

GAHC010227462021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/167/2022

JAGADISH MASHAHARY,
S/O MAHESH MASHAHARY,
R/O VILL-SALGURI,
P.O.-JAHRBARI, P.S.-SERFANGURI,
DIST-KOKRAJHAR, BTR, ASSAM.

2: NIBARAM BRAHMA,
S/O RAJEN BRAHMA,
R/O VILL- BERSORKONA,
P.O.-MONGLAJHORA, P.S.-BOGOBARI,
DIST- KOKRAJHAR, BTR, ASSAM.

.....Petitioners

-VERSUS-

1.THE STATE OF ASSAM,
REPRESENTED BY
THE CHIEF SECRETARY TO THE GOVERNMENT OF ASSAM,
HOME DEPARTMENT, DISPUR, GUWAHATI-6,

2:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM,
HOME AND POLITICAL AFFAIRS DEPARTMENT,
DISPUR, GUWAHATI-6.

3:THE DIRECTOR GENERAL OF POLICE, ASSAM,
ULUBARI, GUWAHATI-7

4:THE SECRETARY, HEALTH, BTC, KOKRAJHAR,
P.O. AND DIST-KOKRAJHAR, BTR, ASSAM.

5:THE JOINT DIRECTOR OF HEALTH SERVICES, KOKRAJHAR,
P.O. AND DIST- KOKRAJHAR, BTR, ASSAM.

6:THE SUPERINTENDENT OF POLICE,
P.O. AND DIST-KOKRAJHAR BTR, ASSAM.

7:THE OFFICER-IN-CHARGE,
SERFANGURI POLICE STATION,
P.O AND P.S.-SERFANGURI,
DIST-KOKRAJHAR, BTR, ASSAM.

.....Respondents

For the Petitioners : Mr. D. Kalita, Adv.
: Mr. R. Majumdar, Adv.
: Mr. R. Dhar, Adv.
: Mrs. R. Rongmei, Adv.
: Mr. B.C. Muchahary, Adv.

Advocates

For the Respondent Nos.1,2, 3, 6 & 7 : Mr. D. Nath,
Sr. Govt. Adv., Assam.

For the Respondent Nos.4 & 5 : Ms. R.B. Bora, SC, BTC.

Advocates

BEFORE

HON'BLE THE CHIEF JUSTICE (ACTING) MR. N. KOTISWAR SINGH

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Date of Hearing and Judgment : 17.01.2023

JUDGMENT AND ORDER (ORAL)

17.01.2023

[N. Kotiswar Singh, CJ(Acting)]

Heard Mr. R. Dhar, learned counsel for the petitioners. Also heard Mr. D. Nath, learned Senior Government Advocate, Assam appearing for respondent Nos.1, 2, 3, 6 & 7 and Ms. R.B. Bora, learned Standing Counsel, BTC appearing for respondent Nos.4 & 5.

2. The present petition has been filed seeking for a direction for conducting an impartial and fair enquiry by the Central Bureau of Investigation (CBI) or any other independent agency relating to the death of Jwngsar Mushahary and Janak Kumar Brahma, sons of the two petitioners who were shot dead allegedly in a fake encounter on 17/18.09.2021 by the police/State machinery and to take necessary legal action against the concerned erring police officers and also for payment of adequate compensation to the petitioner Nos.1 and 2.

3. The plea of the petitioners, in brief, is that the aforesaid two persons Jwngsar Mushahary and Janak Kumar Brahma were killed in cold blood in a fake encounter on 17/18.09.2021 by the police/security personnel at Ultapani Jungle, Kokrajhar District. The petitioners do acknowledge that their sons were earlier members of the banned organization, namely, NDFB(S) but they surrendered on 27.01.2020 following a Peace Accord between the Government of India, Government of Assam and various organisations including NDFB(S) and thereafter, they had been leading a peaceful life and were engaged in business of timber for earning their livelihood.

4. It has been alleged that in the early morning on 17.09.2021 in course of their business, while the petitioners' sons were returning home in a motor cycle, they met with an accident in a village under Sarfanguri Police Station at about 2.00 A.M. in which they sustained injuries. Jwngsar Mushahary broke his leg and was taken to nearby Medical Sub-Centre for treatment assisted by Janak Kumar Brahma. While the said Jwngsar Mushahary was undergoing treatment in the said Medical Sub-Centre, the police came and took them away for alleged treatment and subsequently the petitioners came to know that their sons had died in an encounter in the night of 18.09.2021 at Ultapani Jungle.

