WP(C)/4368/2014 on 25 March, 2022

Bench: N. Kotiswar Singh, Malasri Nandi

GAHC010126452014

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

Case No. : WP(C)/4368/2014

1. Sri Konto Warisa,
Son of Late Ringpron Warisa,
Resident of Village- Wari Lamphu,
P.O. & P.S. Dehangi,
District- Dima Hasao (Assam),
PIN- 788819.

2. Sri Golom Nunisa, (now deceased)
Son of Late Dononsing Nunisa,
Resident of Village- Wari Lamphu,
P.O. & P.S. Dehangi,
District- Dima Hasao (Assam),
PIN- 788819.

-----Represented by

(i) Smt. Sopola Nunisa,
Wife of Late Golom Nunisa.

(ii) Sri Kombo Nunisa
Son of Late Golom Nunisa.
Both are permanent residents of
Village: Wari Lamphu,
P.O. & P.S.- Dehangi,
District- Dima Hasao (Assam),
PIN-788819.
- Vide order dated 10.08.2021 passed in I.A.(C) No. 1053/2021.

.....Petitioners.

-Versus-

1. The Union of India,

Represented by the Secretary to the Govt. of India,
Department of Home Affairs,
New Delhi- 110001.

2. The Group Commandant,
12th Battalion, Madras Regiment,
C/o. 99 APO,
Haflong, Dima Hasao (Assam),
PIN- 788819.

3. The Deputy Commissioner/The District Magistrate/
The District & Sessions Judge,
Haflong, Dima Hasao,
PIN- 788819.

4. The Additional Deputy Commissioner/
Additional District Magistrate,
Haflong, Dima Hasao,
PIN-788819.

5. The Superintendent of Police,
Haflong, Dima Haso,
PIN- 788819.

6. The Joint Director of Health Services,
Haflong, Dima Haso,
PIN- 788819.

.....Respondents.

BEFORE HON'BLE MR. JUSTICE N. KOTISWAR SINGH HON'BLE MRS. JUSTICE MALASRI NANDI For the Petitioner : Mr. D.C.K. Hazarika, Advocate.

For the Respondent Nos.1 & 2 : Mr. R.K.D. Choudhury,
Asstt. Solicitor General of India.
For the Respondent Nos.3-5 : Mr. R.K. Bora, Advocate.

.....Advocates.

Page No

Dates of Hearing : 09.11.2021, 09.12.2021 & 24.01.2022.

Date of Judgment : 25.03.2022

JUDGMENT AND ORDER (CAV)

[N. Kotiswar Singh, J.]

Heard Mr. D.C.K. Hazarika, learned counsel for the petitioners. Also heard Mr. R.K.D. Choudhury, learned ASGI for respondent Nos.1 & 2 and Mr. R.K. Bora, learned counsel appearing for

respondent Nos.3, 4 and 5.

2. The present petition has been filed by 2(two) petitioners, namely, Sri Konto Warisa and Sri Golom Nunisa who alleged that their sons, namely, Poresh Warisa and Sujit Nunisa, aged about 23 years, residents of Wari Lamphu village were picked up by the personnel of 12 th Battalion Madras Regiment on 14.07.2009 from the said village and subsequently, were shot dead and the dead bodies brought to the Haflong Police Station on 19.07.2009.

The said Poresh Warisa has been also referred to as Pirush Warisa, and sometimes as Pirosh Warisa and Phirosh Warisa in the pleadings.

3. It was submitted that in connection with the said incident, an F.I.R. was lodged with the Dehangi Police Station by one Dimanon Kemprai. On receipt of the F.I.R., Dehangi P.S. Case No. 05/2009 dated 20.07.2009 was registered under Section 302 IPC corresponding to G.R. Case No.177/2009 against the personnel of the 12 th Battalion Madras Regiment, Camp at Kobak Post. However, since no progress was made for bringing the persons responsible for custodial death of the aforesaid two persons, namely, (i) Poresh Warisa and (ii) Sujit Nunisa to book, the present petition has been filed seeking for a direction for holding a judicial Page No.# 4/97 inquiry into the killing of the aforesaid 2(two) persons and to take appropriate action against the army personnel in accordance with law and also to award adequate monetary compensation to the tune of Rs.20,00,000/- (Rupees twenty lakhs) only each to the petitioners, as follows:

> "It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to admit this petition and consider the above materials facts, call for the records, after hearing the parties be pleased to issue rule upon the Respondents to show cause as to why a Writ of Mandamus, directing the Respondents, particularly, the Respondent No.3 to initiate independent judicial enquiry into the killing of detenues namely, (i) Poresh Warisa, aged about 23 years, son of Sri Konto Warisa (Petitioner No.1) and (ii) Sujit Nunisa, aged about 23 years, son of Sri Golom Nunisa (Petitioner No.2) in the custody of the 12 th Madras Regiment, C/o. 99 APO, Haflong (Respondent No.2) during 14.07.2009 to 19.07.2009 for which Dehangi PS Case No. 05/09 dated 20.07.2009 U/S 302 IPC corresponding GR No. 177/2009 was registered and to take appropriate actions against the Army personnel/perpetrators in accordance with law and be pleased to declare failure on the part of the Respondents to protect and safeguard the life of the son of the Petitioners and such killings by the Respondent No.2 is illegal and unconstitutional and further direct the Respondent No.1 and 2 to award suitable/adequate monetary compensation to the tune of Rs.20,00,000/- (Rupees twenty lakhs) each to the Writ Petitioners and further pass such order/orders as your Lordships may deem fit and proper for the ends of justice."

4. According to the petitioners, from the nature of the injuries as indicated in the post- mortem reports, it was very clear that the said two persons received bullet injuries which were ante-mortem in nature and death was caused due to shock and haemorrhage. It has been alleged that

post-mortem reports indicate numerous marks of torture and accordingly, it was contended that the aforesaid two persons had been victims of torture and fake encounter and accordingly, the persons responsible for the death were liable for appropriate action under law and also for payment of compensation to the petitioners as mentioned above.

5. This petition has been contested mainly by the respondents No. 1 and 2 by filing their affidavit-in-opposition in which it was alleged that two persons were killed in an encounter when they hurled grenade and started firing indiscriminately to the surrounding army Page No.# 5/97 personnel in order to escape and in the retaliatory fire, both of them were killed.

In this regard, an F.I.R. was lodged on 18.07.2019 in the Umrangso P.S. by one Capt. James Jacob of the 12th Bn. Madras Regiment.

6. This Court after hearing the parties and considering the plea taken by the respective parties, vide order dated 05.09.2019 directed the District and Sessions Judge, Dima Hasao, Haflong to conduct a judicial inquiry to ascertain the circumstances leading to death of the two detenues, namely, (i) Poresh Warisa, aged about 23 years, son of Sri Konto Warisa (Petitioner No.1), and (ii) Sujit Nunisa, aged about 23 years, son of Sri Golom Nunisa (Petitioner No.2) in the custody of 12 th Bn. Madras Regiment, C/o. 99 A.P.O. during the period from 14.07.2009 to 19.07.2009, in respect of which Dehangi P.S. Case No.5/2009 dated 20.07.2009 under Section 302 of Indian Penal Code, corresponding to G.R. Case No. 177/2009 was registered.

7. Pursuant to the aforesaid direction of this Court dated 05.09.2019, the learned District and Sessions Judge, Dima Hasao, Haflong, duly conducted the said inquiry by giving notice to all the concerned parities. It is worthwhile to note that on 16.11.2019, it was submitted on behalf of the petitioners and the respondent Nos. 1 and 2 that other respondents were not necessary parties in the inquiry and accordingly, no notice was issued to the other respondents including the State police.

8. In the aforesaid inquiry, as many as 9(nine) witnesses were examined in support of the claim of the petitioners. The District and Sessions Judge examined 2(two) witnesses as Court witnesses and the respondent Nos. 1 and 2 examined 2(two) witnesses. Certain documents including the post-mortem reports, injury reports in respect of the army personnel involved Page No.# 6/97 were also examined. Copies of the General Diaries of the aforesaid F.I.R. case were also requisitioned and examined.

9. After due inquiry, the learned District and Sessions Judge, Dima Hasao, Haflong submitted his report dated 23.02.20021 before this Court and the copies of the report were made available to the learned counsel for the petitioner as well as the respondents vide order dated 27.09.2021.

FINDINGS IN THE INQUIRY REPORT

10. The learned District and Sessions Judge, after considering the evidences on record, made the following findings:-

"1. Captain James Jacob of 12th Battalion, Madras Regiment and his team conducted an operation at Wari Lampu village from the early hours of 14.07.2009. The said operation was illegal and without jurisdiction and not in terms of the Act, 1958 as no police officer or personnel was present at the time of the operation.

2. Both Poresh Warisa and Sujit Nunisa who were residents of Wari Lampu village did not have any criminal background and the record of enquiry did not reveal that they were in any way connected with any extremist outfit like DHD-J.

3. Both Poresh Warisa and Sujit Nunisa were young persons who were healthy and able bodied persons. Both of them were tortured by the personnel of 12 th Battalion, Madras Regiment which made both of them very weak and infirm. Under those conditions both of them were taken from Wari Lampu village to Dimadao Wapo village by tying them on two bamboo poles like the way animals are carried.

4. The story of Madras Regiment that one of the two Dimasa youths first hurled one grenade which blasted and thereafter both of them fired at the party of 12 th Battalion, Madras Regiment is not believable as both the youths were cordoned and surrounded by the team of about 30 personnel of 12th Battalion, Madras Regiment. This finding also finds support from the testimony of CW2, Shri Upen Bora, as well as the other witnesses.

5. DW2 Sepoy Yellapa Goudra was treated at Haflong Civil Hospital on 18.07.2009 at 05:30 pm as per the Medical Examination Report (Ext.3) of Dr. Lalawmilan Suantak which was proved by PW8 Dr. Parikshit Barman. Said Ext.3 only indicated one simple injury caused by sharp instrument. As such, the aforesaid stand taken by the Army that Sepoy Yellapa Goudra sustained bullet injury is not believable.

6. The both Poresh Warisa and Sujit Nunisa were killed in cold blood by the Page No.# 7/97 aforesaid personnel of 12th Battalion, Madras Regiment."

SUBMISSION OF THE PETITIONERS

11. Mr. Hazarika, learned counsel for the petitioners, based on the said inquiry report, has submitted that there is a clear finding by the learned District and Sessions Judge, Dima Hasao, Haflong to the effect that both the deceased, (i) Poresh Warisa and (ii) Sujit Nunisa were killed in cold blood by the personnel of 12 th Battalion, Madras Regiment after they were taken into custody and subjected to torture by them on 14.07.2009.

12. It has been further submitted by the learned counsel for the petitioners that in the inquiry report, the learned District and Sessions Judge, Dima Hasao has given a clear finding that the personnel of the Madras Regiment had conducted an operation at Wari Lamphu village from early hours of 14.07.2009 without involving the civil administration or the police in which the aforesaid two persons were tortured and subsequently killed.

13. It has been also submitted by learned counsel for the petitioners that the aforesaid two persons did not have any criminal background and there was no record to indicate their involvement with any of the extremist outfits like DHD(J).

14. Learned counsel for the petitioners has also submitted that the version of the army that both of them died in retaliatory fire after they tried to escape from the custody of the army by hurling grenade, has not been established in course of inquiry and thus, rejected by the learned District and Sessions Judge.

Accordingly, it has been submitted by the learned counsel for the petitioners that it is clearly established by the inquiry report that the aforesaid two deceased persons who were in their early twenties were victims of fake encounter and as such, the respondent authorities Page No.# 8/97 should be liable to pay compensation at least to the tune of Rs.20,00,000/- (Rupees twenty lakhs) each to the petitioners.

15. Learned counsel for the petitioners submits that in a decision rendered by the Hon'ble Supreme Court in Rohtash Kumar Vs. State of Haryana through the Home Secretary, Government of Haryana, Civil Secretariat, Chandigarh and Ors., [(2013) 14 SCC 290], the Hon'ble Supreme Court had awarded a sum of Rs.20,00,000/- (Rupees twenty lakhs) only to a person who was a victim of fake encounter by the police.

It has been submitted that in the said case of Rohtash Kumar (supra), the Hon'ble Supreme Court relying on the decision in Nilabati Behera Vs. State of Orissa [(1993) 2 SCC 746] had directed the State of Haryana to pay a sum of Rs.20,00,000/- (Rupees twenty lakhs) only to the appellant therein as compensation for the pain and suffering undergone by him on account of loss of his son who was killed in the fake encounter.

16. It has been submitted by the learned counsel for the petitioners that in the present case, it has been clearly established that the said two persons, (i) Poresh Warisa and (ii) Sujit Nunisa were innocent and subjected to brutal torture resulting in unwarranted death and the families of the aforesaid two persons had undergone through pain and suffering for the last 12 years and as such, in the present case, awarding a sum of Rs.20,00,000/- (Rupees twenty lakhs) only each in respect of the aforesaid two persons would be just and proper.

17. Mr. R.K. Dev Choudhury, learned Assistant Solicitor General of India, on the other hand, submits that no case has been made out for fastening any liability on the Union respondents including the respondent No.2 as the finding arrived at by the learned District & Sessions Page No.# 9/97 Judge in his inquiry cannot be sustained in law for the following reasons.

18. The inquiry conducted by the learned District & Sessions Judge, Dima Hasao, was definitely not a trial on the basis of the Dehangi P.S. Case No.05/2009 registered against personnel of the respondent No.2 under Section 302 IPC and as such, the said inquiry ought to have been a very broad based involving all the stakeholders which unfortunately was not done as no police personnel who were acquainted with the incident were examined.

19. Apart from that, a proper analysis of the evidence of DW-1 would show that police officials including lady police constables were very much in Wari Lampu village on 16.07.2009 and these police personnel were part of the operation conducted by the personnel of the respondent No.2, but they were never examined during the inquiry. According to the learned ASGI, it is on record that there were some lady cadres who were arrested from the village and these lady cadres were arrested only after the arrival of the lady police constables. However, none of these police personnel was examined.

20. Learned ASGI also has submitted that there are certain inconsistencies in the finding which are not based on records. According to the finding in the inquiry report, the army personnel started operation at about 9 PM of 14.07.2009, but it is on record that the army personnel reached the village only in the morning of 15.07.2009 and as such, the question of the army personnel being present in the village on 14.07.2009 does not arise.

It has been also submitted based on the statement of the DW-1 that the police along with the lady constables came to the village on 16.07.2009 and not only the two cadres of the DHD(J) group were killed in the encounter, but 8 others were also apprehended and were handed over to the police on 17.07.2009. However, this aspect of apprehension of male and Page No.# 10/97 female DHD(J) cadres from the village was not examined by the learned District & Sessions Judge, which would have portrayed the correct picture of the operation conducted by the army personnel in the said village. However, the learned District & Sessions Judge focused the inquiry only on the death of the two persons and not on other aspects. Thus, it was a flawed inquiry.

21. Learned ASGI also has submitted that as regards the allegation that these two persons and other villagers were tortured, there is no medical evidence in that regard except for oral testimonies of the villagers who were interested persons. Learned ASGI also has submitted that all those articles which were recovered from the place of occurrence including the photographs, weapons, mobile phones, etc. were in the custody of the police which however, were not considered by the learned District & Sessions Judge.

22. As regards the post-mortem reports, learned ASGI submits that apart from the bullet injuries, these also show certain bruises, which do not necessarily indicate that the deceased were subjected to torture. Learned ASGI also submits that there was an encounter which is amply proved by the fact that one of the personnel of the 12 Madras Regiment, namely, Yellappa Goudra, who was examined as DW-2, had suffered injury on his right palm.

23. Referring to the deposition of PW-8, one Dr. Prikshit Barman regarding Exbt.-3, which is the report of the injury received by Yellappa Goudra, it has been submitted that the said PW- 8 did not explain under what circumstances the said Yellappa received the injury.

24. As regards non-receiving of injury by the army personnel, it was submitted that the grenade lobbed by one of the deceased might not have reached the target or might have been shielded by the trees as they were in the jungle and as such, merely because no splinter Page No.# 11/97 injury was caused to any of the army personnel, it cannot be a reason to disbelieve the stand of the army that a

grenade was lobbed by one of the deceased.

25. Learned ASGI also has submitted that the fact that the victims were members of unlawful militant organization is amply proved by the fact that there was recovery of a large number of arms and ammunitions from the place of occurrence. Secondly, the police has identified the aforesaid two deceased persons as cadres of DHD(J) group.

26. As regards the allegation of torture, it has been further submitted that apart from the fact that the said allegation is not supported by medical evidence, there was not a single civilian eye witness. Though police personnel were also present in the village during the operation, the police were not examined. Thus, it has been submitted that the conclusion arrived at by the learned District & Sessions Judge is not based on credible evidence but on mere oral testimony of the villagers without any supportive evidence including from the police personnel involved in the operation. It has been submitted that the police personnel were not examined who were in possession of the critical pieces of evidence, i.e. the passport photograph of one of the deceased Perush Warisa, who had been also identified by one of the villagers, namely, Demanjoy Langthasa, to be an active DHD(J) cadre, who himself also confessed to be member of the DHD(J).

Accordingly, it has been submitted that since the finding of the learned District & Sessions Judge is flawed, it could not be acted upon for any purpose including any action sought against the army personnel as well as award of compensation. PLEADINGS

27. Before we examine the submissions advanced on both the sides qua the Inquiry Page No.# 12/97 Report, it may be appropriate to refer to the pleadings as well as the records since these have to be also taken into consideration while assessing the findings in the Inquiry Report.

After the writ petition was filed and notices were issued to the respondents on 05.09.2014 alleging torture and custodial death of the aforesaid two deceased in the hands of the army personnel under respondent No.2, the respondent Nos.1 and 2 filed their affidavit- in-opposition on 14.09.2015. The plea taken by the respondent Nos.1 and 2 as reflected in para No.3 of the said affidavit may be reproduced as below.

