

(2006) 09 GAU CK 0039

Gauhati High Court

Case No: None

Anil Ramchiary

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: Sept. 28, 2006

Acts Referred:

- Constitution of India, 1950 - Article 21, 226
- Penal Code, 1860 (IPC) - Section 307, 353

Citation: (2007) 2 GLR 379 : (2006) 4 GLT 620

Hon'ble Judges: B. Sudershan Reddy, C.J; B.P. Katakey, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

B. Sudershan Reddy, C.J.

The petitioner invokes the extra ordinary jurisdiction of this court under Article 226 of the constitution of India with a prayer to issue a writ in the nature of mandamus directing a judicial enquiry into the circumstances under which the petitioner's brother Sunil Ramchiary was killed by the army and bring the culprits to book and punish them as per law. It is also prayed to issue an appropriate direction directing the respondent to pay adequate compensation to the family of the deceased Sunil Ramchiary.

2. The allegations levelled in the writ petition are that on 28th March, 2001 at about 2-30 A.M. a group of army personnel visited the residence of the petitioner at village Agardhowa under Barama P.S. in the District of Nalbari and forcefully took away the petitioner's brother Sunil Ramchiary along with them. The army personnel ignored the protest and request made by the family members not to take him away.

3. It is further stated that even while the petitioner and other members of the family were in utter shock and fear by the sudden turn of events, they could hear the sound of gunshots immediately after sometime the army personnel left the

residence of the petitioner along with his brother Sunil Ramchiary. The petitioner along with some villagers went in search towards direction from where gunshots were heard. In the process they have reached the spot near Angardhowa Batho Temple, where they found pool of blood with signs of dragging, but not found any person in and around the vicinity. They have made enquires at Dhamdhama police station as well as the Barimakha Army camp but without any result. While the petitioner and other members were in total dark about the said Ramchiary they were informed by the police of Barama P.S. at about 2 P.M. on 28th March, 2001 about the death of Sunil. Based on the information so furnished by the police the petitioner and other family members went to Nalbari and received the dead body of Sunil Ramchiary from the Civil Hospital in the evening of the same day.

4. The case set up by the petitioner is that the deceased was picked up from his residence and was killed by the army without any reason or justification. It is a cold and calculated murder by the army. It is alleged that the army as usual set up a false claim that the deceased was a militant, and killed in an encounter with the army. It is asserted that the deceased was an innocent person. He was neither, a militant nor a member of any banned organization and no way connected with any unlawful activities whatsoever.

5. That on the basis of a false report of fake encounter given by the army, the Barama Police station registered Case Number 10/2001 u/s 307/353 of I.P.C.

6. It is contended that the army has no authority in law to torture and kill the people on mere suspicion of having extremist connections. The army failed in its duty to arrest the deceased if he was a militant and produce him before nearest police station within twenty four hours as required in law. The army failed to follow the instructions issued by Union of India from time to time as regards precaution required to be taken by the army while undertaking such operation.

7. Shorn of all the details the contention is that the army in a high handed and arbitrary manner extinguished the precious life of the petitioner's brother guaranteed under Article 21 of the Constitution of India. The petitioner accordingly prays the court to grant appropriate relief in the matter.

8. Detailed affidavit in opposition has been filed on behalf of the respondent No. 1 & 2 denying all the material averments and allegations made in the writ petition. The case set up by the army is that on receipt of specific information, that some NDFB militants were taking shelter in village Angardhowa with an intention of sabotaging the forthcoming assembly election, an army patrol was launched for search operation at the said village at 2330 hrs, on 27th March, 2001. When the army personnel were putting in the inner cordon surrounding the suspected house, the militants including the deceased tried to escape by firing at the army troops. The army personnel of the inner cordon chased the militants and opened fire in retaliation. The militants fled towards outer cordon of the army personnel placed

they and hence came into direct line of fire at a very close proximity the outer cordon. In the ensuing encounter one of the militant who was identified as Sunil Boro @ Sunil Ramchiary was killed at approx 0315 hrs on 28th March, 2001, while the others fled taking advantage of darkness. One 9mm revolver, 3 live rounds and 01 fired case recovered from the deceased. The dead body of the deceased along with the recoveries was handed over to O/C Barama police station on a proper handing taking over certificate and an FIR was also lodged by army.