5. It has been submitted that the *post mortem* report of the deceased Jwngsar Mushahary clearly shows that there were three bullet entry wounds on his chest, which would indicate that these wounds were caused due to firing from a close range. Similar wounds were also found on the body of the other victim, Janak Kumar Brahma. According to the petitioners, since the bullet injuries were caused by firing from close range, it cannot be a case of a normal encounter as alleged by the police. It has been, accordingly, submitted that as they were shot from a close range, it would only be a case of fake encounter.

6. Petitioners claim that they had lodged an FIR before the Sarfanguri Police Station in connection with the aforesaid incident which was registered as Sarfanguri P.S. Case No.50/2021 under Sections 120B/199/302 of IPC read with Section 3 of Prevention of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

7. It has been submitted that there was a public uproar against the killing of their two sons demanding actions against the erring police personnel. However, nothing has materialized. On the contrary, false allegations were made against their sons of being involved in the illegal extremist activities, alleging that they were members of a newly constituted extremist organization, called ULB and involved in extortion cases, against whom an FIR was lodged being Kokrajhar P.S. Case No.646 of 21.

It has been submitted that being aggrieved, the petitioners had approached the Assam Human Rights Commission by filing a representation. However, the matter is pending there also, without any concrete result.

8. It has been submitted since nothing has materialised as regards the F.I.R. lodged by the petitioners and having received no concrete response from the concerned authorities, the

petitioners have been compelled to approach this Court filing this petition under Article 226 of the Constitution of India seeking for an impartial enquiry as well as payment of compensation as mentioned above.

9. We have heard the learned counsel for the parties and perused the materials placed before us. We have also given our anxious consideration on the materials on record.

10. The allegations of the petitioners are indeed serious. The *post mortem* reports do indicate that the two victims had died due to close range bullet injuries. As to what preceded before the two received the said bullet injuries, is something which can be ascertained only after a proper enquiry is made, in view of the conflicting claims of the contesting parties.

11. It has however been submitted by Mr. D. Nath, learned Senior Government Advocate that the investigation is going as far as the FIR lodged by the petitioners is concerned. Similarly, the Assam Human Rights Commission has taken cognizance of it, which directed the Lower Assam Commissioner to conduct an enquiry.

It has been submitted by Mr. Nath that enquiry report has now been submitted to the Government and the matter is pending before the State Government for consideration.

12. Having heard the learned counsel for the parties and on perusal of the records, we would like to make the following observations and directions.

13. There is an array of precedence before this Court that whenever there are allegations of human rights violations involving alleged fake encounters, the Court would normally direct holding of a judicial enquiry by the District and Sessions Judge or such Judicial Officer especially, whenever such allegations of violation of human rights are contested by the State with equal vehemence by taking the plea that such persons were indeed members of banned

organisations and were involved in extremist and terrorist activities, and they got killed in the encounter. The contradictory claims obviously would require examination of the factual positions involved in such cases, and accordingly, this Court normally would direct holding of some kind of enquiry to ascertain the facts and circumstances attending such violent deaths. Thereafter, based on such findings, the Court would proceed to pass necessary consequential orders including payment of compensation and/or for taking action against such erring persons wherever found appropriate.

14. Though we could have adopted the aforesaid course of action, perhaps, in the present case, it may not be required to do so in view of the action initiated by the Assam State Human Rights Commission, which is functioning in the State of Assam and created under the Protection of Human Rights Act, 1993 enacted by the Parliament primarily to look into the allegations and complaints relating to violation of human rights specifically involving armed forces or the police as the case may be.

15. Under the aforesaid Protection of Human Rights Act, 1993, hereinafter referred to as the 'Act', the State Human Rights Commissions have been constituted in the States which have been mandated to perform certain functions as provided under Section 12 of the Act which includes, amongst others, (a) to inquire *suo motu* or a petition presented to it by a victim or any person on his behalf or on direction or order of any court, into the complainant of

(i) violation of human rights or abetment thereof; or

(ii) negligence in the prevention of such violation, by a public servant, etc.

The Protection of Human Rights Act, 1993, empowers the State Human Rights

Commissions constituted under the Act to carry out investigation under Section 14 of the Act with the help of any officer or investigating agency which reads as follows,

“14. Investigation.- (1) The Commission may, for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.