> "3. .....that on 14 June 2009, 12 Madras Regiment received specific information from the their source regarding presence of 10-15 hardcore DHD(J) cadres in the general area of village Wari Lampu (RF 3259) and Dimadao (RF 3760 (FF 3640) under Dehang Police Station. Accordingly, the unit Cordoned the village Wari Lampu and Dimadao during the night 15/16 July 09 and on morning of 16 July 2009, an individual named Perush Warisa, S/O Konto Warisa, R/O Wari Lampu was detained while he was trying to escape the cordon in a suspicious manner. On detailed body search of the person, one photograph in DHD(J) uniform was found in his wallet and he confessed to be an OWG'S in the village. He further revealed the presence of two or more male OGW's and also some lady cadres of DHD(J) present in the village. Accordingly, Assam Police Team was requisitioned. A team to Assam Police including, three Mahila Police from Haflong Police Station arrived in village Wari

Lamp on the evening of 16 th July 2009 and apprehended two lady cadres. All the apprehendees, including the female cadre who were under detention of Mahila Police, were kept in village Wari Lampu itself during the night 16/17 July 2009 as search was still going on.

Again, on 17 July 2009, based on information provided by the apprehended female cadres about presence of additional female cadres in neighbouring village of Dimadao, a column of Security Force along with Mahila Police went to that village. Further, apprehension of six female cadres and two female OGW's who were involved in providing information of move of Security Force and acting as Couriers for transportations of rations were made. All the apprehended female cadres were handed over to Haflong Police Station ON 17 th July 2009 while the police was de-inducting from area of operation.

On 17th July 2009 at 2000 hours the operation were called off and accordingly troops along with the apprehendees move out from village for de-induction, scheduled for next day morning i.e. 18 July 2009, since the area of operation was away from the road head.

On 18 July 2009, at around 0400 hours, the stay behind party, spotted one individual who was trying to run away from the village in a suspicious manner. On questioning, he revealed that he his name was Sujith Nunisa @ Jonko Dimasa and he further revealed that he was listed cadre of banned DHD(J) group. He also confessed that Perush Warisa @ Royal Dimasa, who was apprehended earlier, was also listed DHD(J) cadre and is a S/S Corporal and that they had hidden their weapons in the jungle near village New Sangbar (F2747) and promised to lead the Security Force to the weapon cache. Accordingly, Major Sunas Badave Page No.# 13/97 who was accompanying the apprehendees was informed to remain Perush Warisa with him and handover the rest two apprehendees to police.

Two columns of unit under Captain James Jacob and Major Suhas Badave along with two DHD(J) cadres started from the area of operation at Wari Lampu at 0700 hours and reached the dense jungle near New Sangbar by 0900 hrs and commenced search of the area of the for arm caches. At about 1130 hours, both cadres told that they had spotted the exact location where they had hidden there cache of arms and ammunitions and promised they would retrieve them. Accordingly party lead by Major Suhas Badave, laid cordon around entire area and party under Captain James Jacob stayed with the cadres.

At around 1210 hours, the cadres while approaching a dense bush, they suddenly pushed away the sentries guarding them. One of the cadres produced a Chinese grenade and hurled it at army troops. The troops immediately took cover and by this time, it was observed that both the cadres had recovered their weapons from cache and were firing indiscriminately. The Security Force immediately retaliated to the

hostile fire. The firefight lasted around 15-20 minutes during which both the cadres got killed. During the firefight Number 2606977M Sepoy (Now Lance Naik) Yallapa Goudra, suffered a bullet injury at his right palm. He was given first-aid at the site.

The incident was reported to higher Headquarter and a police team arrived at the site around 1730 hours and dead bodies of the cadres alongwith recovered cache of arms and ammunitions were handed over to them. A Court of inquest was also held at the site by Sh SN Singh, Administrator NC Hills, Haflong. A First Investigation Report was lodged by Captain Jacob on 18th July 2009 in the Umrangso Police Station regarding the above incident.

Number 2606977M Sepoy (Now Lance Naik) Yallapa who sustained bullet injury was rushed to Civil Hospital, Haflong at 1300 hours on 18 th July 2009. He was subsequently shifted to 151 Base Hospital, Guwahati and further to command Hospital, Kolkata.

The Post-Mortem of the slain cadres was carried out under the aegis of Civil Administrator of Government Civil Hospital, Haflong.

A Magisterial Inquiry has been ordered by District Commissioner, Haflong vide memo No. NCHG/E-402/2009-10/6551 dated 11 Aug 2009.""

Accordingly, the allegations made in the petition were denied.

28. The Superintendent of Police, respondent No.5 also filed affidavit-in-opposition on 29.09.2015, which however, gave a different picture of the incident by not corroborating the stand taken by the respondent Nos.1 and 2.

The respondent No.5 in the affidavit-in-opposition stated that after the FIR was registered in the Dehangi Police Station as Dehangi P.S. Case No.05/2009 under Section 302 IPC on a complaint of one Dimanon Kemprai of alleged killing by the army personnel of 12 th Page No.# 14/97 Madras Regiment, the matter was investigated into and in course of the investigation, the Investigating Officer (I/O) visited the place of occurrence and drew up a rough sketch map of the P.O. in a separate sheet. The I/O examined the complainant Sri Dimanon Kemprai and other available witnesses namely, (1) Sri Konto Warisa, 55 years, S/O Lt. Ringrondao Warisa, village Walilampu, PS-Dehangi, Dist.-Dima Hasao, (2) Sri Golon Nunisa, 56 years, S/O Lt. Donon Singh Nunisa, village Warilampu, PS-Dehangi, Dist.-Dima Hasao, (3) Sri Nilkanta Langthasa, 60 years, S/O Lt. Kilendra Langthasa, village Warilampu, PS-Dehangi, Dist.-Dima Hasao, (4) Mrs. Lormi Warisa, 40 years, W/O Sri Konto Warisa, village Warilampu, PS- Dehangi, Dist.-Dima Hasao, (5) Mrs. Sopola Nunisa, 42 years, W/O Golon Nunisa, village Warilampu, PS-Dehangi, Dist.-Dima Hasao, (6) Sri Bangcharan Warisa, 85 years, (Gaon Bura of Warilampu village), S/O Lt. Narang Warisa, village Warilampu, PS-Dehangi, Dist.-Dima Hasao, (7) Sri Amal Warisa, 35 years, S/O Sri Bainon Warisa, village Mayanpur, PS-Umrangso, Dist.-Dima Hasao, (8) Sri Rangcharan Warisa, 37 years, S/O Sri Nadi Warisa, village Warilampu, PS-Dehangi, Dist.-Dima Hasao, (9) Sri Subinan Warisa, 70 years,

S/O Lt. Gunesing Warisa, village Warilampu, PS-Dehangi, Dist.-Dima Hasao and (10) Sri Monoj Jidung, 28 years, S/O Joylon Jidung, village Warilampu, PS-Dehangi, Dist.-Dima Hasao and recorded their statements under Section 161 Cr.P.C..

29. It was stated on behalf of the respondent No.5 that on examination of the complainant Dimanon Kemprai and other witnesses, it was revealed that on 14.07.2009 @ 3 AM an Army party of 12th Madras Regiment arrived at their village Warilampu and asked them about the movement of extremists in their village. The Army party assaulted the complainant's nephew and grandson namely, (1) Phirosh Warisa and (2) Sujit Nunisa respectively and asked questions about the extremists. The Army party also tortured them by electric shock. The Page No.# 15/97 Army personnel picked up all of them from their village including the deceased (1) Phirosh Warisa and (2) Sujit Nunisa. The Army party conducted operation in the area for 3(three) consecutive days. After that, the villagers were taken away by Army personnel. It was stated that the physical condition of Sujit Nunisa and Sri Phiros Warisa was very bad and they could not walk properly. Even then, they were dragged by the Army personnel with their hands and feet tied with rope. Later on, both the victims were taken in separate vehicles to an unknown destination. It was stated that on 19.07.2009 when the complainant went to Haflong, he learned there that his nephew and grandson Phirosh Warisa and Sujit Nunisa, respectively had died and their dead bodies were sent to Haflong Civil Hospital for post-mortem examination. On the following day i.e. on 20.07.2009, he lodged the FIR at Dehangi P.S. in this regard.

It was stated in the affidavit-in-opposition of respondent No.5 that the other witnesses mentioned above corroborated the statement of the complainant Dimanon Kemprai and the case remained pending for recording of statements of the Army personnel of the 12 th Madras Regiment.

Thus, it was a stand of the State police that as the army personnel did not cooperate with the investigation of the case, the matter had remained pending at that stage.

30. Later on, it was submitted before the Court that the aforesaid case was handed over to the CID for investigation. In view of the above submission made, the status report as regards the investigation conducted by the CID was called for by this Court. Subsequently, the said CID report was submitted before this Court by way of an affidavit.

31. Relevant portions of the affidavit filed by the Superintendent of Police (CID), Assam Page No.# 16/97 containing the status report relating to FIR lodged by the army personnel are reproduced hereinbelow.

> "Status report of Umrangso P.S. Case No. 19/09 U/S 120(B)/121(A)/353/370/224/326 IPC R/W Sec. 25(1-A) Arms Act. and 5 ES Act. in connection with WP(C) No. 4368/2014 On 18/07/09 Complainant Captain James Jacob of 12th Bn. Madras Regiment camp- at Kabok P.S. Umrangso lodged an FIR at Umrangso P.S to the effect that on 14/07/09 they launched an operation based on specific information about the presence of hard core DHD(J) cadres at Warilampu village under Dehangi P.S. Accordingly they apprehended DHD cadre Sujit Nunisa @

Janko Dimasa and Perush Warisa @ Royal Dimasa from the said village. During sport interrogation they could learn that they had hidden their weapons somewhere in the jungle. Both cadres agreed to lead the Army personnel to place where they had concealed arms and ammunitions. Subsequently, on 18.07.2009 at 7:30 hrs an operation was launched under the guidance of Sr. Army Officer. As indicated by the accompanied cadres a certain area was cordoned and a search for the conceal arms and ammunitions was carried out from approximately 10:00 hrs till 12:10 hrs. As reported in the FIR while the cadres were digging for the cache of arms and ammunitions, all of a sudden one of the cadres hurled one Chinese grenade towards the Army personnel standing nearby. Both the cadres started indiscriminate firing upon the Army with AK series Rifle and tried to escape. The Army also retaliated by firing back, as a result of which both the DHD cadres were killed on the spot. One Army sepoy260977 Yellapa Goudra sustained bullet injury in his right palm. The Army also recovered two AK series Rifles, 2(two) Magazines, 10(ten) Rds of live ammunitions, 20 (twenty) nos of empty catridges and 1(one) Chinese Granade. Hence the case.

During the investigation the former I/O S.I. Nur Mohammad of Umrangso P.S. visited the P.O, drew up sketch map of the same, seized 2(two) A.K. series Rifle bearing body No. 06111715 and 26556 with 2(two) Magazine and 10(ten) nos of live ammunitions, 22 (twenty- two) nos of empty catridge of A.K. ammunitions and also 1(one) Chinese Granade from the P.O on being shown by Maj. Subhas of 12th Bn Madras Regiment. All the seized arms and ammunitions were sent to 5th APBn, HQ Sontilla for examination and expert opinion. The live hand grenade was demolished obtaining destruction from the District Magistrate, Dima Hasao.

The examination report was collected from the Bn. HQ. The dead body of deceased Sujit Nunisha and Perush Warisha were sent to Haflong Civil Hospital for PM examination. The PM examination were conducted by a team of Doctors and videography of PM examination was also done. The PM report of both the deceased were collected which reflected that apart from bullet injuries there were so many injuries such as bruises, abrasion, laceration mark were found during PM examination. The injured Sepoy 260977 Yellappa Goudra reportedly sustained bullet injury on his right palm was sent for medical examination by 12 th Bn. Madras Regiment at Haflong Civil Hospital and the injury report was also collected from which it is known that the said constable sustained simple injury due to impact of sharp instrument.

During investigation of the case a good numbers of local witnesses including the complainant and Army Personnel were examined and recorded their statement. But the statement of injured Sepoy Yellappa Goudra could not be examined as he was immediately shifted for better treatment. Moreover, the statement of the complainant is also not found complete such as how many rounds of ammunition were fired during the period of encounter Page No.# 17/97 which lasted for 20 minutes. The complainant captain James Jacob along with injured Sepoy 260977 Yellappa Goudra were asked by sending W.T. message four times since 26/07/2011 for clarification of some points but no response were found from their end. A good numbers of public witnesses were examined out of

which 1) Sri Nirada Warisha, S/O- Sri Perugcharan Warisha, 2) Sri Nilkanta Langthasa, S/O- Lt. Gelendra Langhtsa, 3) Sri Deman and Kemprai, S/O- Sri Barendro Kemprai, 4) Sri Demanjoy Langthasa, S/O- Dilforna Langthasa, all are of village Warilangpo, P.S.- Dehangi and they stated that since 14/07/2009 at 4:30 AM to 14/07/2009 early morning the Army troop cordoned the small halmet Warilangpo (consist of 12 houses) and all male and female of that village were brought to the house of local Gaonburah and among them the deceased persons were also brought to the house of local Gaonburah on 14/07/2009 early morning from their own house and brutally tortured. The witnesses also stated that in the early morning of 17/07/2009 the Army troop took away a few male and female along with Sujit Nunisha and Perush Warisha and left the village. But Sujit Nunisha and Perush Warisha could not walk on foot due to unbearable physical torture by the Army and later the Army carried both Sujit Nunisha and Perush Warisha with the help of bamboo fastening their hand and feet by rope. The Army troop took 6 (six) persons out of which four persons were handed over to Haflong PS on 18/07/2009 and rest two were killed in so called encounter.

The team of Doctors who conducted PM examination on both the corpse was examined and their statements were recorded U/S-161 Cr.P.C. In their statement they stated that apart from bullet injury they detected other multiple injuries such as scratches, bruises in the abdomen wall which are of ante mortem in nature.

The following materials are found during investigation which does not substantiate the context of FIR.

It may also be mentioned that the complainant Captain James Jacob and injured Sepoy 260977 Yellappa Goudra were asked to appear at CID HQ for clarification of some points. The effort for asking them to appear had been started since 26/07/2011 but till today none of them appeared so far.

1. In FIR, it was clearly mentioned that the alleged extremist namely Sujit Nunisha was apprehended in course of operation conducted by Army troop on 17/07/2009 but the witnesses stated that Sujit Nunisha and Perusah Warisha were brought from their own house on 14/07/2009 morning and kept in the courtyard of Goanburah till 17.07.2009 morning. It proves that the person died in so called encounter were not apprehended on 17/07/2009 during search operation.

2. The witnesses stated that both the deceased are common men of the locality, Neither they were member of DHD(J) nor had any relation with extremist outfit.

3. In FIR the complainant mentioned that one Sepoy 260977 Yelloppa Goudra sustained bullet injury on his right palm but the injury report collected reveals that Sepoy sustained simple injury caused by sharp instrument which does not carry bullet injury. So, it seems to be manipulated one.

4. In FIR, it was mentioned that both the so called extremist died in encounter sustaining bullet injury but the PM report shows that apart from bullet injury they sustained ante mortem multiple injuries such as bruises, abrasion and laceration in the abdomen wall, which proves that they were subjected to physical torture.

5. As the deceased were suspected to be subjected to physical torture and could not walk on foot on 17/07/2009, so question of encounter does not arise as because both Page No.# 18/97 persons remained in custody of Army since 14.07.2009 to 18.07.2009 and during that period the Army neither reported the matter to local police nor District Administration about the custody of villagers in Warilangpo village.

6. The 12th Bn. Madras Regiment, camp Kobak conducted the operation at Warilangpo village under Dehangi P.S, Dima Hasao since 14/07/2009 to 17/07/2009 without any information to local P.S. and the apprehended alleged extremists were also not handed over to local P.S. during that period.

7. The FIR reflects that apprehended cadres were digging for a cache of arms/ammunitions but during investigation the I/O neither could recover any implements of digging nor the complainant could show the digging spot and the digging implements which establish that the fact of digging is false and manipulated one.

8. In the FIR it is clearly reflected that the encounter lasted for 20(twenty) minutes but the complainant showed only the weapons along with live and empty cartridge which were reportedly used by the apprehended extremist which were duly seized by the Army personnel. The complainant disclosed that the apprehended DHD(J) cadres died due to retaliation. The concept of retaliation cannot be sustained as no information relating to counter fire from the part of Army personnel is found.

9. In FIR, it is reflected that the Army personnel led by Captain James Jacob took position in the nearest place in which the apprehended DHD(J) cadres were digging and the Army troops led by Major Subhash was cordoning the area. The two alleged cadres of DHD(J) who were in custody of Army were taken to the digging site under guard and watchful eye of Army party. It is also prudent to expect that while the alleged cadres were digging for the arms, the army party would have been in close vicinity to prevent their escape or any mischief. Therefore, the alleged cadres getting hold of Arms and grenades and also getting time to use it seems difficult to believe.

In course of investigation no evidence has been found to substantiate the FIR so far."

32. This Court after perusal of the said status report submitted by CID (Assam) in the light of the averments made in the writ petition as well as the counter claim made in the affidavit-in-oppositions, more particularly of the respondent Nos.1 and 2, was of the opinion that an inquiry be conducted by the learned District & Sessions Judge, Dima Hasao, Haflong, to inquire into the circumstances leading to the death of two detenues, namely, Poresh Warisa and Sujit Nunisa, relating which Dehangi P.S. Case No.05/2009 dated 20.07.2009 under Section 302 IPC was registered and it was directed vide order dated 05.09.2019 that the said inquiry be completed within 4(four) months and the learned District & Sessions Judge was Page No.# 19/97 empowered to issue summons for appearance to produce documents and/or to give evidence and to compel appearance of persons.

33. Subsequently, on completion of the inquiry, the Inquiry Report dt. 23.02.2021 was submitted before this Court and this Court furnished copies of the inquiry report to all the respondents and thereafter the matter was heard.

34. In this connection, it may be mentioned that in course of the proceeding, the petitioner No.2, namely, Sri Golom Nunisa expired because of which one I.A. being I.A.(Civil) No.1053/2021 was filed seeking substitution of the petitioner No.2 by his wife and son, namely, Smt. Sopola Nunisa and Sri Kombo Nunisa, as petitioner Nos.2(i) and 2(ii), respectively which was allowed vide order dated 10.08.2021. Accordingly, the cause of the petitioner No.2 has been persued by the aforesaid two legal heirs, i.e., his wife and son. CONSIDERATION BY THE COURT

35. We now proceed to examine the findings of the learned District & Sessions Judge, Dima Hasao, Haflong as contained in the report dated 23.02.2021. NATURE OF THE INQUIRY

36. At the outset we would like to clarify that while considering the said Inquiry Report, we are not sitting as an appellate court. The said inquiry was directed to be conducted by this Court in order to satisfy ourselves of the veracity of the claims made by the petitioners in the light of the contradictory version by the army authorities and for the purpose of appropriate relief that may be granted by this Court. This petition was not filed for challenging any order passed by any Court but to issue certain directions or writs to the concerned authorities, for which this Court desired to have a clearer picture of the incident. In other words, the inquiry which was directed to be conducted by the District & Sessions Judge, was not akin to any Page No.# 20/97 criminal trial nor a criminal investigation, but to ascertain the circumstances under which the aforesaid two deceased had died to enable this Court to pass appropriate orders in this regard in exercise of the extra-ordinary jurisdiction under Article 226 of the Constitution.