9. It is asserted that the army have acted as per the provisions of Armed Forces Special power Act 1958 and have not flouted any norms. It was an encounter in which the deceased had fired at army jawans while trying to escape and the army opened fire in retaliation, which has resulted in the killing of the deceased. These facts were stated at the earliest in the First Information Report lodged immediately after the incident.

10. Having regard to the nature of controversy this court vide its order dated 4.11.2005 directed the District and Sessions Judge, Nalbari to cause an enquiry into the matter, record evidence of both sides and submit report within a period of four months. The parties were accordingly directed to appear before the District Judge on 24th January, 2005.

11. The District & Sessions Judge pursuant to the direction of this court made a detailed enquiry during which as many as four witnesses were examined on behalf of the petitioner. Some witnesses were examined as court witnesses 1 to 6. Army did not examine any witness on their behalf but cross-examined the RW. 1 to 4.

12. P.W. 1 Anil Ramchiary stated in his evidence that on 28th March, 2001 at about 2.30 A.M. about 6 Army personnel surrounded their dwelling house and enquired about Sunil Ramchiary and having entered forcefully into the house took away his brother Sunil Ramchiary out of his house. On raising hullah many villagers came and assembled and after about half an hour of the army personnel taking away Sunil they have heard sound of firing from a distance of half kilometer. Then they thought Sunil was killed. He along with some villagers went to that place from where they heard firing. They saw some blood near the Bathow temple at about 6 A.M. he and villagers came to Dhamdhama out post at about 8 A.M. That he along with Gaonburha went to Barimakha Army camp to enquire about Sunil. Thereafter they went to Dhadhama police out post where they were informed that the dead body of Sunil was handed over in the police station by army and the dead body was sent to Nalbari Civil hospital. P.W. 1 and others went to Nalbari Civil hospital and saw the dead body with bullet injuries on the chest.

13. P.W. 2 is a neighbour of deceased Sunil. He did not say anything about the incident as such worth noticing. The District Judge observed that his evidence is not coherent since he gave different version as to he was actually doing when the army allegedly came to the village and the house of the deceased. P.W. 3 & 4 also did not

state anything about the incident.

14. C.W. 2 Dr. Nalendra Narayan Deka, Medical Officer stated in his evidence that he performed post mortem with Sunil Ramchiary in connection with Barama P.S. case No. 10/01 and found the following injuries:

(1) One oval shaped lacerated injury 2cm x 1cm, front of left side of chest just medial to left nipple (entry), (2) (3) Oval wound 2cm x 1cm, left side of chest in front, close to injury No. 2 (entry), (4),(5) and (6). Three (3) lacerated injuries 2cm x 5cm each, in close proximity left side on back in 10th intercostals space (exit).

In his opinion death was caused by bullet injury. He found bullet injuries entered from front side and exit from back side.

The Bullet injuries were caused not at close range .The injuries caused were attributable not to any close range firing. He stated "if bullet injury was made at close range there would have been burnt injury" (sic.)

15. The District Judge upon appreciation of evidence and material available on record held that:

The pertinent question is to ascertain whether army took Sunil Ramchiary from his house showing force and using muscle power. The death of Sunil due to bullet injuries fired by army is not disputed. It is not explained by any of the parties or proved by adducing any evidence at what circumstances the bullet injuries were caused having entry on the front side and exit injury on the backside of the dead body. It is also not explained or proved by evidence by any of the parties how bullet injuries were found not to have been fired from close range.

O.P. Nos. 1 and 2 by way of adducing evidence did not substantiate their plea that army was in operation of cordoning extremists. The brothers of the deceased and the villagers of Angardhowa made the statements that they saw army or heard noise in the house of Sunil Ramchiary. The presence of army in the house of Sunil Ramchiary in the night of incident can be held from the evidence of brothers of Sunil Ramchiary. It also can be held that army took Sunil Ramchiary from his house in the night of incident showing force. The alleged encounter of militants with the army lacks evidence.

