People's Union for Civil Liberties

Vs

Union of India and Another

Writ Petition (CRL) No. 612 of 1992

(B. P. Jeevan Reddy, S. C. Sen JJ)

05.02.1997

JUDGMENT

A. P. JEEVAN REDDY J

People's Union for Civil Liberties has filed this writ petition under Article 32 of the Constitution of India for issuance of a writ of mandamus or other appropriate order or direction (1) to institute a judicial inquiry into the fake encounter by Imphal Police on 3-4-1991 in which two persons of Lunthilian Village were killed, (2) to direct appropriate action to be taken against the erring police officials and (3) to award compensation to the members of the families of the deceased. According to the petitioner, there was in truth no encounter but it was a case where certain villagers were caught by the police during the night of 3-4-1991, taken in a truck to a distant place and two of them killed there. It is alleged that three other persons who were also caught and taken away along with two deceased persons were kept in police custody for a number of days and taken to Mizoram. They were released on bail only on 22-7-1991. It is further submitted that Hamar Peoples' Convention is political party active in Mizoram. It is not an unlawful organization. Even according to the news released by the said organization, it was a case of deliberate killing. Though representations were made to the Chief Minister of Manipur and other officials, no action was taken. Along with the writ petition, affidavit of the persons who were taken into custody along with the deceased, taken in a truck and kept in custody for a number of days, were filed. Affidavits of the wives of the deceased were also filed setting out the miserable condition of their families after the death of their respective husbands.

2. On notice being given, counter-affidavit was filed by the Joint Secretary (Home), Government of Manipur denying the allegations. The allegation of "flake encounter" was denied. It was submitted that there was genuine cross-firing between the police and the activists of Hamar Peoples' Convention during which the said two deaths took place. The report of the Superintendent of Police, Churachandpur was relied upon in support of the said averment. It was submitted that Hamar Peoples' Convention was indulging in illegal and terrorist activities and in acts disturbing the public order. Particulars of several FIRs issued in respect of crimes committed by them under different police stations in that area were set out. The truth and correctness of the supporting affidavits was also disputed. Along with the counter-affidavit, copies of post-mortem reports were filed.

3. After hearing the counsel for both parties, this Court directed, by its order dated 30-5-1995, that the learned District and Sessions Judge, Churachandpur shall make an inquiry into the alleged incident and submit his report as to what exactly happened on that day. Subsequently, that inquiry was entrusted to the learned District and Sessions Judge, Manipur (West), who has submitted this report dated 8-4-1996. The learned District and Sessions Judge has concluded that "there was no

encounter in the night between 3-4-1991 and 4-4-1991 at Nungthulien Village. The two deceased, namely, Lalbeiklien and Saikaplien were shot dead by the police while in custody on 4-4-1991". The State of Manipur has filed its objections to the report along with certain documents which according to them purport to disprove the correctness of finding recorded by the learned District and Sessions Judge.

4. We have heard the counsel for the parties. We are satisfied that there are any reasons for not accepting of the learned District and Sessions Judge which means that the said deceased persons were taken into custody on the night of 3-4-1991, taken in a truck to a long distance away and shot there. The question is what are the reliefs that should be granted in this writ petition ?

5. It is submitted by Ms. S. Janani, the learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organizations, that they have been indulging in a number of crimes affecting the public order - indeed, affecting the security of the State. It is submitted that there have regular encounters and exchange of fire between police and terrorists on a number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.

6. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms. Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them.

7. Shri Rajinder Sachar, learned counsel for the petitioner, submits that in view of the findings of the learned District and Sessions Judge, this is a proper case where this Court should order the

prosecution of the police officials concerned and also award compensation to the families of the deceased.

8. In Challa Ramkonda Reddy v. State of A. P. [AIR 1989 AP 235 : (1989) 2 Andh LT 1], a decision of the Division Bench of the Andhra Pradesh High Court, one of us (B. P. Jeevan Reddy, J.) dealt with the liability of the State where it deprives a citizen of his right to life guaranteed by Article 21. It was held :

> "In our opinion, the right to life and liberty guaranteed by Article 21 is so fundamental and basis that no compromise is possible with this right. It is 'non-negotiable'. .... The State has no right to take any action which will deprive a citizen of the enjoyment of this basis right except in accordance with a law which is reasonable, fair and just."