Thus, our analysis of the findings of the learned District & Sessions Judge, Dima Hasao, does not partake the character of exercise of the power of appellate or revisional jurisdiction, but only to assure ourselves of the fidelity and actionability of the findings in the Inquiry Report.

37. Keeping the aforesaid perspective in mind, we have to examine whether the findings arrived at by the learned District & Sessions Judge are based on relevant evidences and materials or not and whether such findings arrived at by the learned District & Sessions Judge are the most probable view of the incident which had occurred during the period of 14.07.2009 to 19.07.2009 in connection with which the aforesaid F.I.R. Dehangi P.S. Case No.05/2009 dated 20.07.2009 under Section 302 IPC was registered qua the version put forth by the army respondents as referred to above.

38. As mentioned above, the allegation of the petitioners in brief, is that the personnel of the 12th Madras Regiment picked up the two deceased persons, tortured them while in their custody and killed them. Thus, it was a case of custodial death which would warrant appropriate actions to be taken against the erring army personnel as well as award of adequate compensation. On the other hand, it is the case of the army personnel under the respondent No.2 that the two deceased were militants and active members of DHD(J) group who were engaged in various criminal and

anti-national activities, which necessitated neutralizing them by taking appropriate actions and these persons were apprehended after Page No.# 21/97 getting specific information about their presence in the village and they confessed to be members of DHD(J) group and had volunteered to reveal certain arms and ammunitions which were concealed in the jungles and while leading the army personnel in the jungle, before they could reveal the concealed arms and ammunitions, they tried to flee by lobbing a hand grenade and opening fire at the armed personnel, resulting in retaliatory fire by the security personnel in which both the deceased died. In short, it is not a case of custodial death but death in a genuine encounter in which the deceased themselves were responsible for firing and using arms against the army personnel.

39. We would also like to mention that while examining the probative value of the inquiry report, we have to clarify the approach to be adopted by this Court as to whether the allegations made by the petitioners relating to which the inquiry was ordered to be conducted, had to be proved on the basis of proof beyond reasonable doubt or on the basis of preponderance of probability.

In our jurisprudence, only the criminal cases are to be proved beyond reasonable doubt because of the serious consequences it entails on the life and liberty of the person concerned. On the other hand, in the civil suit or in proceedings like domestic or departmental inquiries etc. the standard of proof is the preponderance of probability as the civil consequences which flow from such findings are less stringent and serious, without effecting much of personal liberties and life.

As mentioned above, the inquiry proceeding before the learned District and Sessions Judge is not in the nature of a criminal trial but an inquiry directed to be held by this Court to ascertain whether there are bases for the allegations made by the petitioners of the custodial Page No.# 22/97 torture and death of the two petitioners at the hands of the army personnel for the purpose of granting of reliefs sought for in the writ petition filed under Article 226 of the Constitution.

Thus, in our view, the persuasive value of the Inquiry Report has to be examined by applying the principle of preponderance of probability, which is normally applied in all the non-criminal proceedings.

THE INQUIRY REPORT

40. The learned District and Sessions Judge examined as many as 9 witnesses cited on behalf of the petitioners. The Court also examined two defence witnesses produced by the army authorities including two Court Witnesses. The learned District and Sessions Judge requisitioned the GD Entry in respect of the two FIRs which were registered in connection with the aforesaid incident, one by a villager and another by the army authorities. The learned District and Sessions Judge also considered the post-mortem reports and the injury reports.

PETITIONERS' WITNESSES

41. In order to properly appreciate the findings of the learned District and Sessions Judge, it may be apposite to briefly refer to the depositions and evidences on record, which have been extensively

quoted in the inquiry report.

42. Out of the 9 witnesses examined by the learned District and Sessions Judge in support of the case of the petitioners, the first witness, Dimanon Kemprai (PW1), was a resident of Wari Lampu village to which the said two deceased persons belonged. He testified that he knew both the deceased Pirosh Warisa, son of Konto Warisa and Sujit Nunisa, son of late Golon Nunisa and they were aged about 21-22 years when the incident occurred in the year Page No.# 23/97 2009. He also testified that Pirosh was a matriculate and he engaged himself in jhum cultivation after his matriculation. On the other hand, Sujit Nunisa was a cultivator without any education. Both of them were able bodied, healthy and young.

He testified that in the month of July, 2009, the army personnel of the 12 th Battalion, Madras Regiment were engaged in operation in their village Wari Lampu and both Pirosh and Sujit were killed in cold-blood by the army personnel. He stated that he lodged a First Information Report before the Officer-in-Charge of Dehangi Police Station on 19.01.2007 regarding the said incident. In the said FIR, he stated that both Pirosh and Sujit were picked up by the army personnel of 12 th Battalion of Madras Regiment on 14.07.2009 from their village Wari Lampu and after being shot dead, their dead-bodies were brought to Haflong Police Station on 19.07.2009.

He also deposed that on 14.07.2009, the army personnel of 12 th Battalion, Madras Regiment came to their village consisting of about 12 households and asked the villagers including the elderly women and minor children to gather in a group inside one room of their village Headman/ Sarkari Gaon Burah, Bangsran Warisa. The villagers were kept confined in the house of the Village Headman for three nights and three days. He also stated that the army personnel had beaten both Sujit and Pirosh with lathis in his presence and others by tying them on a tree and a post/pole. As a result of the brutal beating by the army personnel, both Pirosh and Sujit fainted. They also sustained injuries in different parts of their bodies. He also stated that the beating and assault upon them continued after regaining consciousness.

He also stated that the army personnel were not accompanied by any police personnel or officer when they were engaged in the aforesaid acts.

Page No.# 24/97 He stated that on 17.07.2009 at about 8-9 AM, all the adult males were taken by the army personnel to a nearby village called Dimadao Wapu, which is located at a distance of about 9 kilometers from Wari Lampu village and on reaching there, the army personnel allowed them to return to their village. Pirosh and Sujit were also taken to Dimadao Wapu village. At that time, physical conditions of both the persons were grim and they could not walk due to the injuries sustained because of beating and assault by the army personnel for which they had to be carried on bamboo posts by tying them while proceeding to Dimadao Wapu village.

He testified that all the villagers who were taken to Dimadao Wapu village were allowed to return to Wari Lampu village except Pirosh Warisa, Sujit Nunisa, Konto Warisa and Dimanjoy Langthasa. Later on, he heard that Konto and Dimanjoy were handed over to the Assam Police and they were released subsequently.

He stated that the dead-bodies of both Pirosh and Sujit were brought to Haflong Police Station on 19.07.2009 and after coming to know that they were killed by army personnel, the First Information Report was lodged.

43. During cross-examination of PW1 (Dimanon Kemprai) on behalf of the army, the said witness denied that there were many youths of Wari Lampu village who were DHD(J) cadres or supporters. He specifically denied that both Pirosh Warisa and Sujit Nunisa were cadres of DHD(J). He also denied that any incriminating article was recovered by the army personnel from the house of Pirosh Warisa. He, however, stated that he was not present when both Pirosh and Sujit were interrogated by the army personnel but he stated that both Pirosh and Sujit were inside the room of the house belonging to the then Gaonburah/village headman Page No.# 25/97 Bangshron Warisa where all the villagers were kept. Later on the two deceased were taken outside and tied on a tree/pole. He also stated that he did not see or witness the actual killing of both Pirosh Warisa and Sujit Nunisa.

44. The second witness who was examined as PW2 was Konto Warisa, the father of the deceased Pirosh Warisa.

He testified that he knew the other deceased Sujit Nunisa also as he was a distant relative and a co-villager. He stated that his son Pirosh Warisa was a Matriculate having passed H.S.L.C. examination from Dehangi High School who was about 23 years old and he was engaged in jhum cultivation. He also stated that the other deceased Sujit Nunisa was young and about 23 years old and was also a jhum cultivator.

He also stated that one day in the month of July, 2009, the army personnel had come to their village Wari Lampu and stayed there for 3(three) days and 3(three) nights and all the villagers were made to stay together in the house of son of village Headman/ Sarkari Gaonburah, namely, Neradao Warisa, son of Bangshron Warisa. He stated that when the army personnel came to their village, they were not accompanied by State police personnel or officer. He stated that the hands and feet of both his son Pirosh Warisa and Sujit Nunisa were tied by ropes and they were severally beaten and assaulted by lathis and because of the severe beating, both of them were in a serious condition and they could not walk.

He also stated that after 3 (three) days of stay in their village Wari Lampu, the army personnel took the adult males of the village including him, Pirosh Warisa and Sujit Nunisa to Dimadao Wapu village which took about 2(two) hours to reach. As both Pirosh Warisa and Sujit Nunisa could not walk due to injuries sustained by them in the hands of army, the army Page No.# 26/97 personnel tied both of them on 2(two) separate bamboo poles and took them to Dimadao Wapu village in the manner animals like pigs are carried.

He also stated that at Dimadao Wapu village, the army personnel made Dimonjoy Langthasa sit in one vehicle whereas they directed him, his son Pirosh Warisa and Sujit Nunisa to sit in another vehicle. At that time both Pirosh Warisa and Sujit Nunisa were alive though they were very weak and injured.

He stated that all the four thereafter, were brought to Dehangi in two separate vehicles. On reaching Dehangi, the army personnel separated his son Pirosh Warisa and Sujit Nunisa from them. At that time, both of them were very weak and unconscious and the army personnel brought him and Dimonjoy Langthsa to the Haflong Police Station in two separate vehicles and he was kept in police lock up at Haflong Police Station one night and released the next day. After his release, he came to know that both Pirosh Warisa and Sujit Nunisa were killed by army.

45. In the cross-examination, he stated that in and around 2009, there were activities of the DHD(J) group and some cadres of DHD(J) came to their village but he denied that his son Pirosh Warisa and Sujit Nunisa were DHD(J) cadres. He also stated that he did not witness the actual killing of his son Sujit Nunisa. He reiterated in the cross-examination that at Dehangi he was separated from Pirosh Warisa and Sujit Nunisa.

He also reiterated that at Dehangi when he was separated from Pirosh Warisa and Sujit Nunisa, both of them were still alive.

46. The next witness was Rangcharan Warisa, P.W.3, the village Headman/Gaonburah who knew both the deceased Pirosh Warisa and Sujit Nunisa.

Page No.# 27/97 He testified that both the deceased were residents of the village Wari Lampu and were cultivators and were aged about 20-23 years old.

He testified that Pirosh Warisa and Sujit Nunisa were killed by Indian Army in July 2009. He stated that a few days before they were killed by the army, the army personnel came to the village Wari Lampu and directed all the villagers to gather in the house of the then Gaon Burah Bongshron Warisa. He also stated that both Pirosh Warisa and Sujit Nunisa were tied by the army personnel and severely beat them by lathis. He was also confined along with other male members in the village for three days and three nights in the house of the said the then Gaonburah.

He also stated that at that time there were no police personnel present in the village. He also corroborated the statement of other two witnesses that after three days, the army personnel took all the adult males numbering about 10-12 from Wari Lampu village towards Dimadao Wapu village on foot and both Pirosh Warisa and Sujit Nunisa were carried by tying on two separate bamboo poles in the manner animals are carried, and they were taken to Dimadao Wapu village. However, he was allowed to return back to the village after going halfway.

He stated that though both Pirosh Warisa and Sujit Nunisa were very young, fit and healthy person, because of the severe beating and assault by the army personnel, both of them became seriously sick and weak and could not walk. He stated that he did not see Pirosh Warisa and Sujit Nunisa again after they were taken away and later, he heard that army had killed both of them in cold blood.

47. In the cross-examination, PW3 (Rangcharan Warisa) stated that he knew both Pirosh Page No.# 28/97 Warisa and Sujit Nunisa from childhood days and Pirosh Warisa was a matriculate having passed H.S.L.C. Examination from Dehangi High School. He also stated that in and around the year

2009, Dima Hasao (then N.C. Hills) was infested with extremists and insurgencies. He did not know whether Dehangi area was infested with militants of DHD(J). He also denied having any knowledge of recovery of incriminating articles from the house of Kanto Warisa, the father of Pirosh Warisa. He also reiterated that all the villagers were confined in the house of the then Gaonburah for three days and three nights. He stated that though they were provided meals twice a day, he did not know whether the army provided food to Pirosh Warisa and Sujit Nunisa. He also denied that both Pirosh Warisa and Sujit Nunisa were DHD(J) cadres.

48. The next witness examined was Smt. Sopola Nunisa, P.W.4, the mother of Sujit Nunisa who testified in similar manner about the coming of army personnel in their village and staying in the village for three days and nights and confining the villagers in the house of the then Headman/Gaonburah Bongshron Warisa. She also testified that both her son Sujit Nunisa and Pirosh Warisa were tied and kept outside and they were beaten severely by the army personnel with lathis continuously for three days and nights because of which they sustained serious injuries on different parts of their bodies and as such, they became very weak and were not in a condition to walk. She also testified that after three days the army personnel took both Sujit Nunisa and Pirosh Warisa to Dimadao Wapu village by tying both of them on two separate bamboo poles in the manner animals like pigs are carried.

She stated that thereafter she did not see her son Sujit Nurisa as well as Pirosh Warisa and later heard that her son Sujit Nunisa and Pirosh Warisa were killed by the army.

49. In the cross-examination, she denied that her son Sujit Nunisa was a cadre of DHD(J). She reiterated that her son was a jhum cultivator and was killed by the army personnel in cold blood though she did not see the actual killing of her son and also denied that both her son and Pirosh Warisa were cadres of DHD(J).

50. The next witness was Sri Demonjoy Lagthasa who was examined as P.W.5. He was also a resident of said Wari Lampu village and he knew both the deceased Pirosh Warisa and Sujit Nunisa. He also testified that Pirosh Warisa was a matriculate, having passed his HSLC examination from Dehangi High School and after completion of his school, took up Jhum cultivation as his profession like Sujit Nunisa, who, however, was not educated.

According to him, both of them were killed by the Army.

He narrated the incident by stating that about 30 to 40 Army personnel came to his village Wari Lampu on 14.07.2009 in the early morning at about 2 to 3 AM before dawn. The Army personnel gathered all the villagers including the women in the house of the then Gaonburah, namely, Sri Banshron Warisa and confined them there. He also stated that the Army personnel tied him with the ropes outside the house of the village headman and both Pirosh Warisa and Sujit Nunisa were also tied with ropes to a jackfruit tree and a bamboo pole and Army personnel beat them with sticks. The Army personnel also electrocuted him with battery powered devices on different parts of his body

and they subjected him to waterboarding by immersing his head inside a water filled bucket.

He stated that the Army personnel stayed in their village for 3 days and nights and they were not accompanied by any State Police personnel or officers. He also stated that both Pirosh Warisa and Sujit Nunisa were young and healthy but after being subjected to Page No.# 30/97 continuous and severe beating by lathis by the Army personnel, both of them sustained serious injuries on different parts of their bodies and they were not in a condition to walk. He also stated that after 3 days the Army personnel took about 10 to 12 villagers of Wari Lampu including himself, Konto Warisa, Pirosh Warisa, Sujit Nunisa and others towards Dimadao Wapu village. Since Pirosh Warisa and Sujit Nunisa sustained severe injuries and could not walk, they were carried by tying them on two bamboo poles in the manner pigs are carried. He was also made to carry Pirosh Warisa and at that time, he noticed that Pirosh Warisa and Sujit Nunisa were badly injured and their faces were swollen and eyes were partially shut. However, they were alive till that time. After reaching Dimadao Wapu village he was then taken to Halflong Police Station and thereafter, sent to Sub-Jail Halflong where he remained for 2 months and 4 days and later on, released on bail. He stated that he came to know about the death of Pirosh Warisa and Sujit Nunisa from the Army personnel when he was in the Halflong police lockup.

51. In the cross-examination, he denied that he had an alias by the name of Kapri Dimasa as he has only one name i.e. Demonjoy Langthasa. He denied that he had joined DHD(J) group in the year 2006 as he was then a student of Class VII at Surangdisa ME School under Dehangi Police Station. He also denied that he along with Pirosh Warisa and Sujit Nunisa were DHD(J) Cadres. He stated that all of them were jhum cultivators. He also denied that there was any DHD(J) cadre among the villagers of Wari Lampu village. He stated that however, there may be DHD(J) cadres in the greater Dehangi area. He also admitted that he, Pirosh Warisa and Sujit Nunisa were kept in different places after being tied and they could not see each other. He also did not see or witness the actual killing of Pirosh Warisa or Sujit Nunisa. He also denied having admitted or confessed before the police that he was a DHD(J) Page No.# 31/97 cadre and that he had joined the organization in the year 2006.

52. Next witness is one Sri Romen Warisa (P.W.6), who is a relative of Konto Warisa (the father of Pirosh Warisa). He stated that Pirosh Warisa used to stay with him in his residence at Dehangi in the year 2006 to 2008, during which time Pirosh Warisa was studying at Dehangi Government High School and Pirosh Warisa passed the HSLC Examination in the year 2008 in 3rd Division. However, because of his economic condition he could not continue his further studies and he was engaged in jhum cultivation. He also stated that he did not see the killing of Pirosh Warisa but heard that Army had killed Pirosh Warisa and Sujit Nunisa. He was present at the time when the dead bodies were handed over to the respective families.

53. In the cross-examination he stated that he did not know the actual age of Pirosh Warisa nor witnessed the army operation in the village Wari Lampu on July 2009. He also did not know whether Pirosh Warisa and Sujit Nunisa were killed in an encounter or in cold blood. But he was sure that Pirosh Warisa was not a cadre of DHD(J) and denied that both Pirosh Warisa and Sujit Nunisa were DHD(J) cadres.

54. One Sri Kombo Nunisa was examined as P.W.7, who is the younger brother of the deceased Sujit Nunisa. He stated that Sujit Nunisa was a jhum cultivator and he was killed by the army in the month of July, 2009 and he was about 10 years old at that time.