16. The army filed its objection to the report submitted by District Judge, inter alia, contending that the conclusion drawn by District Judge is not based on proper appreciation of evidence. There is no evidence worth mentioning produced on behalf of the petitioner except the self-serving statement of the petitioner himself who is examined as P.W. 1. It is also contended that the District Judge committed serious error in giving no credence to the factum of recovery of weapons from the spot and duly handed over to the police .The weapons recovered from the slain militant credibly proved that the deceased fired at the army and in retaliation army open fire and that is how the deceased got hit on the front side of his body. The

findings of the District Judge that the army failed to explain as to under what circumstances the bullet injury was caused is perverse.

17. The learned Counsel for the petitioner relying upon the report of the District Judge prayed to grant relief as prayed for. The findings according to the learned Counsel did not suffer from any infirmity. The findings even to be taken as prima facie are enough to allow the writ petition as prayed for. The learned standing counsel of the Union of India submitted that the conclusions drawn by the learned District Judge are *epsi dixit* since they are not based on any evidence.

18. We have carefully considered the rival submissions. We are not unaware of the fact that the proceeding on hand is confined itself to adjudicate issue relating to guarantee of fundamental rights and the enquiry itself is confined to record if there is any infringement of right to live or personal liberty at the hands of the army. The enquiry is not for the purpose for adjudicating guilt of any officer with a view to record any conviction and award sentence. The limited scope of enquiry is to decide whether the guarantee of fundamental rights of the person under Article 21 has been violated and whether the State is liable to pay any compensation for such infringement. It is well settled that public law remedy proceeding cannot be used as a substitute for the enforcement of private law for awarding damages which can be enforced efficaciously through ordinary process of court. The court, however, may award compensation in a proceeding under Article 226 of the Constitution based on strict liability for contravention of fundamental rights.

19. In [Sube Singh Vs. State of Haryana and Others](#), the Supreme Court cautioned that before awarding compensation the court will have to post its following questions:

- (a) whether the violation of Article 21 is patent and incontrovertible,
- (b) Whether the violation is gross and of a magnitude to shock the conscience of the court.
- (c) Whether the custodial torture is supported by medical report.

The court held where there is no evidence of custodial torture of a person except his self serving statement and where such allegation is not supported by any medical report or other corroborative evidence or where there are clear indications that the allegations are false or exaggerated fully or in part, the courts may not award compensation as a public law remedy but relegate the aggrieved party to the traditional remedies.

20. We are required to consider the case at hand in the light of the law so declared and laid down by the Supreme Court. The conclusion drawn by the learned District Judge to say in least is vague and indefinite in their nature. That except PW1 no other witness examined on behalf of the petitioner supported the case set up by the petitioner. Learned District Judge himself disbelieved the evidence of PW 2. PW 3

and 4 did not state any thing worth mentioning in their evidence to arrive at any conclusion based on their evidence. The doctor who conducted the post mortem examination did not support the version of the petitioner and as a result we are left with conflicting versions one put forth by the petitioner and other by the army. The learned District Judge without any basis whatsoever observed PW 1, 2, 3, and 4 stated about taking of Sunil Ramchiary by the army in the night from his house. Having stated so the learned District Judge observed out of those witnesses only PW 1 was present in the house of Sunil Ramchiary who stated that about 2.30 A.M. the army personnel having enquired about Sunil took him and Sunil outside the house and took away Sunil with them. This part of the story is not supported by any witness. The findings are self contradictory on the face of it.

21. In such view of the matter we find it difficult to accept the conclusion drawn by the learned District Judge based on which no relief could be granted. Having regard to doubtful nature of the findings recorded by the learned District Judge we considered that it would be inappropriate to award any compensation based on the report of the learned District Judge.

22. We accordingly relegate the petitioner to the traditional remedies. It is needless to observe that in case .if the petitioner avails any such remedies the same may have to be considered on its own merits uninfluenced by the observation and conclusion drawn by the District Judge in his report and as well as the observations if any made in this order.

23. The writ petition fails and shall accordingly stand dismissed without any order as to cost.