(2) For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under sub-section (1) may, subject to the direction and control of the Commission,--

- (a) summon and enforce the attendance of any person and examine him;
- (b) require the discovery and production of any document; and
- (c) requisition any public record or copy thereof from any office,

(3) The provisions of section 15 shall apply in relation to any statement made by a person before any officer or agency whose services are utilised under sub-section (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The officer or agency whose services are utilised under sub- section (1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.

(5) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under sub-section (4) and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.”

16. The Act also lays down the procedures to be followed in making the inquiry as provided under Section 17 thereof which reads as follows,

“17. **Inquiry into complaints.**- The Commission while inquiring into the complaints of violations of human rights may-

- (i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it:

Provided that-

- (a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;
 - (b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;
- (ii) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

17. Section 18 of the Act provides the steps that may be taken during and after the inquiry.

It has been provided under Section 18(a) that where the inquiry discloses commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority-

- (i) to make payment of compensation or damages to the complainant or to the victim or to the members of his family as the Commission may consider necessary;
- (ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons;
- (iii) to take such further action as it may think fit.

18. Section 18(c) of the Act provides for recommending to the concerned Government or authority at any stage of the inquiry for grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary.

19. Section 18(e) of the Act provides that the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereof, to the Commission.

20. Section 18(f) of the Act provides that the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

21. Thus, what we find is that the Protection of Human Rights Act, 1993 provides a comprehensive procedure to be followed by the Commission in dealing with any allegation of violation of human rights including the power to make investigation and inquiry and also to recommend payment of compensation and to take action against the concerned officials discussed above.

22. Keeping the aforesaid provisions of the Protection of Human Rights Act, 1993, we will examine the issue at hand.

23. After the petitioners had approached the Assam Human Rights Commission, the Assam Human Rights Commission had directed the Commissioner, Lower Assam Division to cause an inquiry into the matter to find out the facts and circumstances leading to the death of both

the deceased and submit report thereof within 45 days of receipt of the notice.

Relevant portion of the order passed by the learned Member, Assam Human Rights Commission reads as follows,

“25.10.2021

Carefully perused the complainant submitted by Sri Jagadish Mushahary and Sri Nibaran Brahma.

It is stated in the complaint that the complainants are the father of Jwngsar Mushahary and Janak Kumar Brahma, respectively, who were allegedly murdered in cold blood by police in a fake encounter, were members of NDFB(S) and surrendered on 27-01-2020, following peace accord between Government of India and Government of Assam and various organizations including NDFB. After coming over ground a started to lead a peaceful life. On 17-09-2021 both the victims while returning home riding on a motor cycle met with an accident and both of them sustained severe multiple injuries and Jwngsar Mushahary got his leg broken. After the accident they went to village medical sub-centre at Aflagaon for treatment 5:30 am and while they were undergoing treatment around 6 am some police personnel of Sarfanguri police station came to the said Medical Sub-Centre and took both of them to Sarfangury P.S. The police informed the family members of Jwngsar Musahary about the accident. Around 2 pm on 17-07-2021 complainant no-1, father of injured Jwngchar, reached the PS with some co-villagers and talked with the both victims and came to know that his son sustained fracture injury on leg and other one also sustained severe injuries in the accident.

The complainant no-1 and his co-villagers waited at the police station till 5 PM on 17-09-2021 but the victims were not released and hence, they came back home. The next morning, i.e., on 18-09-2021, around 10 am the complainant came to know about a fake encounter that took place in the night of 18-09-2021 at Ultapani Jungle in Kokrajhar Dist. where 2 persons died and the dead bodies brought to the Kokrajhar P.S. Immediately the complainant no-1 and 2 along with others went to Kokrajhar PS where they identified the dead bodies of Jwngsar Mushahary and Janak Kumar Brahma.

Subsequently the complainant learnt that a case vide Sarfangury PS Case No.47/2021, U/s 120(b)/121/121(A)/122/387/506 IPC. RW 25 1(A) of the Arms Act was registered against

both the deceased at the instance of Additional Superintendent of Police, Kokrajhar, Surjeet Singh Penesar.

According to the complainants, the killing of the deceased/victims is clearly a cold blooded murder committed by the Additional Superintendent of Police, Kokrajhar, and his police team in a fake encounter.

In view of above complaint, a prima-facie case of violation of Human rights appears to exist for taking cognizance of the matter for inquiry and accordingly the cognizance has been taken. The prayer of the complainant for passing an order for judicial inquiry preferably by a retired judge of Gauhati High Court, cannot be considered by the Commission as it is not within the ambit of the Commission to pass such order. However, the prayer for compensation for payment of compensation to family members of the victim may be considered after finding materials on completion of proper and thorough inquiry.