He stated that the Army personnel came to his village one early morning before dawn and they asked all the villagers including the women and children to gather inside the house of the then Gaonburah (village Headman). The Army personnel stayed in the village for 3 (three) days and 3 (three) nights and the Army took away his brother Sujit Nunisa and thereafter, he did not see his brother again. He heard from his fellow villagers that the Army Page No.# 32/97 had killed his brother Sujit Nunisa.

55. In the cross-examination, he reiterated that he could remember and recollect the incident of Army carrying out an operation in his village. He, however, did not witness the assault or beating of his elder brother Sujit Nunisa. He also stated that he did not know if his elder brother Sujit Nunisa was killed in an encounter or in cold blood.

56. The other two witnesses i.e. P.W.8 and P.W.9 were the doctors who conducted the post mortem examination on the dead bodies of Pirosh Warisa and Sujit Nunisa.

Dr. Parikshit Barman (P.W.8) conducted the post-mortem examination on the death body of Pirosh Warisa along with Dr. Nomita Nunisa, Dr. N. Lalsim and Dr. Kalpana Kemprai.

He deposed that after conducting the post-mortem examination on the body of Pirosh Warisa the following were recorded:

> "1. Dead body of male person, 21 years old, has been brought for PM examination.
>
> 2. Complexion-Brown, Hair-Black in colour,
>
> 3. Dead body wrapped with plastic sack,
>
> 4. Deceased was wearing grey colour long pant, folded at knee level and blue underwear,
>
> 5. Maggots seen at the sites of wounds,
>
> 6. Rigor mortis present,
>
> 7. Face, neck and other parts of the body covered with mud,
>
> 8. There were multiple bullet injuries in the trunkal region of the body.
>
> 9. There were plenty of scratches all over the body and multiple lacerations and bruises.

10. There was lacerated injury in the right temporo-frontal region of scalp.

11. Abrasions-

a. Wide area of abrasions in right face, b. Large area of abrasions in left face, Page No.# 33/97 c. Large abrasion in mandibular and sub-mental region, d. Large area of abrasion in right behind auricular region, e. Multiple ligature mark with abrasion above both wrist joints, f. Bruises-there were bruises on both buttocks, thighs, arms, legs, feet and in back.

g. There were multiple scratches in the chest wall with multiple abrasions, bruises and bullet injuries.

h. There were multiple fracture of ribs and cartilages.

i. Pleurae - Lacerated, larynx and trachea lacerated, right and left lung lacerated, j. Pericardium - lacerated.

k. Hear - lacerated. All the chambers opened and empty, vessels - lacerated.

l. Abdomen - The abdominal wall is having multiple scratches and small abrasions.

m. Peritoneum - Torn.

n. Mouth, pharynx and esophagus - mouth was stained with mud and lower lip is abraded, esophagus - lacerated.

o. Stomach and its contents - multiple perforations in stomach and its cavity is empty.

p. Liver - Lacerated.

q. Spleen -Lacerated.

r. Muscle, bones and joints _

i. Exit wounds : there was exit wounds of bullet in the front side of neck measuring 3X6 cm approx.
ii. Exit wound just above the axilla in right shoulder - anteriorly.
iii. Exit wound in right of sternum measuring 8X5 cm approx.
iv. Exit wound in left lower chest measuring 2X3 cm approx.
v. Large exit wound in left axilla.
vi. Exit wound just below hand anteriorly (of left axilla) measuring 3X3 cm Approx.
vii. Exit wound in left just above the rib margin.
viii. Exit wound just below the anterior superior iliac spine

measuring 5X12 cm approx.

s. Entry Wounds :
i. Entry wound of bullet in the right side of nape of neck.
ii. Entry wound of bullet just medial to right scapula - superiorly.
iii. Entry wound of bullet in left scapula - placed inferomedially.
iv. Entry wound of bullet in left scapula - placed inferomedially.
v. Entry wound of bullet in right shoulder- posteriorly.
vi. Entry wound of bullet injury just medial to right scapula (lower 2/3rd).
vii. Entry wound of bullet below left scapula.
viii. Entry wound of bullet in right buttock."

He also deposed that as the dead body had bruises, lacerations, abrasions and scratches as well as ligature marks on both the wrists apart from eight (8) numbers of bullet injuries, the aforesaid injuries clearly point towards physical torture upon the victim.

The witness was also shown the injury report of one Yellappa Gaudra, Army No.2606977 Sepoy 12 battallion Madra regiment camp (D.W.2) and testified about the injury report in which the following observations were made.

"Date and Time of Examination - 18.07.2009, 5.30 PM Hospital Registration no.3072 of 2009 Injury - 1X1X0.5 cm, laceration with ragged margins noted on the palm of right hand. No injury noted with deep structures.

Probable cause of Injury - Sharp instrument.

Remarks - Simple Injury."

57. The other witness was Dr. Kalpana Kemprai (P.W.9) who conducted the post-mortem examination on the dead body of Sujit Nunisa and made the following observations in the post-mortem report:

Page No.# 35/97 "1. Dead body of a male person, 28 years old, has been brought for PM examination.

2. Complexion - Brown, Hair - Black in colour, Built - average,

3. Attire - Green T-shirt, Grey coloured long pant and grey coloured underwear.

4. Whole body was swollen.

5. Maggots seen.

6. Peeling of skin seen on both thighs, both buttocks, lower abdomen with raw areas.

7. Peeling of skin also seen on right forearm and other parts of the body.

8. Blackish discoloration of the face.

9. Eyelids swollen with bruises.

10. Bruises also seen on both sides of the face.

11. Superficial abrasions on left side of the face.

12. There were multiple scalds containing serous fluids in all the limbs and abdominal wall and back.

13. There were bruises on both buttocks, thighs and feet.

14. Scalp - Lacerated at the side of the bullet injury, fractures involving both parietal bone and occipital bone, fracture right temporal bone,

15. Vertebra - intact.

16. Membrane - Lacerated at the injury site.

17. Brain - Lacerated at the injury site with brain matter coming out through the vertex.

18. Spinal Cord - Intact.

19. Abdomen - Lacerated in different parts in relation to the injuries described above.

20. Fracture - on right temporal bone, fracture on left rami of mandible, fracture on both parietal bone and occipital bone,

21. Bullet Injuries -

a. Entry wound of bullet on the forehead with exit wound on the vertex.
b. Bullet injury on the right temporal region with exit wound on the left mandibular region.
c. Entry wound of bullet in the lateral side of right forearm in his

upper 1/3rd and exit wound on the medial side of forearm.
d. Entry wound of bullet in right flank with exit would in the left flank.

22. Peritoneum - Lacerated in different parts in relation to the injuries described above.

23. Stomach - Healthy and Empty.

24. Small Intestine - Lacerated.

25. Large intestine - Lacerated."

She also testified that since the dead body had bruises, lacerations, abrasions and scratches, swollen eyelids, peeling of skin, multiple fractures as well as number of bullet injuries, the aforesaid injuries point towards physical torture upon the victim. She stated in the cross-examination that injuries like peeling of skin, bruises, lacerations and abrasions might not have caused the death but stated that the cause of death was due to bullet injuries and there were four bullet injuries on the body of the victim.

58. As mentioned above, two witnesses were examined on behalf of the respondent No.2, Lt. Colonel James Jacob as DW-1, and Sri Yellappa Goudra, Sepoy No.2606977M, as DW-2.

DW-1 is the star witness as far as the respondent Madras Regiment is concerned, as he was the only one who in detail narrated the incident in which according to him the two deceased died in the encounter.

As per (DW1) Lt. Colonel James Jacob, who was a Captain at the relevant time, on getting specific information on 14.07.2009 regarding presence of DHD(J) cadres in the village Dimadao that the cadres of DHD(J) were suffering from malaria, two columns of troops proceeded, one towards Dimadao village and the other towards Warilampu village to cordon both the villages. He stated that they started at about 9.00 PM of 14.07.2009. He was the Page No.# 37/97 leader of the column that had gone towards Warilampu village and reached there at around 4 AM/4.30 AM of 15.07.2009 before sunrise and laid the cordon around Warilampu village. The said column comprised of one officer, two JCOs and 30 other ranks. After searching for about 2 hours in the houses of the village Warilampu, they found one passport size photograph of a youth in army uniform in one of the houses. He was identified from amongst the villagers of Warilampu village, who was about 20 years. He stated that on interrogation and cross-questioning of the villagers, one villager, namely, Dimonjoy Langthasa identified the youth in the photograph to be an active DHD(J) cadre, namely, Pirush Warisa @ Royal Dimasa. On interrogation the said Pirosh Warisa admitted that he was an active member of DHD(J) cadre and he also admitted that even Dimonjoy Langthasa was also an active DHD(J) cadre. According to DW1, interrogation of both Dimonjoy Langthasa and Pirush Warisa @ Royal Dimasa led to two more lady/female cadres of DHD(J) in Warilampu village. However, the said two lady cadres could not be arrested as there were no lady police constables and accordingly, awaited arrival of lady constables. He stated that on 16.07.2009, the O/C of the Dehangi Police Station as well as the O/C of Haflong Police Station came to Warilampu village accompanied by three lady police constables.

59. DW-1 stated that in presence of the police personnel both Dimonjoy Langthasa and Pirush Warisa @ Royal Dimasa confessed that they were active DHD(J) cadres and the two lady DHD(J) cadres, namely, Nonita Langthasa and Moita Kemprai also admitted that they were DHD(J) cadres.

According to DW-1, in the meantime Pirush Warisa @ Royal Dimasa informed them that he would lead the army to the outskirts of Warilampu village in the jungle where weapons including guns were hidden.

Page No.# 38/97 Accordingly, on the next day on 17.07.2009 at about 9 A.M., DW-1 along other personnel of the 12th Madras Regiment and State police comprising of O/C of Dehangi P.S. searched for the weapons in the outskirts of the village Warilampu but did not find any weapons. As the hidden weapons could not be found, the battalion headquarter at Gunjung directed them to handover the two cadres Pirush Warisa @ Royal Dimasa and Dimonjoy Langthasa as well as two lady DHD(J) cadres to the police at Dehangi PS. Accordingly, as they were proceeding towards the road where their vehicles were parked, Pirush Warisa @ Royal Dimasa informed them that 3 more female cadres of DHD(J) were present in Dimadao village and he agreed to identify them. Thereafter, on 17.07.2009 in the afternoon they reached Dimadao village which was already cordoned by the first column of the 12 th Madras Regiment led by Major Suhas from the morning of 15.07.2009. On reaching there, Dimonjoy Langthasa and Pirush Warisa @ Royal Dimasa identified 3 more lady cadres of DHD(J) at Dimadao village who were apprehended by the lady police constables of Dehangi PS. Thereafter, the DW-1 was directed by the Battalion Headquarter to go back to Warilampu village and he went back to Warilampu village and reached there at around 4 PM.

60. DW-1 stated that Sujit Ninisa was a youth of Warilampu village who was aged about 20-21 years and was trying to break the cordon and escape but was caught.

DW-1 stated that when he reached Warilampu village at about 4 PM, Sujit Nunisa who was caught by the troops of 12th Madras Regiment confessed to him that he was an active cadre of DHD(J) outfit. He stated that however, at that time, the State police including lady police constables were not present at Warilampu village.

According to DW1, Sujit Nunisa then told him that he would show them the place where Page No.# 39/97 the DHD(J) cadres had kept weapons. Then Sujit Nunisa was taken by a team of 12 th Madras Regiment to the Headquarter at Gunjung on foot via village Dimadao. In the meantime, DW-1 stayed back in the outskirts of Warilampu village in the jungle in the night of 17.07.2009.

61. DW1 stated that on the next morning of 18.07.2009, he was directed by the Battalion Headquarter to carry out search operation near Sangbar forest (another place) with Sujit Nunisa and Pirush Warisa @ Royal Dimasa. At around 8.30 AM to 9.30 AM they searched Sangbar forest to locate the hidden weapons, accompanied by Sujit Nunisa and Pirush Warisa @ Royal Dimasa. According to DW-1, as shown and led by Sujit Nunisa and Pirush Warisa @ Royal Dimasa, they dug the earth in the forest of Sangbar in about 8 to 9 places for about 3 hours but did not find anything.

62. DW-1 stated that they made the two captured cadres, namely, Sujit Nunisa and Pirush Warisa @ Royal Dimasa dig the earth with digging tools like pickaxe and shovels. Suddenly, one of the cadres took out a hand grenade from the dug earth and threw it at them and they all ran for cover. The hand grenade blasted. Then both the apprehended cadres picked up one AK-47 and one AK-56 Rifles and started firing upon them indiscriminately. At that time, one of their men, namely, Sepoy Yellappa Goudra (DW-2) was injured on his right palm due to the firing by Sujit Nunisa and Pirush Warisa @ Royal Dimasa. They then retaliated for about 15/20 minutes and neutralized (shot dead) both the cadres. The incident occurred between 12 noon to 2 PM of 18.07.2009.

He stated that the total strength of the column would be about 30 comprising of two officers (himself and captain Subhas), two JCOs and 30 other ranks. But no State police personnel were present.

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63. DW-1 stated that all the cadres of DHD(J), namely, Sujit Nunisa, Dimonjoy Langthasa and Pirush Warisa @ Royal Dimasa were suffering from malaria and they had admitted that because of that they were not operating with other active cadres of DHD(J) and they were on some kind of sick leave. DW-1 also stated that both Pirush Warisa @ Royal Dimasa and Sujit Nunisa had confessed that they were involved in the Migrendisa train incident as well as burning of Michidui village under the leadership of Garden Dimasa.

Later, DW-1 lodged the report before the O/C of Umrangso PS on 18.07.2009.

64. In the cross-examination, DW-1 stated that he did not know if the local police was informed before or after carrying out the operation at Warilampu village.

He stated that the local police informed the Battalion Headquarter at Gunjung that some cadres of the DHD(J) were suffering from malaria and were taking shelter at Dimadao village. However, no State police personnel accompanied them at the time of operation.

He denied that the army personnel had confined the villagers of Warilampu village in a single room. He also stated that Pirush Warisa @ Royal Dimasa was apprehended from his house on 15.07.2009 and he was interrogated in the house of one villager of the same village. He stated that they apprehended Dimonjoy Langthasa on 15.07.2009 and denied that he did not identify Pirush Warisa @ Royal Dimasa to be a DHD(J) cadre. He denied that Sujit Nunisa was apprehended on 15.07.2009. He stated that on 15.07.2009 they were not accompanied by any police officials, but on 16.07.2009 during daytime, local police with lady constables came to Warilampu village and accordingly, denied that no police official came to Warilampu village on 16.07.2009.

In the cross-examination, he stated that though the hands of both Pirush Warisa and Page No.# 41/97 Sujit Nunisa were tied with rope, they were not carried on bamboo poles like animals.

He stated that on 18.07.2009 he saw Sujit Nunisa and Pirush Warisa @ Royal Dimasa at Sangbar village in the jungle area who were taken there by a Ghatak team (Commando). He denied that both Pirush Warisa @ Royal Dimasa and Sujit Nunisa were not in good physical condition when they were taken from Warilampu village to Dimadao village.

He admitted that there was no police personnel present on 18.07.2009 at Sangbar when the encounter took place.

65. The other witness produced by the army authorities was Sri Yellappa Goudra as DW-2, who stated that on 18.07.2009 on receipt of direction from the company senior-most Havilder, he was detailed to go to Sangbar for an operation, in which about 30 army personnel were involved. He stated that at that time, two cadres/militants of DHD(J) were present. These two militants informed that they had concealed and hidden weapons in the jungle by digging earth. However, though the team dug the earth at about 4 to 5 places as shown by the militants, they did not find any hidden weapons. Thereafter, the two militants were asked to dig the earth, which continued for about 3 hours, but no weapons were found. Then suddenly, one of the militants lobbed and threw a hand grenade at them because of which the whole team of 12th Madras Regiment consisting of 30 personnel had scattered away to save themselves. Thereafter, one of the militants started firing at them with AK-47 Rifle. As DW-2 was near the militant, who was firing, he went towards him and tried to overpower him and jumped towards him when the militant shot at him with the AK-47 Rifle from a distance of about 2 to 3 ft. As per DW-2, the bullet entered his right palm and exited from the other side of his right hand and he was given first aid at Sangbar and thereafter, he was given Page No.# 42/97 anesthesia injection at Sangbar itself and as there was great loss of blood, he did not regain consciousness soon. He was brought to the Base Hospital, Guwahati and then to Command Hospital, Kolkata.

66. In the cross-examination, DW-2 stated that the team of 12 th Madras Regiment had surrounded the two militants from a distance of about 10 to 15 ft. and they had maintained strict vigil on the militants and had surrounded them from all sides. He also stated that the two militants were digging the earth at the same place/location and they were near each other. He stated that by the time their team fired at both the militants, he had become unconscious and did not know what happened thereafter. He denied that both the militants were not fit and healthy and they were not capable of digging earth due to torture by the army. He also denied that one of the youths did not hurl any grenade at them. When questioned whether he recollected that he was treated at Haflong Civil Hospital, he replied in the negative.

67. Thereafter, the Court examined two Court witnesses, namely, Suriya Kanta Morang, APS, Deputy S.P., Headquarter Dima Hasao as CW1, who mentioned about availability of a ballistic expert, namely, Sri Upen Borah, Deputy Director of Forensic Science Laboratory (FSL), Kahilipara, Guwahati. Since he had made a deposition only for the purpose of identifying the ballistic expert, both the sides did not subject him to cross-examination.

68. Sri Upen Bora, Deputy Director of FSL, Kahilipara, Guwahati, was examined as Court Witness No.2.

He stated that after going through the post-mortem reports of the two deceased persons, who were allegedly shot dead by the army personnel of the 12 th Battalion Madras Page No.# 43/97 Regiment, who according to them were armed with AK-47 and Insas Rifles and after taking into account the size of the multiple entry and exit wounds, he would agree with the opinion of the two doctors (PW-8 and PW-9), who had performed the post-mortem examination and gave the opinion that the aforesaid two deceased expired due to shock and hemorrhage as a result of the bullet injuries which were ante-mortem in nature.

He also testified that having examined the explosives including grenades, he would say that when a grenade is lobbed after removing the safety pin, it takes only 5 to 6 seconds for a grenade to explode which is a really short period of time.

He also mentioned of the testimony of the DW-1 Captain James Jacob who had stated that the grenade blasted after being lobbed. According to Upen Borah, when a grenade explodes, the safety pin, the safety lever, the main spring and splinters are to be found along the scene of explosion and it is highly improbable that not a single Army personnel of the 12th Madras Regiment was injured by splinters of the grenade.