The decision also dealt with the question whether the plea of sovereign immunity is available in such a case. The following observations are relevant :

> "The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by a law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State ?
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> .... Can the fundamental right to life guaranteed by Article 21 be defeated by pleading the archaic defence of sovereign functions ? Does it mean that the said theory clothes the State with the right to violate the fundamental right to life and liberty, guaranteed by Article 21 ? In other words, does the said concept constitute an exception to article 21 ? We think not. Article 21 does not recognize any exception, and no such exception can be read into it by reference to clause (1) of Article 300. Where a citizen has been deprived of his life, or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the sovereign functions of the State."

9. Reliance was placed in the said decision upon the decision of the Privy Council in Maharaj v. Attorney General of Trinidad and Tobago [(1978) 2 All ER 670 : (1978) 2 WLR 902 : 1979 AC 385, PC]. After setting out the relevant provisions of the Constitution of Trininad and Tobago, it was pointed out that Section (1) of that Constitution corresponds inter alia to Section 21 of our Constitution, while Section 2 and Section 6 of that Constitution correspond to Articles 13 and 32/226 of our Constitution. Applying the reasoning of the Privy Council, it was held by the High Court :

> "The fundamental rights are sacrosanct. They have been variously described as basis, inalienable and indefeasible. The founding-fathers incorporated the exceptions in the articles themselves - wherever they were found advisable, or appropriate. No such exception has been incorporated in Article 21, and we are not prepared to read the archaic concept of immunity of sovereign functions, incorporated in Article 300(1), as an exception to Article 21. True it is that the Constitution must be read as an integrated whole; but, since the right guaranteed by Article 21 is too fundamental and

> basis to admit of any compromise, we are not prepared to read any exception into it by a process of interpretation. We must presume that, if the founding-fathers intended to provide any exception, they would have said so specifically in Part III itself."

10. In Nilabati Behera v. State of Orissa [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] this Courts (J. S. Verma, Dr. A. S. Anand and N. Venkatachala, JJ.) held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort. It is held further that the award of damages by the Supreme Court or the High Court in a writ proceeding is distinct from and in addition to the remedy in private law for damages. It is one mode of enforcing the fundamental rights by this Court or High Court. Reliance is placed upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which says, "anyone who was has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The two opinions rendered by J. S. Verma, J. Dr. A. S. Anand, J. are unanimous on the aforesaid dicta. The same view has been reiterated very recently by a Bench comprising Kuldip Singh and Dr. A. S. Anand, JJ. in D. K. Basu v. State of W. B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : (1996) 9 Scale 298]. The observations in para 54 of the judgment are apposite and may be quoted : (SCC P. 443, para 54)

> "Thus, to sum up, it is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes 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 the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. 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 tortious 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 evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizens, 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 be way of damages in a civil suit."

11. The reference to and reliance upon Article 9(5) of the International Covenant on Civil and Political Rights, 1996 in Nilabati Behera [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] raises an interesting question, viz., to what extent can the provisions of such international covenants/conventions be read into national laws. This issue has been the subject-matter of a recent

decision in Australia, viz., Minister for Immigration and Ethnic Affairs v. Teoh [(1995) 69 Aus LJ 423]. The United Nations Convention on the Rights of the Child was ratified by the Commonwealth Executive in December 1990 and had force in Australia from 16-1-1991 pursuant to declaration made on 22-12-1992 by the Attorney General pursuant to Section 47(1) of the Human Rights and Equal Opportunity Commission Act, 1986 to the effect that the said convention is an international instrument relating to human rights. Respondent Teoh, a Malaysian citizen was found to have imported and be in possession of heroin, for which he was convicted. An deportation order was passed on that basis. The Immigration Review Panel opined that deportation of Teoh would deprive his young children (who were Australian citizens) of their only financial support, landing them in bleak misery. Article 3 of the aforesaid Convention provides that :

> "1. In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Teoh invoked this article to ward off his deportation. The matter was carried to the High Court where the question of enforceability of the Convention by the national courts was thoroughly debated. Mason, C.J., speaking for himself and Dean, J., stated the position in the following words :

