

Ranjan Gogoi, J

This writ petition has been filed seeking appropriate orders from the Court for payment of compensation and registration of a criminal proceeding in respect of the death, in Army custody, of four persons including the 27 year old son of the writ petitioner. According to the writ petitioner, his son Mankeswar Basumatary along with Danswarang Basumatary, Philimon Campramari and Kishore Narzary were picked up by the Army personnel of Runikhata Army Camp at about 11-11.30 p.m. of 19.5.2003. According to the petitioner, he along with the parents/ guardians of the other three boys made frantic search for the missing boys in course of which they had visited several police stations of the locality and had also approached the Deputy Commissioner and the Superintendent of Police, Kokrajhar. However, on 22.5.2003, the petitioner received information that his son along with the other three boys had been killed in an encounter with the Army. Contending that no such encounter had taken place and that the four boys had been killed in cold blood by the Army personnel, this writ petition has been filed claiming the reliefs earlier noticed.

2. The claim made in the writ petition was resisted by both sets of respondents in the writ petition i.e. the Union of India and the State of Assam. According to the Union of India, none of the aforesaid four boys were picked up in the night of 19.5.2003, as alleged by the petitioner. Rather, the case of the Union, as evident from the affidavits filed in the present case, was to the effect that there was an encounter with some unknown terrorists at about 9.30 p.m. of 21.5.2003 at a place called Tukri Basti. In the course of such encounter four terrorists were killed by the Army and their dead bodies were handed over to the Runikhata Police Out Post at about 3 a.m. of 22.5.2003. In so far as the State of Assam is concerned, the affidavit filed by the Superintendent of Police, Kokrajhar would seem to indicate that according to the State respondents, the deceased persons were active members of NDFB (National Democratic Front of Bodoland), a banned organization.

3. The stand taken by the contesting parties before the Court having given rise to two conflicting versions with regard to the core facts that were essential to be determined, a learned Single Judge of this Court by order dated 31.3.2008 directed an enquiry to be made by the District & Sessions Judge, Kokrajhar with regard to the circumstances in which death of the aforesaid four persons had occurred.

4. The learned District & Sessions Judge, Kokrajhar who was appointed as the Enquiry Officer by the above stated order of the Court, thereafter, issued notice to all the contesting parties who on receipt of notice entered appearance before the Enquiry Officer. In the course of the enquiry proceedings six persons in all were examined on behalf of the writ petitioner. The aforesaid six persons included the parents/ guardians of the deceased boys as well as the village headman, one Samuel Narzary (P.W.5) and an independent person Nicholas Narzary, who was examined as P.W.6. On behalf of the Army authorities apart from the reliance placed on the affidavits filed in the writ petition, documents were also laid before the Enquiry Officer to prove and establish that the four boys had died in an Army encounter. The aforesaid documents brought on the record of the enquiry by the Army authorities were in the form of situation reports submitted

by one Lt. Pankaj Sarma. Specifically, it must be noticed that there were four sets of such situation reports dated 19.5.2003, 21.5.2003 and two separate reports, both dated 22.5.2003. The learned Enquiry Officer on due consideration of the cases projected before it and after taking into account the oral and documentary evidence adduced by the parties, came to the conclusion that in the instant case it cannot be said that the death of the four boys had occurred in the course of an encounter, as claimed by the Army. The learned Enquiry Officer also came to the specific finding that the four boys were picked up by the Army personnel at about 11-11.30 p.m. of 19.5.2003 and were taken from their houses by the Army personnel. Subsequently, the dead bodies of the aforesaid four boys were handed over to the Runikhata Police Out Post on 22.5.2003 by the Army.

5. The report of the learned District & Sessions Judge, Kokrajhar having been submitted to the Court, by earlier orders passed, the Court had directed copies of the said report to be made available to the learned counsels for the petitioner, the Union of India as well as the State Government. On receipt of the report of enquiry, objections have been filed on behalf of the Union of India urging the Court not to accept the report submitted by the learned District & Sessions Judge, Kokrajhar.

6. We have perused the report submitted by the learned District & Sessions Judge, Kokrajhar; the evidence adduced in the course of the enquiry proceedings and the objections filed by the Union of India. We have also heard Mr BK Mahajan, learned counsel for the petitioner; Mrs. R Bora, learned counsel for the Union of India and Mr PS Deka, learned Govt. Advocate, Assam.

7. A consideration of the evidence of P.W.1 to 4 who are the parent/s/ guardians of the four deceased boys would go to indicate that Army personnel had visited their respective houses in between 11 to 11.30 p.m. of 19.5.2003 and had taken each of the deceased along with them. Thereafter, in the next morning P.W.1 to 4 along with P.W.5 the village headman had visited different police stations located in the area trying to trace the whereabouts of the missing boys. Not being very successful, P.W.1, Sri Hasa Basumatary (writ petitioner) filed a complaint in this regard before the Deputy Commissioner, Kokrajhar who endorsed it to the Superintendent of Police, Kokrajhar for necessary enquiry. The filing of the complaint before the Deputy Commissioner, Kokrajhar and forwarding of the same by the office of the Deputy Commissioner to the Superintendent of Police, Kokrajhar has been proved by the evidence and the materials adduced in the course of the enquiry proceedings. The materials on record also indicate that in the course of the search of the missing boys by P.W.1 to 4 they had come to Runikhata Police Out Post where they were informed that their respective sons/ wards had been killed in a Army encounter and that the dead bodies were lying in a vehicle parked within the Police Out Post.