He also mentioned that the post-mortem reports of the two deceased persons do not reveal and indicate presence of grenade splinters inside their dead bodies.

In the cross-examination on behalf of the 12 th Madras Regiment, when he was shown a scanned coloured photograph of the hand of a person, he stated that he cannot give any comment on the same.

69. In course of the inquiry, a local inspection was carried out by the District and Sessions Judge on 09.02.2020 visiting the places of occurrence, that is, Wari Lampu village, Dimadao village and Sangbar forest.

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70. The Learned District Judges on appreciation of the evidence on record give the findings as quoted in paragraph 10 above.

71. We will now proceed to examine each of the findings of the learned District Judge and Sessions Judge.

72. The first finding is that "Captain James Jacob of 12th Battalion, Madras Regiment and his team conducted an operation at Wari Lampu village from the early hours of 14.07.2009. The said operation was illegal and without jurisdiction and not in terms of the Act, 1958 as no police officer or personnel was present at the time of the operation." 72.1 In our opinion, the first part of the finding is fully substantiated by the evidence of the witnesses, PW 1 to PW 7 who were all villagers of Wari Lampu from where the two deceased persons were picked up by the army personnel. All these witnesses corroborated each other on this vital aspect. Though the witness, DW 1 examined by the

respondent Madras Regiment denied having conducted any operation at Wari Lampu village from the early hours of 14.07.2009, but from 15.07.2009, his sole testimony is not corroborated by other evidences and as such, does not inspire confidence to ignore the evidence of the aforesaid PWs.

72.2 In this regard, it may also be noted that the army authorities in their affidavit in opposition as well as in the oral testimony of DW1 mention that an F.I.R. was lodged on 18.07.2009 by the army authority in which it was clearly stated that operations were launched by 12 MADRAS on 14th July 2009. In paragraph 1 of the said F.I.R., a copy of which is annexed to the affidavit in opposition of the Respondents no.1 and 2 and exhibited (as Exhibit A) and proved by DW1 during the inquiry, it is mentioned, as quoted below that, Page No.# 45/97 "1. Based on the specific information received from higher headquarters regarding presence of hardcore DHD (J) in the general area of village Wari Lampu North of Dihangi Police Station, operations were launched by 12 MADRAS on 14th July 2009." (Emphasis added) 72.3 In paragraph 2 of the F.I.R. it has been mentioned that after various arrests, operations were called off on 17.07.2009.

Thus, their own records and pleadings contradict the testimony of DW 1 that the army column reached the village in the early morning of 15.07.2009 before sunrise at around 4/4:30 AM and laid cordon around Wari Lampu village and in the early morning they started search of the houses in the village.

73. In this regard it may be also mentioned that there are some other inconsistencies in the evidence of the army authorities, which render their version highly improbable. 73.1 In para 3 of the affidavit-in-opposition filed by the respondents No.1 and 2, relating to the apprehension of Pirush Warisa, it was stated that in the morning of 16 July 2009, an individual name Persuh Warisa, S/o Konto Warisa, resident of Wari Lampu was detained while he was trying to escape the cordon in a suspicious manner. It was also stated that on a detailed body search of the person, one photograph in DHD(J) uniform was found in his wallet and he confessed to be an overground worker in the village. 73.2 On the other hand, DW1 in his deposition states that in the early morning of 15.07.2009, they started their search in the houses of Wari Lampu and after about 2 hours of search they found one photograph of a youth in army uniform in one of the houses. It was a passport size photograph and they identified and located the person in the photograph from amongst the villagers. He further deposed that on interrogation and on cross questioning of the villagers, one of the villagers namely Dimonjoy Langthasa identified the youth in the Page No.# 46/97 photograph to be an active DHD (J) cadre, namely Pirush Warisa. 73.3 Thus, it is quite clear that as regards the manner of apprehension of the aforesaid Pirush Warisa and recovery of the passport size photograph, the affidavit in opposition filed by the respondents No. 1 and 2 differs from the testimony of DW 1 who was allegedly a member of the army column which apprehended the aforesaid Pirush Warisa.

While as per the affidavit in opposition, the said Pirush Warisa was apprehended while he was trying to escape the cordon in a suspicious manner and when searched, they found a photograph in DHD(J) uniform, DW1 testified that a photograph of a person in uniform of DHD(J) was recovered from one of the houses in the village and after interrogation and the said Pirush Warisa was identified. Thus, these two versions of the Respondents No.1 and 2 differ in material aspects,

rendering their version unreliable.

74. There are also inconsistencies relating to apprehension of Sujit Nunisa. As per the affidavit in opposition of the Respondents no.1 and 2, he was spotted by the army personnel at around 0400 hours of 18.07.2009 while trying to run away from the village in a suspicious manner. It was also alleged that on questioning he admitted being a DHD (J) cadre.

On the other hand, DW 1 in his deposition stated that on 17.07.2009 in the afternoon, after he and his team reached Dimadao village from Wari Lampu village, he was directed by the Battalion Headquarter to go back to Wari Lampu village and accordingly, he returned to Wari Lampu and reached there at about 4 pm. And when he reached there he found Sujit Nunisa who was already apprehended by the army personnel who had stayed back in Wari Lampu and confessed to him that he was an active DHD (J) cadre.

Thus, according to DW 1, Sujit Nunisa was already arrested when DW 1 reached Wari Page No.# 47/97 Lampu in the evening at about 4 pm on 17.07.2009, whereas, as per the affidavit in opposition he was arrested in the early morning of 18.07.2009.

In our opinion, these material inconsistencies render the version of the army authorities unreliable about the apprehension of both the deceased persons.

75. As regards the second part of the first finding that the said operation was illegal and without jurisdiction and not terms of the Act, 1958 as no police officer or personnel was present at the time of operation, we are also of the same view. We are of the opinion that the army authorities could not have carried out the operation for such a long period of three days without involving the civil authorities and the police, as it was not a case of sudden attack or ambush by the insurgents but a well-planned and thought out operation by the army authorities to apprehend some insurgents of whose presence in the village the army learnt from intelligence report.

75.1 We have also noted that the army did not adhere to the norms as required under the law as also highlighted by the Ld. District Judge and Sessions Judge in his report citing the judgment of the Hon'ble Supreme Court in Naga People's Movement of Human Rights vs. Union of India, (1998) 2 SCC 109.

In this regard, one may also refer to para nos.53 and 58 of the aforesaid decision in Naga People's Movement of Human Rights (supra) wherein the Hon'ble Supreme Court had emphasised the binding nature of certain code of conduct (Dos and Don'ts) for the security forces during operations as follows:

> "53. Before we conclude the consideration of the questions regarding the constitutional validity of the Central Act, we may refer to the grievance of the petitioners that there has been widespread abuse of powers conferred under the Central Act by the personnel of the armed forces while such forces were deployed in the areas declared as "disturbed areas" under the Page No.# 48/97 Central Act.

.... On behalf of the Union of India it has been submitted that an inquiry is made whenever any complaint about misuse of powers conferred under the Central Act is received and that on enquiry most of the complaints were found to be false, and that whenever it is found that there is substance in the complaint, suitable action has been taken against the person concerned under the provisions of the Army Act. The learned Attorney General has placed before us instructions in the form of a list of "Dos and Don'ts" that are issued by the Army Headquarters from time to time. The instructions contained in the said list which must be followed while acting under the Armed Forces (Special Powers) Act, 1958 are in these terms: (Emphasis added) "List of Dos and Don'ts while acting under the Armed Forces (Special Powers) Act, DOS

1. Action before Operation

(a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.

(b) Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.

(c) Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.

(d) As far as possible coopt representative of local civil administration during the raid.

2. Action during Operation

(a) In case of necessity of opening fire and using any force against the suspect or any person acting in contravention of law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.

(b) Arrest only those who have committed cognizable offence or who are about to commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.

(c) Ensure that troops under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.

(d) Ensure that women are not searched/arrested without the presence of female police.

In fact women should be searched by female police only.

3. Action after Operation

(a) After arrest prepare a list of the persons so arrested.

(b) Hand over the arrested persons to the nearest police station with least possible delay.

(c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.

(d) Every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon a particular case.

(e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.

(f) All such arms, ammunition, stores etc. should be handed over to the police station Page No.# 49/97 along with the seizure memo.

(g) Obtain receipt of persons and arms/ammunition, stores etc. so handed over to the police.

(h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.

(i) Make a record of the commander and other officers/JCOs/NCOs forming part of such force.

(k) Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police along with the details leading to such death.

4. Dealing with civil court

(a) Directions of the High Court/Supreme Court should be promptly attended to.

(b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.

(c) Answer questions of the court politely and with dignity.

(d) Maintain detailed record of the entire operation correctly and explicitly. DON'TS

1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest police station.

2. Do not use any force after having arrested a person except when he is trying to escape.

3. Do not use third-degree methods to extract information or to extract confession or other involvement in unlawful activities.

4. After arrest of a person by the member of the armed forces, he shall not be interrogated by the member of the armed force.

5. Do not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.

6. Do not tamper with official records.

7. The armed forces shall not take back a person after he is handed over to civil police."

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58. The instructions in the form of "Dos and Don'ts" to which reference has been made by the learned Attorney General have to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note should be taken of violation of the instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950." (Emphasis added) 75.2 We have also observed that except for apprehension of female cadres, the army personnel did not appear to have sought the assistance of the civil police during the operation Page No.# 50/97 and while dealing with the two deceased persons as regards alleged endeavour to recover arms at the instance of the two deceased persons.

In the deposition of DW1, he does not mention of the presence of the civil police when they laid cordon on Wari Lampu village and during the search conducted in the houses and apprehension and interrogation of Dimonjoy Langthasa and Pirush Warisa. Only when they disclosed the presence of female DHD(J) cadres, DW1 mentions of waiting for the female constables.

DW1 specifically stated that when he met Sujit Nunisa in Wari Lampu village at around 4 pm of 17.07.2009 who allegedly confessed to DW1 that he was an active member of DHD(J), the police including lady constables were not present in Wari Lampu village.

DW1 himself also categorically states that no police personnel was present when the army personnel went with the two deceased at Sanbar forest to recover hidden arms on 18.07.2009.

We find this non-involvement of the police by the army personnel at the most crucial part of the operation, in the light of the aforesaid mandatory Dos and Don'ts, to be incomprehensible.

76. Coming to the second finding of the learned District and Sessions Judge that both Poresh Warisa and Sujit Nunisa who were residents of Wari Lampu village did not have any criminal background and the record of inquiry did not reveal that they were in any way connected with any extremist outfit like DHD(J), we are also in agreement with the said finding. If there be any allegation against the aforesaid two persons that they had criminal background, more particularly, involvement with the extremist DHD(J), there ought to have Page No.# 51/97 been some materials against them. The only evidence which has been sought to be relied upon is the alleged recovery of passport size photo of said Sujit Nunisa in army uniform. However, the said evidence was never produced for the inquiry before the District and Sessions Judge. The other evidence is the alleged confessional statement made by both Poresh Warisa and Sujit Nunisa that they were members of DHD(J) before the army authorities as narrated by DW1 without any corroboration. Such self incriminating statements allegedly made as narrated by DW1 apart from being inadmissible hardly inspires confidence.

There is, thus, no reliable evidence to show that the deceased were involved with the activities of the extremist outfit.

It is to be also noted that if they were alleged to have connection with the extremist outfits like the DHD(J), there ought to have been some other materials in terms of earlier F.I.R. against them or any statement made in that regard by other persons, which were not forthcoming in the inquiry except for the alleged confessional statement made by these two persons to the army authorities during the operation which has no evidentiary value.

Therefore, in absence of any tangible evidence to show that said Poresh Warisa and Sujit Nunisa had links with extremist outfit like DHD(J), we do not find the conclusion arrived at by the learned District and Sessions Judge to be perverse.

It is also noteworthy to mention that the civil police also did not indicate the involvement of these two deceased persons with DHD(J) or any such terrorist activities in their affidavit filed.

77. The third finding of the learned District Judge is as follows:

> "3. Both Poresh Warisa and Sujit Nunisa were young persons who were healthy and able Page No.# 52/97 bodied persons. Both of them were tortured by the personnel of 12 th Battalion, Madras Regiment which made both of them very weak and infirm. Under those conditions both of them were taken from Wari Lampu village to Dimadao Wapo village by tying them on two bamboo poles like the way animals are carried."

77.1 As regards the finding about the physical condition and health of the two deceased persons, the same stands corroborated by the evidences and witness accounts. The evidence of the defence witnesses of the Madras Regiment also clearly indicates that they were young, healthy and abled bodied persons.

77.2 As regards the conclusion and finding of the learned District and Sessions Judge that they were tortured by the personnel of 12 th Battalion, Madras Regiment which made them weak and infirm, in our view, is also substantiated by the evidences of PW1, PW2, PW3, PW4, PW5, PW6 and PW7.

77.3 The oral evidence of the aforesaid witnesses stand corroborated by the medical evidence i.e. the post-mortem reports which were proved by PW8 and PW9. In fact, PW8 (Dr. Parikshit Barman) had categorically stated that as the dead body had bruises, lacerations, abrasions and scratches as well as ligature marks on both the wrists apart from the eight (8) bullet injuries, the aforesaid injuries clearly point towards physical torture upon the victim i.e. Poresh Warisa.

77.4 Similarly, PW9 (Dr. Kalpana Kemprai) who conducted the post-mortem examination on the dead body of Sujit Nunisa also stated that these injuries of bruises, lacerations, abrasions, scratches, swollen eyelids, peeling of skin, multiple fractures apart from bullet injuries point to physical torture upon the victim.

Page No.# 53/97 77.5 Accordingly, if the said Poresh Warisa and Sujit Nunisa were tortured in the manner as testified by PW1 to PW7 which is corroborated by the medical evidence, the finding that both Poresh Warisa and Sujit Nunusa were taken from Wari Lampu village and Dimadao Wapo village by tying them on two bamboo poles in the manner animals were carried cannot be said to be unsubstantiated.

78. Coming to the fourth finding arrived at by the learned District and Sessions Judge that the version of the Madras Regiment that one of the two Dimasa youths had first hurled one grenade which blasted and thereafter both of them fired at the party of 12 th Battalion, Madras Regiment is not believable, as both the youths were cordoned and surrounded by the team of about 30 personnel of 12th Battalion, Madras Regiment, cannot be also said to be perverse.

78.1 In our view, the said finding is based on normal human conduct, fortified by the testimony of CW2, Sri Upen Bora.

It is on record that it was not a chance encounter of the said two deceased persons with the army personnel when one of them hurled hand grenade and fired upon the army personnel. These two persons were already in the custody of the Madras Regiment and under close supervision of the army. According to the army version they were specifically taken to the jungle for recovery of certain alleged hidden arms as stated by both their witnesses, DW1 and DW2.

78.2 The testimony of DW2 who was alleged to be standing close to one of the militants is quite significant.

According to DW2, there were 30 army personnel who were surrounding the said two Page No.# 54/97 persons while they were allegedly unearthing the hidden arms and he was only about 2 to 3 feet away from one of them.

DW2 also categorically stated that the team of the 12 th Battalion, Madras Regiment had surrounded the militants before the blasting of grenade from a distance of 10 to 15 feet and maintained a strict vigil on the militants and surrounded them from all sides. 78.3 The fact that these two deceased persons were digging earth under close supervision of 30 army personnel who were surrounding them, will make it very hard to believe that the hand grenade and arms were found on the ground and that, it would not have been noticed by any of the army personnel who were surrounding the two persons and were keeping a strict vigil on them.

78.4 It is also to be noted that the said operation was being conducted at the noon time, during 12 noon and 2 P.M. Thus, it was during broad day-light where there could not have been any issue relating to visibility. Further, if any person has to hurl a hand grenade, both the hands have to be free as the hand grenade has to be held by one hand and by the other hand the pin has to be removed. If the version of the army is to be believed, the person who was hurling the hand grenade would have to first drop the pixel or shovel with which he was digging and thereafter, pick up the hand grenade and pull the pin and then throw the same, which, in our view, is most unlikely in presence of very well trained armed personnel who apparently belonged to a Commando Unit-Ghatak Team as stated by DW1, who were allegedly keeping a strict vigil on them.

78.5 In this regard, it is worthwhile to recollect the evidence of CW2 who stated that it is highly improbable that not a single army personnel of 12 th Battalion, Madras Regiment was Page No.# 55/97 injured by the splinters on the blasting of the grenade. He also stated that the post-mortem reports of the two deceased persons do not indicate presence of grenade splinters inside their dead bodies which would not have been likely, if the grenade had exploded. 78.6 Furthermore, it may not be out of place to refer to the affidavit filed by the Superintendent of Police, CID, Assam, Ulubari on 18.12.2018 in which it was specifically mentioned that though the F.I.R. reflected that the apprehended cadres were digging for a cache of arms/ammunition but during investigation, the Investigating Officer could not recover any implements of digging nor the complainant could show the digging spot and the digging implements which established that the plea of digging is false and manipulated one. 78.7 In the said affidavit, it has been further mentioned that though it was reflected in the F.I.R. that encounter lasted for about 20 (twenty) minutes, the complainant showed only the weapons along with live and empty cartridges which were reportedly used by the apprehended extremists. It was further stated in the said affidavit that the complainant did not produce any empty cartridge nor arms used by the army personnel and the stand of the army authorities that the apprehended DHD(J) cadres died due to retaliation cannot be sustained as there was no information relating to counter fire from the part of the army. 78.8 The affidavit also stated that though in the F.I.R., it was mentioned that the army personnel led by Captain James Jacob took position in the nearest place in which the apprehended DHD(J) cadres were digging and army troops led by Major Subhas was cordoning the area, and they were under the watchful eye of the army party, it would be expected that while the alleged cadres were digging for arms the army party would be in close vicinity to prevent their escape or any mischief and as such, the allegation that the Page No.# 56/97 cadres got hold of arms and grenades and also had time to use the same appears difficult to believe.

Accordingly, it was stated in the said affidavit that in course of investigation, there was no evidence to substantiate the F.I.R.

78.9 We have taken into account the aforesaid averments made in the affidavit filed by the said Superintendent of Police, CID, Assam to examine the plea of the army authorities vis-à- vis the contention of the petitioners. Though none of the police persons were examined in course of the proceeding, it is to be noted that the counsel for the army authorities had stated before the learned District and Sessions Judge before the commencement of the proceeding that it may not be necessary to issue any notice to the police. Further, nothing prevented the army authorities from examining any of the police personnel by summoning them before the learned District and Sessions Judge. However, no endeavour was made by the army authorities to examine any police witness, though nothing prevented the army authorities to do so in course of the inquiry.

