhs and the cost of Rs.10,000/ with this Registry within a period of 3(three) months from the date of receipt of this order. On being deposited, this Registry shall pay compensation amount of Rs.3 lakhs to the concerned legal heirs of the deceased after proper verification and identification and the cost of Rs.10,000/ to the petitioner after proper identification.

13. On the basis of the materials before the Court, it is not possible to ascertain the identity of the said Army personnel involved in arresting, detention and causing death of the said Tokhuvi Sema and as such this Court is not in a position to direct the respondents for prosecution of any specific person in accordance with law. Apparently, no FIR has been lodged by anybody alleging about the illegal arrest and detention of the said Tokhuvi Sema and also about causing of his death by the Army personnel. It is now more than nine years from the date of death of the said Tokhuvi Sema. From the side of the State respondents, nothing is disclosed about the result of the investigation of the FIR No.3(5)97 of Thanlong P.S. said to have been registered on the basis of a report lodged by an Army personnel in connection with the death of the said Tokhuvi Sema. If the investigation of the said case has not been completed, the concerned O.C. Thanlon P.S. shall have to take all the necessary steps for completion of its investigation without further delay. Further, it will be proper and just on the part of the respondents^{1, 4 and 5} to direct for inquiry by an appropriate Agency/authority for ascertaining as to who was responsible for the

said illegal arrest, detention and death of the said Tokhuvi Sema and if warranted under the law, to take necessary steps for prosecution of those responsible Army personnel.

14. With the above observations and directions, this writ petition stands disposed of.