8. P.W.5, Samuel Narzary, the headman of the village, in his deposition before the Enquiry Officer had stated that at about 11 p.m. of 19.5.2003 on hearing gun shots he came out to his courtyard with his wife and found hue and cry coming from the northern side. According to P.W.5, he, thereafter, went to the house of Hasa Basumatary (writ petitioner) and found his wife weeping on account of the fact that her son Mankeswar Basumatary had been picked up by the Army personnel.

9. P.W.6, Nicholas Narzary in his deposition before the Enquiry Officer had stated that at about 11 p.m. of 19.5.2003 while he was sleeping in his house on hearing gun fire he came out along with his wife and could hear cry and lamentation coming from the northern side of his house. According to this witness, he could see four boys being taken by the Army personnel and some of the guardians following them.

10. A close look of the evidence tendered by P.W. 1 to 6 examined in

the enquiry held leaves no room whatsoever for taking the view that the said witnesses are in any way unreliable or had been discredited in the course of their cross-examinations. However, Mrs. R Bora, learned counsel for the Union of India had pointed out that P.W.2 one Khanat Basumatary, elder brother of deceased Danswarang Basumatary in his cross-examination had stated, it was dark night. Out of fear I did not come out from my room when Army personnel picked up my brother from the house. I was reported by Hasa Basumatary that the person who picked up my brother were Army personnel. Accordingly, Mrs. Bora, learned counsel, has argued that P.W.2 could not have seen his brother being taken away by the Army personnel.

11. We have considered the submissions advanced by Mrs Bora, learned counsel appearing on behalf of the Union of India and have read and re-read the entire of the evidence of P.W.2. It is our considered view that the above statement in the cross-examination of P.W.2 cannot be considered in isolation and the evidence of the said witness properly construed indicates that while he had seen the Army personnel taking his brother from his house, out of fear he had not come out from his room. It is not the statement of P.W.2 that he had locked himself in the room or that the outside of the room was not visible while he had remained confined to his room out of fear.

12. If the evidence of P.W.1 to 6 is to be accepted, which we are inclined to do, it has to logically follow that after the four boys were picked up by Army personnel in the late evening of 19.5.2003 they were in Army custody until their dead bodies were handed over to the Police Outpost on 22.5.2003. If a person in Army custody dies while in such custody, it is really for the Army authorities to explain how the death had occurred. In the present case, such explanation has been forthcoming with the version that an encounter had taken place at about 9.30p.m. of 21.5.2003 between some extremists and the Army. If the deceased persons were all along in Army custody from the evening of 19.5.2003 it is incomprehensible as to how they could be involved in an encounter with the Army on 21.5.2003, as claimed. The story of encounter, therefore, has to be necessarily dis-believed. The said fact would lead to the conclusion that the death of the four boys, while in Army custody, has remained unexplained by the Army.

13. There is yet another reason for which we are not inclined to accept the Army version. A reference has been made to the four situation reports which were laid before the Enquiry Officer on behalf of the Army authorities. It has also been noted that there are two reports both dated 22.5.2003. In one of the reports of the said date (for convenience referred to as 'the first report') the situation and incidents upto 0800 hours of 22.5.2003 have been stated in details. In the said report there is no mention of any encounter or death of any terrorist in such encounter. However, in the other report (referred to as 'the second report') there is a mention of an encounter, death of four extremists and the handing over of the dead bodies of the four extremists to the Runikhata Police Out Post at 0300 hours of 22.5.2003. If the incident had occurred as claimed by the Army at 9.30 p.m. of 21.5.2003, it had to be explained by the Army authorities why the said incident was not mentioned in the first report though in the said report incidents upto 8 A.M. of 22.5.2003 have been stated. It was also necessary for the Army to explain why two reports covering the same time span was required to be prepared. No such explanation has been forthcoming on behalf of the Union of India.

14. In the above circumstances, we hold the Army authorities to be responsible for the death of Mankeswar Basumatary along with Danswarang Basumatary, Philimon Campramari and Kishore Narzary. The above finding of ours would entitle the family members of the deceaseds to compensation in the domain of public law on account of the infringement of the fundamental rights of the victims guaranteed by Article 21 of the Constitution. The further question that will be required to be determined by us is the extent/quantum of the compensation and whether

r the provisions of penal law should be pressed into service as against the erring Army personnel.

15. From the post mortem report which has been furnished to us by the learned counsel for the petitioner, we find that all the deceased persons were young men between 25 to 27 years of age. They were all bachelors and were working as cultivators. The determination of the extent or quantum of compensation necessarily involves a subjective element though efforts must be made to introduce as much objectivity as possible in such an exercise. Taking into account the age of the deceased, their occupation and other relevant circumstances, we are of the view that a compensation amount of Rs. 3.50 lakhs each would meet the ends of justice. We, accordingly, direct the Union of India to pay the aforesaid amount to the respective heads of the families of the deceased persons within a period of two months from the date of receipt of this order or a certified copy thereof.

16. The materials available to us indicate sufficient room for entertaining the view that the four young boys had been killed by the Army personnel in cold blood. Surely, payment of compensation alone cannot fully satisfy the requirements of justice. We, therefore, direct the Officer-in-Charge of Basugaon Police Station under whose jurisdiction the incident took place, to register a case under Section 302 IPC and to investigate the same. Thereafter, all such steps as may be required in accordance with law will be taken by investigating agency. The Superintendent of Police, Kokrajhar will supervise the investigation of the case and will ensure that the investigation is carried out in a free, fair and impartial manner.

17. The writ petition is allowed in terms of the direction as contained hereinabove.