78.10 In this regard, we would also make the observation that the army authorities had taken the plea that they had recovered 2 assault rifles, one grenade and certain ammunitions as also mentioned in the F.I.R.. However, it is to be noted that the burden and onus was on the army authorities to prove that these were recovered at the instance of the two deceased persons, something akin to recovery under Section 27 of the Indian Evidence Act, 1872. Unless, the recovery of the arms and ammunitions are relatable to the two deceased persons, mere recovery of arms and ammunitions will not render the version of the petitioners suspect. It is only when the army authorities link and connect the recovery of arms and Page No.# 57/97 ammunitions with the deceased with cogent materials that some inference can be drawn against the two deceased. However, as discussed above, when the most crucial disclosure was allegedly made by the two deceased that they would show where they had hidden certain arms and ammunitions, the army never informed the civil police. Further, even after the alleged disclosure was made to the army personnel long before the incident, no attempt was made by the army personnel to inform the police or involve the police in the so called exercise to recover the arms. The police during their investigation did not believe the version of the army as clearly mentioned in the status report submitted before the Court. Hence, even if the army personnel had recovered certain arms and ammunitions as claimed by them these are not linked to the two deceased persons.

Under the circumstances, we find no reason not to accept the fourth conclusion arrived at by the learned District and Sessions Judge that hurling of grenade and firing by the two deceased is not believable. Further, it has not been also satisfactorily established that the arms and ammunitions allegedly recovered were at the instance of the two deceased persons.

79. Learned District and Sessions Judge gave the fifth finding that DW2 Sepoy Yellapa Goudra was treated at Haflong Civil Hospital on 18.07.2009 at 05:30 PM and as per the Medical Examination Report of Dr. Lalawmilan Suantak it merely indicated a simple injury caused by a sharp instrument and as such, the stand taken by the army authorities that Sepoy Yellapa Goudra sustained bullet injury is not believable. 79.1 The said Sepoy was examined as DW2 who stated that he was standing near one of the militants who fired on them. He stated that he went towards him and tried to overpower Page No.# 58/97 him and as he jumped in order to overpower him, the militant shot him with his AK-47 Rifle from a distance of about 2 to 3 feet and a bullet entered his right palm and

exited from the other side of the hand. He was then given first aid at the place by their team and thereafter, was given anaesthesia injection at Sangbar itself and as there was a great loss of blood, he lost consciousness and did not regain consciousness. He stated that he was later taken to Base Hospital, Guwahati and then to Command Hospital, Kolkata.

This deposition of the DW2, however, hardly inspires confidence in us. First of all, when a detail affidavit was filed on behalf of respondent Nos.1 & 2 on 14th September, 2015 though there is a mention that one of the Sepoy(s) suffered bullet injury in his right palm and he was given first aid at the site, there was no mention that he lost consciousness. 79.2 On the other hand, there is medical evidence on record that the said Sepoy was treated by Dr. L. Suantak, MHO 1 in Haflong Civil Hospital on 19.07.2009 in which it is mentioned that the said Sepoy was examined on 18.07.2009 at 05:30 pm and injury found was 1x1x0.5 cm laceration with ragged margins on the palm of right hand and no injury to deep structures was noted and the probable cause of injury was sharp instrument with the remark that it was a simple injury. This report rules out any "injury to deep structures" which means that there could not have been any such injury which would pierce the palm. Had there been piercing injury on the palm, that would have been reflected in the very first injury report. The said report was a contemporaneous report which would lend more credence to the assertion that no serious injury was received by the said Sepoy and it was rather a superficial scratch injury.

The said medical report was duly exhibited as Ext.3 and proved in original before the Page No.# 59/97 learned District and Sessions Judge during the inquiry. However, apart from feigning ignorance of the said report, there was no denial nor challenge to the genuineness of the said report by the army authority.

On the other hand, the army authorities has now sought to substantiate the alleged gunshot injury received by DW2 though certain medical documents which were annexed in their affidavit. These, however, were not proved by them in course of the inquiry. 79.3 We have also noted that the respondent Nos.1 & 2 had annexed one document as "Appx C" to the additional affidavit filed on 19.12.2018 to claim that DW2 had received gunshot wound of AK-47 Rifle on right palm. But it was also not proved in course of the inquiry.

79.4 Further, when the Superintendent of Police (CID), Assam filed his status report prior to the holding of inquiry by the District & Sessions Judge, it was also mentioned that the injured Sepoy 260977 Yellappa Goudra reportedly sustained bullet injury on his right palm and was sent for medical examination by 12th Bn. Madras Regiment at Haflong Civil Hospital and the injury report was also collected from which it was known that the said constable sustained simple injury due to impact of sharp instrument.

79.5 If the version of DW2 is to be believed, it certainly amounts to a grievous injury, since not only a bullet pierced his right palm but because of the bleeding he lost consciousness, which means that if he had not been promptly attended, it could have been life threatening. Yet, such a serious injury was not highlighted when the affidavit was filed earlier, which in ordinary course, would have been mentioned in the affidavit. The deposition of DW2, therefore, appears to be an improvement and

embellishment as all the contemporaneous Page No.# 60/97 evidences do not support it.

80. The learned District and Sessions Judge gave the last and sixth finding that both Poresh Warisa and Sujit Nunisa were killed in cold blood by the personnel of 12 th Battalion, Madras Regiment.

80.1 The version of the petitioners that the deceased were picked up from their village and subjected to severe beating is supported by the evidence of PW1 to PW7.

The contention that they were subjected to brutal torture is corroborated by the post- mortem report and expert evidence of PW8 and PW9.

The fact that both the deceased were in the custody and they met their end while in the custody of the army authority is an admitted position, with the army authority explaining that they died during retaliatory fire.

Though there is no eye witness account on how the two deceased died while in the custody of the army, the version of the army authority that the deceased died while they tried to flee from the custody of the army by hurling hand grenade and firing from assault rifles has been disbelieved as discussed above.

80.2 In this regard one may recall the principle underlying Section 106 of the Indian Evidence Act which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In the present case, as discussed above, it is on record that these two persons were apprehended by the army personnel and they were in their custody for three days and these two persons died while in their custody. As to what happened to these two persons after they Page No.# 61/97 were taken into custody by the army personnel and later shown to be shot dead is within the especial knowledge of the army authorities. The army authorities are the ones who have to explain how these two persons died while in their custody. The burden is on the army authorities to discharge by properly explaining the circumstances in which these two persons died and it is not for the petitioners to prove that the two persons were killed and shot dead by the army personnel. In the present case there is nothing on record which satisfactorily explains the circumstances under which these two persons died of multiple bullet injuries.

The burden is also on the army authorities to explain how the two received multiple injuries over their bodies. It is the specific stand of the petitioners that the two deceased were subjected to brutal torture when they were in the custody of the army personnel which has been satisfactorily established by the oral as well as medical evidence. Thereafter, they were brought dead by the army personnel claiming that they were killed in the retaliatory fire. The law is well settled that the explanation as required under Section 106 of Indian Evidence Act to discharge the burden must be cogent and credible and if the explanation proffered is either false or not believable, the necessary adverse inference has to be drawn. [See Joshinder Yadav v. State of Bihar, (2014) 4 SCC 42] 80.3 As discussed above, in the present case, army authorities have failed to satisfactorily explain the

circumstances in which the said two persons were killed. On the contrary the evidences show that the version put up by the army personnel is not credible and explanation offered by the army personnel is prima facie false.

Apart from failure to properly explain the death of the two persons in their custody, the army authorities have utterly failed to explain how the two deceased got the injury marks all Page No.# 62/97 over their bodies, which the medical experts have stated, point towards torture.

Under the circumstances in the light of the medical evidence of injuries all over the bodies of the two deceased persons indicating torture and the evidence of the villagers to that effect that they were tortured and taken away in debilitating conditions, the only logical inference that can be drawn as also mentioned in the inquiry reports is that the army personnel had shot and killed these two persons without adequate cause and reasons after torturing them.

Even if there be any lingering doubts about the circumstances of the death of these two persons, the status report submitted by the SP CID as referred to above puts to rest any such doubt.

81. In this regard, we may also examine the objections raised by Mr. R.K.D. Choudhury, learned ASGI about the findings of the Inquiry Report.

81.1 It was submitted by Mr. R.K.D. Choudhury, learned ASGI that the inquiry was not broad based involving all the stakeholders with which we are not in agreement for the reason that it was a very focused inquiry to ascertain the circumstances under which the said two deceased persons had died. Moreover, nothing prevented the army authorities from examining other witnesses including the police by calling them. However, they had opted not to do so. As noted above, in the beginning of the inquiry, the counsel for the army authorities had stated before the learned District and Sessions Judge that it was not necessary to issue notice regarding the inquiry to other respondents which included the State police and as such, the objection raised at this stage does not appear to be appropriate. 81.2 It was contended by Mr. Choudhury, learned ASGI that no police personnel including Page No.# 63/97 the lady constables who were involved in the apprehension of the lady cadres of DHD(J) were examined. As mentioned above, it was a focused inquiry. Further, the witnesses of the respondent Nos.1 and 2 had clearly stated in their testimony that no police was present when the most crucial occurrences happened, namely, at the time of apprehension of the said two deceased persons and also when the said two deceased persons allegedly told the army personnel that they would show where the arms and ammunitions were allegedly hidden in the jungles and also when they were allegedly leading the army personnel to the forest and as such, in our view, non-examination of the police personnel who were not involved in the crucial parts of the operation does not cause any prejudice to the army authorities. 81.3 As regards the contention of the learned ASGI that there were inconsistencies in the inquiry report about the commencement of the operation, we are of the view that there are no inconsistencies. If at all there be inconsistencies, these were in the evidence of the respondent Nos.1 and 2 themselves. They had given different timings of the commencement of the operation in their pleadings which do not correspond to their oral evidence. 81.4 Coming to the contention of the learned ASGI that merely because certain bruise remarks were found on the bodies of the deceased, these do not necessarily indicate that they were

tortured, we have already taken the view that it was incumbent upon the respondent army authorities to satisfactorily explain how the deceased persons had suffered these bruises as it was in their especial knowledge since the two persons were in the captivity of the army personnel. Thus, in absence of any explanation forthcoming from the army authorities which is missing in the present case, such a contention in our view is without any basis.

Page No.# 64/97 81.5 As regards the alleged injury received by Yellappa Goudra, who was examined as DW2, one of the army personnels involved in the operation, it was for the army authorities and for the said witness to prove with necessary documentary evidence as to how he allegedly suffered such a serious injury. However, as already discussed above, we have taken the view that the explanation offered by the said DW2 is not borne by records considering the contemporaneous medical report which merely indicates superficial scratch and not any serious injury.

81.6 Learned ASGI also has contended that merely because the army personnel did not receive any splinter injuries does not discount their version of hurling of grenade by one of the deceased.

In this regard, without going much into the detail, it can be stated that the expert opinion as well as investigation by the police as mentioned in the status report have cast a serious doubt on the army version. We would go by expert opinion as well as report by the police as they were better equipped to explain the lack of absence of any splinter injury which indicates the improbability of hurling of grenade by anyone of the deceased. 81.7 It was also submitted by learned ASGI that there is evidence that a large number of arms and ammunitions were recovered which would amply prove that the two deceased persons were militants.

We have already discussed this issue by holding that mere recovery of arms and ammunitions will be of no help to their case, unless it can be shown with credible evidence that these discoveries were made at the instance of the two deceased persons. However, as discussed above, the army authorities have failed to link and connect the recovery with the Page No.# 65/97 two deceased persons. We have also noted that there is not even a whisper from the side of the civil police that the two deceased persons were suspected of being militants in course of the police investigation. Therefore, we see lack of evidence to indicate that the said two deceased persons were militants.

81.8 As regards the contention of the learned ASGI that the witnesses examined on behalf of the petitioners were all interested witnesses and as such, their allegation that the two deceased persons were subjected to torture ought not be believed. However, we are unable to accept this contention for the reason that the oral testimony of these witnesses could not be shaken during the cross-examination. That the deceased were subjected to torture is corroborated by the medical evidence as discussed above.

Accordingly, we do not find any ground in the objections raised by the learned ASGI.

82. Having considered the whole gamut of evidences which are available on record including the testimonies of the witnesses examined by the learned District and Sessions Judge as well as the pleadings as discussed above, we do not find any reason to disagree with the findings arrived at by

the learned District and Sessions Judge, that the two deceased were killed in cold blood by the personnel of 12th Bn. Madras Regiment. 82.1 We would also like to make the observation that, though the findings of the Ld. District & Sessions Judge were not based on the standard of "proof beyond reasonable doubt" as it was not a criminal trial, yet the findings were based on a more heightened standard of "preponderance of probabilities". The evidences to support the findings are overwhelming and highly credible which stand corroborated by the status report of the State police and we have no doubt the State police were unbiased, nor it was even suggested by the army authorities, Page No.# 66/97 that the State police could be biased when they submitted the status report debunking the version of the army authorities.

82.2 We find on the basis of the gamut evidences that the version of the petitioners is more probable than the version offered by the army authorities. Rather the version of the army authorities lacks credibility substantially.

83. Having accepted the aforesaid findings of the learned District and Sessions Judge that these two persons were picked up from the village and subjected to brutal torture and were subsequently shot to death by the army in cold blood and not in an encounter as alleged by the army authorities, we have to consider what reliefs can be granted to the petitioners.

84. As to the compensation claimed by the petitioners, the power of the Constitutional Courts to grant compensation is now well settled. In fact, it has become an integral part of the public law remedy jurisprudence in this country in exercise of the discretionary and equity jurisdiction of writ Courts. Ordinarily, the writ Courts functioning under Article 226 of the Constitution of India are not the appropriate fora for dealing with claims for compensation or damages which are ordinarily dealt by the Civil Courts. However, during the last about four decades, there has been tremendous development in the field of public law remedy whereby the High Courts exercising jurisdiction under Article 226 and Hon'ble Supreme Court under Article 32 has been granting compensation in appropriate cases for violation of fundamental rights.

85. Grant of compensation by the writ Courts was not generally entertained in view of the traditional approach encapsulated in the Kasturi Lal Ralia Ram Jain Vs. State of U.P. Vs. State of UP, (1965) 1 SCR 375: AIR 1965 SC 1039 in which it was held that in respect Page No.# 67/97 of tortious act committed by public servant referable to exercise of sovereign powers delegated to public servants, action for damages for loss caused by such tortious act would not lie. However, subsequently there has been a fundamental shift in the law. The departure from the said traditional view is reflected in the landmark judgment in Khatri (ii) Vs. State of Bihar, 1981 1 SCC 627 arising out of the infamous Bhagalpur blindings where the issue of grant of compensation of deprivation of life and personal liberty as guaranteed under Article 21 of the Constitution was raised for the first time, as can be seen from the following observations of the Hon'ble Supreme Court, "4. The other question raised by Mrs Hingorani on behalf of the blinded prisoners was whether the State was liable to pay compensation to the blinded prisoners for violation of their fundamental right under Article 21 of the Constitution. She contended that the blinded prisoners were deprived of their eyesight by the police officers who were government servants acting on behalf of the State and since this constituted a violation of the constitutional right under Article 21, the State was liable to pay compensation to the blinded

prisoners. The liability to compensate a person deprived of his life or personal liberty otherwise than in accordance with procedure established by law was, according to Mrs Hingorani, implicit in Article 21. Mr K.G. Bhagat on behalf of the State, however, contended that it was not yet established that the blinding of the prisoners was done by the police and that the investigation was in progress and he further urged that even if blinding was done by the police and there was violation of the constitutional right enshrined in Article 21, the State could not be held liable to pay compensation to the persons wronged. These rival arguments raised a question of great constitutional importance as to what relief can a court give for violation of the constitutional right guaranteed in Article 21. The court can certainly injunct the State from depriving a person of his life or personal liberty except in accordance with procedure established by law, but if life or personal liberty is violated otherwise than in accordance with such procedure, is the court helpless to grant relief to the person who has suffered such deprivation? Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty. These were the issues raised before us on the contention of Mrs Hingorani, and to our mind, they are issues of the gravest constitutional importance involving as they do, the exploration of a new dimension of the right to life and personal liberty. We, therefore, intimated to the counsel appearing on behalf of the parties that we would hear detailed arguments on these issues at the next hearing of the writ petition and proceed to lay down the correct implications of the constitutional right in Article 21 in the light of the dynamic constitutional jurisprudence which we are evolving in this Court."

86. The paradigm shift in the approach and inclination of the Court to award of Page No.# 68/97 compensation for violation of fundamental rights can be seen again in the subsequent decision of Khatri (iv) Vs. State of Bihar, (1981) 2 SCC 493, wherein the Hon'ble Supreme Court made the following significant observation.

> "7. ..... The proceeding is a writ petition under Article 32 for enforcing the fundamental rights of the petitioners enshrined in Article 21. The petitioners complain that after arrest, whilst under police custody, they were blinded by the members of the police force, acting not in their private capacity, but as police officials and their fundamental right to life guaranteed under Article 21 was 20 therefore violated and for this violation, the State is liable to pay compensation to them. The learned Attorney-General who at one stage appeared on behalf of the State at the hearing of the writ petition contended that the inquiry upon which the court was embarking in order to find out whether or not the petitioners were blinded by the police officials whilst in police custody was irrelevant, since, in his submission, even if the petitioners were so blinded, the State was not liable to pay compensation to the petitioners first, because the State was not constitutionally or legally responsible for the acts of the police officers outside the scope of their power or authority and the blindings of the under- trial prisoners effected by the police could not therefore be said to constitute violation of their fundamental right under Article 21 by the State and secondly, even if there was violation of the fundamental right of the petitioners under Article 21 by reason of the blindings effected by the police officials, there was, on a true construction of that Article, no liability on the State to pay compensation to

> the petitioner..... ... . If an officer of the State acting in his official capacity threatens to deprive a person of his life or personal liberty without the authority of law, can such person not approach the court for injuncting the State from acting through such officer in violation of his fundamental right under Article 21? Can the State urge in defence in such a case that it is not infringing the fundamental right of the petitioner under Article 21, because the officer who is threatening to do so is acting outside the law and therefore beyond the scope of his authority and hence the State is not responsible for his action? Would this not make a mockery of Article 21 and reduce it to nullity, a mere rope of sand, for, on this view, if the officer is acting according to law there would ex concessionis be no breach of Article 21 and if he is acting without the authority of law, the State would be able to contend that it is not responsible for his action and therefore there is no violation of Article 21. ..... Would the court permit itself to become helpless spectator of the violation of the fundamental right of the petitioner by the State and tell the petitioner that though the Constitution has guaranteed the fundamental right to him and has also given him the fundamental right of moving the court for enforcement of his fundamental right, the court cannot give him any relief..... ...."