Issue notice with a copy of the complaint to the Commissioner, Lower Assam Division to cause an inquiry in to the matter to find out the facts and circumstances leading to the death of both the above named deceased and submit report thereof within 45 days of receipt of the notice.

Fix 14.12.2021 for report.

Inform the complainant.”

24. From the above, it appears that the Assam Human Rights Commission had utilized the service of the Commissioner, Lower Assam Division to conduct the enquiry as contemplated under Section 14(1) of the Act.

However, as has been submitted by Mr. D. Nath, learned Senior Government Advocate, the report is presently under consideration before the State Government. In absence of any affidavit or documents in this regard, we are not able to comprehend properly as to the nature of the report which is being considered by the State Government.

25. We would like to observe that even if the Assam Human Rights Commission had utilized the service of the Commissioner, Lower Assam Division to cause an enquiry into the

matter to find out the facts and circumstances leading to the death of the two persons, as provided under Sub-Section (5) of Section 14, the Assam Human Rights Commission has to satisfy itself about the correctness of the facts and conclusion, if any, arrived at in the report submitted to it under Sub-Section (4) of Section 14 and for this purpose the Commission may make such enquiry including the examination of person or the persons who conducted or assisted in the investigation as it may think fit.

26. We are not aware whether any such steps had been taken by the Assam Human Rights Commission as contemplated under Sub-Section (5) of Section 14 of the Protection of Human Rights Act, 1993 in absence of any document or material before us.

27. In this regard, it would be appropriate to refer to Section 18 of the Protection of Human Rights Act, 1993 again which empowers the Commission to recommend to the concerned Government or authority at any stage of the enquiry for the grant of such immediate interim relief to the victims or the members of the family as the Commission may consider necessary.

It appears that no such recommendation has been made, as otherwise, it would have been brought to our notice either by the parties.

28. We have also noted that it is provided under Section 18(d) of the Protection of Human Rights Act, 1993 that subject to the provisions of Clause (e), the Commission shall provide a copy of the inquiry report to the petitioner or his representative.

It has not been brought to our notice of any such copy of the enquiry conducted at the instance of the Assam Human Rights Commission being given to the petitioners or their representatives.

29. Further, as required under Section 18(e) as discussed above, the Commission is to send a copy of the enquiry along with the recommendation to the concerned Government or the authority and the concerned Government or the authority shall within a period of one month forward the comments on the report including the action taken or proposed to be taken thereon to the Commission and thereafter, as provided under Section 18(f) of the Act, the Commission is to publish its enquiry report together with the comments of the concerned Government or the authority, if any, and action taken or proposed to be taken by the concerned Government or the authority on the recommendation of the Commission.

30. On perusal of the records as discussed above, there is nothing to indicate that the Commission has undertaken the aforesaid exercise as contemplated under Section 14(5) as well as Section 18(c)(d) (e) and (f) of the Protection of Human Rights Act, 1993.

31. We are of the view that if the Assam Human Rights Commission undertakes the aforesaid actions, perhaps, the grievance of the petitioners may be addressed. If that is so, the issue of causing any enquiry at our instance, will not be necessary.

32. We have also observed that the Assam Human Rights Commission is not a party in the present proceeding and as such, we are not able to get the correct factual position and also the steps being taken by the Assam Human Rights Commission.

33. However, be that as it may, even if the Assam Human Rights Commission is not a party in the present proceeding, we are of the view that this will not prevent this Court from making necessary observations and directions in the present case, which can be issued to the Assam Human Rights Commission for doing the needful as contemplated under Section 14(5) as well as Sections 18(c)(d) (e) and (f) of the Protection of Human Rights Act, 1993.

34. Under the circumstances, even if, the Assam Human Rights Commission is not a party in this proceeding before us, we would request the Assam Human Rights Commission to do the needful as regards the functions and duties contemplated under Section 14(5) of the Protection of the Human Rights Act, 1993, including the steps required to be taken under Sections 14(5) as well as Section 18(c) (d) (e) and (f) of the Act, so that the grievance(s) of the petitioners are addressed. We request the Assam Human Rights Commission to do the needful as early as possible preferably within a period of 3(three) months from today.

35. It goes without saying that if the grievances of the petitioners have yet not been redressed, in spite of observations and directions issued by us as above, the petitioners would be at liberty to approach this Court again.

36. With the above observations and directions, the present petition is disposed of.

JUDGE

CHIEF JUSTICE (ACTING)

Comparing Assistant