> "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. (Chow Hung Ching v. King [(1948) 77 CLR 449], CLR at p. 478; Bradley v. Commonwealth [(1973) 128 CLR 557], CLR 582; Simsek v. Macphee [(1982) 148 CLR 636], CLR at pp. 641-642; Koowarta v. Bjelke-Petersen [(1982) 153 CLR 168], CLR at pp. 211-212, 224-25; Kioa v. West [(1985) 159 CLR 550), CLR at p. 570; Dietrich v. Queen [(1992) 177 CLR 292], CLR at p. 305; J. H. Rayner Ltd. v. Deptt. of Trade [(1990) 2 AC 418 : (1989) 3 All ER 523 : (1989) 3 WLR 969], AC at 550.) This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alternation of the law fall within the province of Parliament, not the Executive. (Simsek v. Macphee [(1982) 148 CLR 636], CLR at pp. 641-42.) So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to Section 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.

But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party (Chu Kheng Lim v. Minister for Immigration [(1992) 176 CLR 1] CLR at p. 38), at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is

in conformity and not in conflict with the established rules of international law (Polites v. Commonwealth [(1945) 70 CLR 60], CLR at pp. 68-69, 77, 80-81) ...

> Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. [Mabo v. Queensland (No. 2) [(1991) 175 CLR 1], CLR at p. 42, per Brennan, J. (with whom Mason C.J. and McHugh, J. agreed); Dietrich v. Queen [(1992) 177 CLR 292] (CLR at p. 321), per Brennan J., at p. 360, per Toohey, J.; Jago v. District Court of New South Wales [(1988) 12 NSW LR 558] (NSWLR at p. 569), per Kirby, J.; Derbyshire Country Council v. Times Newspapers Ltd. [1992 QB 770]]. But the courts should act in this fashion with due circumspection when Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials (Lamb v. Cotogno [(1987) 164 CLR 1], CLR at pp. 11-12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law."

12. Toohey, J. and Gaudron, J. Broadly concurred with the above opinion. Toohey, J. spoke of such Conventions giving rise to legitimate expectation among the people that the Executive will honour the commitment while taking any action concerning children while Gaudron, J. relegated the Convention to a subsidiary position vis-a-vis Australian statute law. (McHung, J. dissented altogether.)

13. The main criticism against reading such conventions and covenants into national laws is one pointed out by Mason, C.J. himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making the law is that of Parliament alone; unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Indeed, it appears that at the time of ratification of the said Covenant in 1979, the Government of India had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention. This reservation has, of course, been held to be of little relevance now in view of the decision Nilabati Behera [(1993) 2 SCC 746 : 1993 SCC (Cri) 527]. [See page 313, para 43 (SCC p. 438, para 42) in D. K. Basu [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : (1996) 9 Scale 298].] Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the Covenant with the sanctity of a law made by Parliament. As pointed out by this Court in S. R. Bommai v. Union of India [(1994) 3 SCC 1], every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can

certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such. So far as multilateral treaties are concerned, the law is, of course, different - and definite. See United States Supreme Court decisions in Elisa Chan v. Korean Airlines Ltd. [(104 L Ed 2d 113] and Eastern Airlines v. Floyd [113 L Ed 2d 569] and the House of Lords decision in Equal Opportunities Commission v. Secy. of State for Employment [1994 ICR 317 : (1994) 1 All ER 910] following its earlier decisions, including Factortame (No. 2) [Factortame Ltd. v. Secy. of State for Transport (No. 2), (1991) 1 AC 603 : (1991) 1 All ER 70 : (1990) 3 WLR 818].

14. Now coming to the facts of the case, we are of the opinion that award of compensation of Rs. 1,00,000 (Rupees one lakh only) to the families of each of the deceased would be appropriate and just. The same shall be paid by the Government of Manipur. The Collector/District Magistrate, Churachandpur shall hand over the cheques to the respective families of the deceased, namely Lalbeiklien and Saikaplien, within two months from today. The writ petition is disposed of accordingly. The People's Union for Civil Liberties, which has filed this writ petition and pursued it all these years shall be entitled to its costs, assessed at Rs. 10,000 (Rupees ten thousand only) payable by the State of Manipur within the same period.