87. The said view got crystallized in the subsequent decision of the Hon'ble Supreme Court in Rudul Sah Vs. State of Bihar , (1983) 4 SCC 141 wherein the Hon'ble Supreme Court Page No.# 69/97 in categorical terms held that where a right to liberty has been grossly violated, it can be reasonably prevented and due compliance of the mandate of Article 21 can be secured if the violators are mulct by directing payment of monetary compensation. Payment of compensation would also act as a palliative for the unlawful acts of instrumentalities of the State which would be in addition to normal legal recourse of bringing a suit to recover appropriate damages from the State as held below:

> "8. That takes us to the question as to how the grave injustice which has been perpetrated upon the petitioner can be rectified, insofar as it lies within our power to do in the exercise of our writ jurisdiction under Article 32 of the Constitution. That Article confers power on the Supreme Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is "guaranteed", that is to say, the right to move the Supreme Court under Article 32 for the enforcement of any of the rights conferred by Part III of the Constitution is itself a fundamental right.
>
> 9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it.

But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over 14 years after his acquittal in a full-dressed trial. He filed a habeas corpus petition in this Court for his release from illegal detention. He obtained that relief, our finding being that his detention in the prison after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this habeas corpus petition itself.

10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that 23 a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing Page No.# 70/97 orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers.

11. Taking into consideration the great harm done to the petitioner by the Government of Bihar, we are of the opinion that, as an interim measure, the State must pay to the petitioner a further sum of Rs 30,000 (Rupees thirty thousand) in addition to the sum of Rs 5000 (Rupees five thousand) already paid by it. The amount shall be paid within two weeks from today. The Government of Bihar agrees to make the payment though, we must clarify, our order is not based on their

consent."

88. In the subsequent landmark judgment in Sebastian M. Hongary Vs. Union of India, (1984) 3 SCC 82 relating to a case where two persons were allegedly taken into custody by the army and on the failure of the authorities to produce them on issuance of writ of habeas corpus, it was held that these persons had met an unnatural death and as such the Union of India cannot disown its responsibility. The Hon'ble Supreme Court apart from issuing a writ of mandamus to register an F.I.R. also directed the Union of India to pay Rs.1 lakh each to the wives of the missing persons as a measure of exemplary cost, in the following words:

> "7. Now in the facts and circumstances of the case, we do not propose to impose imprisonment nor any amount as and by way of fine but keeping in view the torture, the agony and the mental oppression through which Mrs C. Thingkhuila, wife of Shri C. Daniel and Mrs C. Vangamla, wife of Shri C. Paul had to pass and they being the proper applicants, the formal application being by Sebastian M. Hongray, we direct that as a measure of exemplary costs as is permissible in such cases, Respondents 1 and 2 shall pay Rs 1 lac to each of the aforementioned two women within a period of four weeks from today."

89. That the said law is now firmly entranced in our jurisprudence, can be seen from the later judgment in Nilabati Behera Vs. State of Orissa, (1993) 2 SCC 746 which Page No.# 71/97 exposited the law in very clear terms as follows:

> "11. In Rudul Sah [(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] it was held that in a petition under Article 32 of the Constitution,this Court can grant compensation for deprivation of a fundamental right. That was a case of violation of the petitioner's right to personal liberty under Article 21 of the Constitution. Chandrachud, CJ., dealing with this aspect, stated as under: (SCC pp. 147-48, paras 9 and 10) "It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases .... The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State

> Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

(emphasis supplied) (SCR pp. 513-14)"

90. Development of law in this direction and departure from the traditional view has been succinctly explained in N. Nagendra Rao & Co. v. State of A.P., (1994) 6 SCC 205 by highlighting that a strict compartmentalisation of the functions of the State as sovereign and non-sovereign is no more sound jurisprudential view considering the myriad functions Page No.# 72/97 discharged by the State in a Welfare State like India which touch upon the lives of large number of citizens in their day to day affairs and that there is no rational for the proposition that even if the officer is liable, the State cannot be sued. The earlier view taken in Kasturi Lal (supra) of immunity to the State for vicarious liability of its employees, for the loss or damage suffered by the owner of the property seized by the State in exercise of statutory authority was not accepted as a good law, except for its applicability in rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in a court of law.

91. In this regard, it may be apposite to reproduce some relevant paragraphs of the judgment in N. Nagendra Rao (supra) as follows:

> "12. However, since 1965 when this decision was rendered the law on vicarious liability has marched ahead. The ever increasing abuse of power by public authorities and interference with life and liberty of the citizens arbitrarily, coupled with transformation in social outlook with increasing emphasis on human liberty resulted in more pragmatic approach to the individual's dignity, his life and liberty and carving out of an exception by the court where the abuse of public power was violative of the constitutional guarantee. Such infringements have been held to be wrong in public law which do not brook any barrier and the State has been held liable to compensate the victims. (See Rudul Sah v. State of Bihar [(1983) 4 SCC 141 : 1983 SCC (Cri) 798] , Sebastian M. Hongray v. Union of India [(1984) 3 SCC 82 : 1984 SCC (Cri) 407] , Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi

> Police Headquarters [(1990) 1 SCC 422 : 1990 SCC (Cri) 145 : AIR 1990 SC 513] , State of Maharashtra v. Ravikant S. Patil [(1991) 2 SCC 373 : 1991 SCC (Cri) 656] .) In Nilabati Behera v. State of Orissa [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] Hon'ble Mr Justice J.S. Verma observed as under : (SCC p. 758, para 10) "It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort."

In the same decision, it was observed by Hon'ble Dr Justice A.S. Anand : (SCC p. 768, para 34) "The purpose of public law is not only to civilize power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights."

13. .....

14. Necessity of the legislation apart, which shall be adverted later, it is necessary to mention Page No.# 73/97 that in subsequent decisions rendered by this Court the field of operation of the principle of sovereign immunity has been substantially whittled down. In Shyam Sunder v. State of Rajasthan [(1974) 1 SCC 690 : AIR 1974 SC 890] where the question of sovereign immunity was raised and reliance was placed on the ratio laid down in Kasturi Lal case [AIR 1965 SC 1039 : (1965) 1 SCR 375] , this Court after considering the principle of sovereign immunity as understood in England and even applied in America observed that there was no "logical or practical" ground for exempting the sovereign from the suit for damages. In Pushpa Thakur v. Union of India [1984 ACJ 559 (SC) : AIR 1986 SC 1199] , this Court while reversing a decision of the Punjab & Haryana High Court (Union of India v. Pushpa Thakur [1984 ACJ 401 (P&H)]) which in its turn placed reliance on a Full Bench decision of that very Court in BaxiAmrik Singh v. Union of India [(1973) 75 Punj LR 1 : 1974 ACJ 105 (P&H)] held that where the accident was caused by negligence of the driver of military truck the principle of sovereign immunity was not available to the State."

15. That apart, the doctrine of sovereign immunity has no relevance in the present-day context when the concept of sovereignty itself has undergone drastic change. Further, whether there was any sovereign in the traditional sense during British rule of our country was not examined by the Bench in Kasturi Lal [AIR 1965 SC 1039 : (1965) 1 SCR 375] though it seems it was imperative to do so, as the Bench in Vidhyawati [AIR 1962 SC 933 : 1962 Supp (2) SCR 989] had not only examined the scope of Article 300 of the Constitution, but after examining the legislative history had observed : (SCR p. 997 : AIR p. 937, para 7) "It will thus be seen that by the chain of enactments beginning with the Act of 1858 and ending with the Constitution, the words „shall and may have and take the same suits, remedies and proceedings in Section 65 above, by incorporation, apply to the Government of a State to the same extent as they applied to the East India Company."

> "24. In the modern sense the distinction between sovereign or nonsovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions.

The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modern notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

25. But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived Page No.# 74/97 of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law

> and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury [1 PH 306 : 41 ER 648] . But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State."

92. Thus, the Supreme Court held that the defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for infraction of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redressal available for contravention of fundamental rights by the State or its servants in the purported exercise Page No.# 75/97 of their powers, and for enforcement of the fundamental rights and claim for compensation by resorting to the public law remedy under Articles 32 and 226 of the Constitution.

93. This law for award of compensation under public law remedy was reiterated again in the landmark judgment in D.K. Basu Vs. State of W.B., (1997) 1 SCC 416 in the following words:

> "44. The claim in public law and for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction for penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect

the fundamental rights of the citizen."

94. In due course, public law remedy for grant of compensation for violation of human rights and fundamental rights was improvised by the Constitutional Courts in favour of the aggrieved persons rather than leaving it to the vagaries of long drawn traditional litigation process in Civil Courts.

95. It is not only for gross violation of life and liberty of individual by abuse and misuse of power by the State functionaries, but also for criminal negligence by not providing safe working environment for those engaged in hazardous works leading to fatality, this compensatory jurisdiction has been invoked.

The Hon'ble Supreme Court in Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers, (2011) 8 SCC 568 deprecated the absence of Page No.# 76/97 appropriate mechanism for protection of persons employed by or through the contractors of the State and/or its agencies/instrumentalities doing works, which are inherently hazardous and dangerous to life, like the sewage workers, nor made provision for payment of reasonable compensation in the event of death. The Supreme Court upheld the PIL espousing the cause of the sewage workers for payment of compensation and other beneficial reliefs claimed on their behalf. The Supreme Court awarded Rs.5 lacs to the families of those who died due to negligence of the public authority, like Delhi Jal Board, which did not take effective measures for ensuring safety of the sewerage workers.

96. The Hon'ble Supreme Court revisited the law relating to public remedy and awarded compensation in Chairman, Railway Board & Ors. Vs. Chandrima Das (Mrs.) & Ors., (2000) 2 SCC 465. In the said case, it was reiterated that right to life includes right to live with human dignity. Rape violates fundamental right as enshrined under Article 21 of the Constitution of India and reiterating that the theory of sovereign power propounded in Kasturi Lal (supra) has yielded to new theories and is no longer available in a welfare State and held that if any employee of the Railways commits an act of tort, the Union Government of which they are employees, can be liable vicariously and upheld the order of the High Court in awarding a sum of Rs.10 lacs as compensation to the victim, who incidentally also happened to be a foreigner and not an Indian citizen.

97. Law, thus, is now firmly established that compensation can be awarded for violation of fundamental rights under the public law remedy.

98. We do not like to burden this judgment with other decisions whereby the Constitutional Courts had awarded exemplary compensation for violation of fundamental rights, more Page No.# 77/97 particularly, Article 21 of the Constitution.

99. Having thus referred to the law relating to the jurisdiction of the Constitutional Courts to grant compensation, we will now focus our attention on examining the quantum of compensation which can be granted.

100. At the outset, we would like to mention that the learned counsel for the petitioners has placed great reliance on the decision of the Hon'ble Supreme Court in Rohtash Kumar Vs. State of Haryana (supra) rendered in 2013, wherein the Hon'ble Supreme Court under the facts and circumstances obtaining in the said case and relying on the decision of the Hon'ble Supreme Court in Nilabati Behera (supra) directed the respondent No.1, State of Haryana to pay a compensation of Rs.20 lakhs to the appellant for the pain and suffering undergone by him on account of loss of his son who was found to have been killed in an encounter which appeared to be fake by the Hon'ble Supreme Court.

101. Mr. Hazarika, learned counsel for the petitioner accordingly has urged this Court that considering the nature of the case as revealed by the inquiry report in the light of the pleadings, awarding of compensation of Rs.20 lakhs to each of the petitioners for each of the individuals killed in the fake encounter would be just and fair.

102. In order to appreciate the claim made by the petitioners and also to ascertain the quantum of compensation, we now turn our focus on various decisions relating to quantum of compensation.

103. Though law is now firmly settled that Constitutional Courts can grant compensation for violation of fundamental rights, more particularly, Article 21, we are, however, unable to find a consistent view as regards the quantum of compensation.

Page No.# 78/97 In fact, the Courts have been granting varying amounts of compensation. There is no uniformity or any set of principles to determine the quantum of compensation.

104. In one of the earliest first landmark judgments in Rudul Sah (supra), (1983) where the Hon'ble Supreme Court granted compensation for violation of the fundamental rights guaranteed under Article 21, the Hon'ble Supreme Court granted a sum of Rs.30,000/- (Rupees thirty thousand) as an interim measure in addition to the sum of Rs.5,000/- (Rupees five thousand) already paid by it.

104.1 In the subsequent landmark decision in Sebestian M. Hongray (supra) (1984) as mentioned above, the Union respondents were directed to pay a sum of Rs.1 lac each to the wives of persons who were taken into custody by the army.

104.2 In Nilabati Behera (supra) (1993) of which a reference was also made by the Hon'ble Supreme Court in the aforesaid case of Rohtash Kumar (supra), the Hon'ble Supreme Court granted a sum of Rs.1,50,000/- as compensation. 104.3 In Chandrima Das (supra) a sum of Rs.10 lakhs was awarded to the victim of rape. 104.4 In M.P. Electricity Board Vs. Shail Kumari, (2002) 2 SCC 162, the Hon'ble Supreme Court upholding the decision of the Hon'ble High Court awarded a sum of Rs.4.34 lakhs.

104.5 In Delhi Jal Board vs. National Campaign & Rights of Sewerage & Allied Workers, (2011) 8 SCC 568, the Hon'ble Supreme Court awarded a sum of Rs.5 lacs to the families of those who died due to negligence of the public authority, Delhi Jail Board, which did not take effective measures for ensuring safety of the sewerage workers.

Page No.# 79/97 104.6 In MCD Vs. Uphaar Tragedy Victims Assn. ¸(2011) 14 SCC 481, the Hon'ble Supreme Court considered at length the various decisions regarding grant of compensation and ultimately, directed payment of Rs.10 lacs in case of death (in the case of three aged more than 20 years) and Rs.7.5 lacs (in the case of those aged 20 years or less) to the legal representatives of the deceased. The Hon'ble Supreme Court further awarded a compensation of Rs.1 lac in case of each of the 103 injured persons.

It may be apposite to reproduce the relevant parts of the judgment in order to understand the principles adopted in awarding different amount of compensation, by bringing in elements of multipliers applied in Motor Accident Claim cases. It may, however, be noted that the Supreme Court did not lay down any principle to assess the quantum.

[Per Raveendran J.] "The legal position

45. In Rabindra Nath Ghosal v. University of Calcutta [(2002) 7 SCC 478] this Court held :

> (SCC p. 483, para 9) "9. The courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in a public law proceedings.

Consequently when the court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. But it would not be correct to assume that every minor infraction of public duty by every public officer would commend the court to grant compensation in a petition under Articles 226 and 32 by applying the principle of public law proceeding. The Court in exercise of extraordinary power under Articles 226 and 32 of the Constitution, therefore, would not award damages against public authorities merely because they have made some order which turns out to be ultra vires, or there has been some inaction in the performance of the duties unless there is malice or conscious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act."

(emphasis supplied) Page No.# 80/97

46. This Court in Rajkot Municipal Corpn. v. Manjulben Jayantilal Nakum [(1997) 9 SCC 552] dealing with a case seeking damages under law of torts for negligence by municipality, held as follows : (SCC p. 601, para 63) "63. The conditions in India have not developed to such an extent that a Corporation can keep constant vigil by testing the healthy condition of the trees in the public places, roadsides, highways frequented by passers-by. There is no duty to maintain regular supervision thereof, though the local authority/other authority/owner of a property is under a duty to plant and maintain the tree. The causation for accident is too remote. Consequently, there would be no common law right to file suit for tort of negligence. It would not be just and proper to fasten

duty of care and liability for omission thereof. It would be difficult for the local authority, etc. to foresee such an occurrence. Under these circumstances, it would be difficult to conclude that the appellant has been negligent in the maintenance of the trees planted by it on the roadsides."

> "54. It is evident from the decisions of this Court as also the decisions of the English and Canadian Courts that it is not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. In regard to performance of statutory functions and duties, the courts will not award damages unless there is malice or conscious abuse. The cases where damages have been awarded for direct negligence on the part of the statutory authority or cases involving doctrine of strict liability cannot be relied upon in this case to fasten liability against MCD or the licensing authority. The position of the DVB is different, as direct negligence on its part was established and it was a proximate cause for the injuries to and death of victims. It can be said that insofar as the licensee and the DVB are concerned, there was contributory negligence."

> "58. We may next consider whether the compensation awarded in this case is proper and in accordance with the principles of public law remedy. As noticed above, the High Court has awarded compensation to the legal heirs of 57 deceased victims at the rate of Rs 18 lakhs where the deceased was aged more than 20 years and Rs 15 lakhs where the deceased was aged 20 years or less. It awarded Rs 1 lakh for each of the 103 injured. In regard to the death cases, the High Court adopted the following rationale : each person who was sitting in the balcony class where the rate of admission was Rs 50 per ticket, can be assumed to belong to a strata of society where the monthly income could not be less than Rs 15,000. Deducting one-third for personal expenses, the loss of dependency to the family would be Rs 10,000 p.m. or Rs 1,20,000 per annum. Applying a common multiplier of 15 in all cases where the deceased was more than 20 years, the compensation payable would be Rs 18 lakhs. The High Court deducted Rs 3 lakhs and awarded compensation at a flat rate of Rs 15,00,000 where the deceased was 20 years or Page No.# 81/97 less. The High Court also awarded interest at 9% per annum on the compensation amount from the date of filing of the writ petition (14-7-1997) to the date of payment."

> "61.Rudul Sah v. State of Bihar [(1983) 4 SCC 141 : 1983 SCC (Cri) 798] was one of the earliest decisions where interim compensation was awarded by way of public law remedy in the case of an illegal detention. This Court explained the rationale for awarding such interim compensation thus : (SCC p. 148, para 12) "12. This order will not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials. The order of compensation passed by us is, as we said above, in the nature of a palliative. We cannot leave the petitioner penniless until the end of his suit, the many appeals and the execution proceedings. A full-dressed debate on the nice points of fact and law which takes place leisurely in compensation suits will have to await the filing of such a suit by the poor Rudul Sah."

62. In Nilabati Behera v. State of Orissa [(1993) 2 SCC 746 : 1993 SCC (Cri) 527 :

> AIR 1993 SC 1960] this Court observed : (SCC pp. 768-69, para 34) "34. ... Therefore, when the court moulds the relief by granting 'compensation in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making "monetary amends"
>
> under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of "exemplary damages" awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

"63. In Sube Singh v. State of Haryana [(2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54] this Court held : (SCC p. 180c-d) "It is now well settled that the award of compensation against the State is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 CrPC. Award of Page No.# 82/97 compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a-half decades."

64. Therefore, what can be awarded as compensation by way of public law remedy need not only be a nominal palliative amount, but something more. It can be by way of making monetary amounts for the wrong done or by way of exemplary damages, exclusive of any amount recoverable in a civil action based on tortious liability. But in such a case it is improper to assume admittedly without any basis, that every person who visits a cinema theatre and purchases a balcony ticket should be of a high income group person. In the year 1997, Rs 15,000 per month was rather a high income. The movie was a new movie with patriotic undertones. It is known that zealous movie-goers, even from low income groups, would not mind purchasing a balcony ticket to enjoy the film on the first day itself. To make a sweeping assumption that every person who purchased a balcony class ticket in 1997 should have had a monthly income of Rs 15,000 and on that basis apply a high multiplier of 15 to determine the compensation at a uniform rate of Rs 18 lakhs in the case of persons above the age of 20 years and Rs 15 lakhs for persons below that age, as a public law remedy, may not be proper."

"67. Insofar as death cases are concerned the principle of determining compensation is streamlined by several decisions of this Court. (See for example Sarla Verma v. DTC [(2009) 6 SCC 121 : (2009) 2 SCC (Cri) 1002 : (2009) 2 SCC (Civ) 770] .) If three factors are available the compensation can be determined. The first is the age of the deceased, the second is the income of the deceased and the third is number of dependants (to determine the percentage of deduction for personal expenses). For convenience the third factor can also be excluded by adopting a standard deduction of one-third towards personal expenses. Therefore just two factors are required to be ascertained to determine the compensation in 59 individual cases. First is the annual income of the deceased, two-thirds of which becomes the annual loss of dependency; and second, the age of the deceased which will furnish the multiplier in terms of Sarla Verma [(2009) 6 SCC 121 : (2009) 2 SCC (Cri) 1002 : (2009) 2 SCC (Civ) 770] . The annual loss of dependency multiplied by the multiplier will give the compensation. As this is a comparatively simple exercise, we direct the Registrar General of the Delhi High Court to receive applications in regard to death cases, from the claimants (legal heirs of the deceased) who want a compensation in excess of what has been awarded, that is, Rs 10 lakhs/Rs 7.5 lakhs. Such applications should be filed within three months from today. He shall hold a summary inquiry and determine the compensation. Any amount awarded in excess of what is hereby awarded as compensation shall be borne exclusively by the theatre owner. To expedite the process the claimants concerned and the licensee with their respective counsel shall appear before the Registrar without further notice. For this purpose the claimants and the theatre owner may appear before the Registrar on 10-1-2012 and take further orders in the matter. The hearing and determination of compensation may be assigned to any Registrar or other Senior Judge Page No.# 83/97 nominated by the learned Chief Justice/Acting Chief Justice of the Delhi High Court. [Per Radhakrishnan J.] "96. [Ed. : Para 96 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2012 dated 7-6-2012.] Courts have held that due to the action or inaction of the State or its officers, if the fundamental rights of a citizen are infringed then the liability of the State, its officials and instrumentalities, is strict. The claim raised for compensation in such a case is not a private law claim for damages, under which the damages recoverable are large. The claim made for compensation in public law is for compensating the claimants for deprivation of life and personal liberty which has nothing to do with a claim in a private law claim in tort in an ordinary civil court.

98. But, in a case, where life and personal liberty have been violated, the absence of any statutory provision for compensation in the statute is of no consequence. Right to life guaranteed under Article 21 of the Constitution of India is the most sacred right preserved and protected under the Constitution, violation of which is always actionable and there is no necessity of statutory provision as such for preserving that right. Article 21 of the Constitution of India has to be read into all public safety statutes, since the prime object of public safety legislation is to protect the individual and to compensate him for the loss suffered. Duty of care expected from State or its

officials functioning under the public safety legislation is, therefore, very high, compared to the statutory powers and supervision expected from the officers functioning under the statutes like the Companies Act, the Cooperative Societies Act and such similar legislations. When we look at the various provisions of the Cinematograph Act, 1952 and the Rules made thereunder, the Delhi Building Regulations and the Electricity laws the duty of care on officials was high and liabilities strict.

Constitutional torts--Measure of damages "99. The law is well settled that a constitutional court can award monetary compensation against the State and its officials for its failure to safeguard fundamental rights of citizens but there is no system or method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact situations. The yardsticks normally adopted for determining the compensation payable in private tort claims are not as such applicable when a constitutional court determines the compensation in cases where there is violation of fundamental rights guaranteed to its citizens.

100. In D.K. Basu v. State of W.B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] , a Constitution Bench of this Court held that there is no straitjacket formula for computation of damages and we find that there is no uniformity or yardstick followed in awarding damages for violation of fundamental rights. In Rudul Sah case [(1983) 4 SCC 141 : 1983 SCC (Cri) 798] this Court used the terminology "palliative" for measuring the damages and the formula of "ad hoc" was applied. In Sebastian Hongray case [(1984) 3 SCC 82 : 1984 SCC (Cri) 407 : AIR 1984 SC 1026] the expression used by Page No.# 84/97 this Court for determining the monetary compensation was "exemplary" costs and the formula adopted was "punitive". In Bhim Singh case [(1985) 4 SCC 677 : 1986 SCC (Cri) 47 : AIR 1986 SC 494] , the expression used by the Court was "compensation" and the method adopted was "tortious formula". In D.K. Basu v. State of W.B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] the expression used by this Court for determining the compensation was "monetary compensation". The formula adopted was "cost to cost"

method. Courts have not, therefore, adopted a uniform criterion since no statutory formula has been laid down.

101. Constitutional courts all over the world have to overcome these hurdles. Failure to precisely articulate and carefully evaluate a uniform policy as against State and its officials would at times tend the court to adopt rules which are applicable in private law remedy for which courts and statutes have evolved various methods, such as loss of earnings, impairment of future earning capacity, medical expenses, mental and physical suffering, property damage, etc. Adoption of those methods as such in computing the damages for violation of constitutional torts may not be proper.

102. In Delhi Domestic Working Women's Forum v. Union of India [(1995) 1 SCC 14 :

> 1995 SCC (Cri) 7] the Apex Court laid down parameters in assisting the victims of rape including the liability of the State to provide compensation to the victims and held as follows : (SCC p. 20, para 15) "15. (7) It is necessary, having regard to the directive principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss.

Some, for example, were too traumatised to continue in employment. (8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if it occurred as a result of the rape."

103. Legal liability in damages exists solely as a remedy out of private law action in tort which is generally time-consuming and expensive, and hence when fundamental rights are violated the claimants prefer to approach constitutional courts for speedy remedy. The constitutional courts, of course, shall invoke their jurisdiction only in extraordinary circumstances when serious injury has been caused due to violation of fundamental rights, especially under Article 21 of the Constitution of India. In such circumstances the Court can invoke its own methods depending upon the facts and circumstances of each case.

Constitutional torts and punitive damages

104. Constitutional courts' actions not only strive to compensate the victims and vindicate their constitutional rights, but also to deter future constitutional misconduct without proper excuse or with some collateral or improper motive. The constitutional Page No.# 85/97 courts can in appropriate cases of serious violation of life and liberty of the individuals award punitive damages. However, the same generally requires the presence of malicious intent on the side of the wrongdoer i.e. an intentional doing of some wrongful act.

105. Compensatory damages are intended to provide the claimant with a monetary amount necessary to recoup/replace what was lost, since damages in tort are generally awarded to place the claimants in the position he would have been in, had the tort not taken place; which are generally quantified under the heads of general damages and special damages. Punitive damages are intended to reform or to deter the wrongdoer from indulging in conduct similar to that which formed the basis for the claim. Punitive damages are not intended to compensate the claimant which he can claim in an ordinary private law claim in tort. Punitive damages are awarded by the constitutional court when the wrongdoer's conduct was egregiously deceitful.

108. Several factors may gauge on a constitutional court in determining the punitive damages such as contumacious conduct of the wrongdoer, the nature of the statute, gravity of the fault committed, the circumstances, etc. Punitive damages can be awarded when the wrongdoers' conduct "shocks the conscience" or is "outrageous" or there is a wilful and "wanton disregard" for safety requirements. Normally, there must be a direct connection between the wrongdoer's conduct and the victim's

injury." 104.7 In Sube Singh Vs. State of Haryana, (2006) 3 SCC 178, the Hon'ble Supreme Court held that the quantum of compensation will depend on the facts and circumstances of each case and observed as follows.

> "46. .....before awarding compensation the Court will have to pose to itself the 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 alleged has resulted in death or whether custodial torture is supported by medical report or visible marks or scars or disability.

Where there is no evidence of custodial torture of a person except his own 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 under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/criminal action."

Page No.# 86/97 104.8 In M.S. Grewal Vs. Deep Chand Sood, (2001) 8 SCC 151, the Hon'ble Supreme Court awarded a sum of Rs.5 lakhs to each of the parents of the 14 students who were drowned in river Beas in a picnic organized by the school by upholding the decision of the High Court.

104.9 In this regard one may refer to the decision rendered by Hon'ble Supreme Court in Rabindra Nath Ghosal Vs. University of Calcutta, (2002) 7 SCC 478, wherein it was observed that before exemplary damages can be awarded it must be shown that some fundamental right under Article 21 has been infringed by arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act. It was thus held that, "9. The courts having the obligation to satisfy the social aspiration of the citizens have to apply the tool and grant compensation as damages in public law proceedings. Consequently when the court moulds the relief in proceedings under Articles 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights and grants compensation, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. But it would not be correct to assume that every minor infraction of public duty by every public officer would commend the court to grant compensation in a petition under Articles 226 and 32 by applying the principle of public law proceeding. The court in exercise of extraordinary power under Articles 226 and 32 of the Constitution, therefore, would not award damages against public authorities merely because they have made some order which turns out to be ultra vires, or there has been some inaction in the performance of the duties unless there is malice or conscious abuse. Before exemplary damages can be awarded it must be shown that some fundamental right under Article 21 has been infringed by

arbitrary or capricious action on the part of the public functionaries and that the sufferer was a helpless victim of that act."

105. As to how our own High Court has been granting compensation, we would like to refer to some of the decisions of this Court.

105.1 Naosem Ningol Chandam Ongbi v. Rishang Keishing, Chief Minister of Manipur & Ors., (1988) 1 GLR 109: In the aforesaid case, following the ratio of the Page No.# 87/97 Hongray's case (supra), it was held by this Court that since the release of Chaoba Singh, son of the petitioner was a counterfeited release, the concerned respondents were liable to pay compensation to the parents of the boy and accordingly, awarded a sum of Rs. 2,00,000.00 (two lacs) as compensation to the petitioner.

105.2 Smti Kamini Bala Talukdar Vs. State of Assam And Ors., 1997 (1) GLT 333 :

> This Court awarded compensation of Rs. 1,00,000/- for the death caused by Police in a negligent manner.
>
> 105.3 Arun Ch. Bhowmik And Ors. vs. The State of Tripura & Ors., 1997 (1) GLT 555: An Advocate was detained under National Security Act, 1980 and mercilessly beaten by the police personnel resulting in grievous injuries for which a compensation of Rs. 1 lakh was granted.
>
> 105.4 Mrs. P. Lily vs. Union Of India, 1997 (3) GLT 542 : The petitioner's husband was missing after being picked up by the Army. The Court awarded an amount of Rs. 1,00,000/-

(Rupees one lakh) as compensation under public law jurisdiction by observing that there can be no strait-jacket formula for determining the quantum of compensation. 105.5 Notle (Mrs.) Vs. Union of India And Ors., 1998 (3) GLT 43 : This Court awarded Rs. 2,50,000/- towards compensation as palliative by observing that there is always certain amount of guess work involved in quantifying the amount of compensation. 105.6 Zukheli Sema vs. Union Of India And Ors., 1998 (4) GLT 333 : A seventy year old was detained by the Army whose whereabouts were not known. The Court awarded a sum of Rs. 2 lacs as compensation to the wife of the missing person. 105.7 Hemchandra Kalita vs. State of Assam & Ors., 1999 (3) GLT 605 : This Court Page No.# 88/97 awarded a sum of Rs. 2,00,000/- to the parents of the deceased who died because of gunshot injury from police firing and other injuries from assault by the police party after he was overpowered and apprehended.

105.8 In Gopal Ch. Sarmah & Anr Vs. State of Assam & Ors., 2000 (1) GLT 643 , the Court on finding that both the deceased had died in Police custody in defiance of the law of the land, awarded compensation at the rate of Rs. 2,50,000/- (Rupees two lakh and fifty thousand) with cost of Rs. 15,000/- each.

105.9 In Fakir Chand vs. State of Assam and others, 2001 (3) GLR 55 : 2001 (1) GLT670 : 2002 AIR (Gau) 84 : 2001 (2) GLJ 298 , this Court awarded a sum of 1 lakh on account of the death due to electrocution because of negligence of the Assam State Electricity Board and held that compensation can be based on reasonable guess work.

> "3. The learned single Judge recorded a finding that there was negligence on the part of the Assam State Electricity Board (ASEB). The counsel for the appellant has vehemently argued that the woman being aged about 35 years and a housewife, her services were quite useful not only to the husband, but to her children as well and for that reason the compensation amount of Rs. 70,000.00 is on the lower side.
>
> 4. Mr. N. N. Saikia, the counsel for the ASEB, on the other hand, while opposing the prayer for enhancement, has with equal vehemence contended that there being no averment regarding the income of the deceased in the writ petition, the learned single Judge has granted appropriate compensation. It has further been argued that the appellant should have filed a civil suit in order to prove the damages, because the present case comes under "Tort".

5. After giving thoughtful consideration to the arguments of the counsel for the parties, we are of the considered view that the case can be disposed of at the stage of admission. There cannot be two opinions that normally the cases arising out of tortious liability are filed in a civil Court; but once the learned single Judge has entertained the writ petition and asked for the report from the Chief Electrical Inspector and once a finding of negligence has been recorded, there is no obstacle in the way of the writ Court to determine proper compensation. The compensation, of course, has to be based upon reasonable guess work.

6. Since the woman died at the prime of her youth when the husband and children needed her company and she was useful to the family, the absence of proof of her income should not be a Page No.# 89/97 hindrance in awarding compensation, which is just, fair and reasonable.

7. After taking into consideration the totality of the facts and circumstances of the case, we are of the considered view that ends of justice will be met if the appellant is granted a sum of Rs.1,00,000.00 (Rupees one lakh only)."

105.10 In Bijan Kumar Mahajan And Anr. Vs. State of Assam And Ors., 2004 (1) GLT 239, there were reports about a large number of children falling ill and of death of 23 children after administration of pulse vitamin-A dose carried out with the financial and logistic support of UNICEF. In the public interest petition filed, this Court directed the Director General of Police to make an inquiry and on the basis of the report, the Court observed that the health workers had not taken adequate care nor were they properly guided. Accordingly, this Court awarded exemplary damages of Rs. 20,000/- each to the families of the children who died after administration of pulse vitamin-A dose in addition to Rs. 5000/- each already paid by State Government.

105.11 In State of Tripura & Anr. Vs. Amrita Bala Sen & Ors., 2004 (3) GLT 720 , the direction of the Ld. Single Judge to award Rs. 60,000/- to each of the petitioners on account of permanent damage to their left eyes due to an infection suffered in the hospital after undergoing operation, was upheld by the Appellate Court.

105.12 In Osman Ali. Vs. State of Assam & Ors., 2006 (3) GLT 696 , this Court awarded a sum of Rs. 2 lacs (Rupees two lacs) as compensation for the death in the custody of the police.

105.13 In Giribala Das vs. Union of India and Ors., 2007 (1) GLT1 , this Court on finding that the Army personnel indulged in and resorted to unprovoked firing which led to the death of the petitioner's husband which shocked the conscience of the Court, awarded a Page No.# 90/97 sum of Rs. 2,00,000.00 (Rupees Two Lakh only) as compensation payable to the petitioner. The husband of the petitioner at the time of his death was aged 55 years and left behind him the widow (Petitioner) and two minor daughters and he was the sole breadwinner of the family.

105.14 In Dino DG Dympes and Anr. Vs. State of Meghalaya and Ors, 2007 SCC OnLine Gau19 : AIR 2007 Gau 155, this Court awarded a sum of Rs.3 lakhs for the death of a villager who died in the hospital after being arrested by the police and while in judicial custody, allegedly after being tortured.

105.15 In Chandrapati Debbarma Vs. State of Tripura And Ors., 2010 (3) GLT 594 , this Court awarded a sum of Rs. 4 lacs to the appellant as compensation in the nature of palliative for the custodial death in the hands of the State Police. 105.16 In Phijam (Ningol) Pheiroijam (Ongbi) Rita Chanu --Vs-- Union Of India And Ors,. 2011 (5) GLT 498, this Court considering the normal life span of a citizen of India awarded Rs. 5 lakhs (Rupees five lakhs) for the death of deceased in the hands of the Army.

105.17 In Moirangthem Omor Singh Vs. State of Manipur & Ors. [W.P.(C) No. 74 (Imp) of 2010] decided on 21.03.2012 this Court awarded a sum of Rs.1 lakh as compensation for the death caused on account of negligence of the electricity department for not properly maintaining a hazardous low tension wire which snapped and fell on the body of the victim, which was found to be the proximate cause of death. 105.18 In Purnima Dey And Anr. Vs. Union of India And Ors., 2013 (5) GLT 301 , this Court awarded a sum of Rs. 10 lakhs (Rupees ten lakhs) only to the petitioner who was a Page No.# 91/97 victim of rape, who underwent serious physical and mental trauma and social stigma. 105.19 In Motilal Sinha Vs. State of Assam And Ors., 2014 (3) GLT 258 , this Court awarded Rs. 2 lakhs for the bodily injury caused including amputation of the right hand of the petitioner's son due to rash and negligent operation of the motor boat on the river, though no independent inquiry into the incident was conducted, by invoking the rule of strict liability. 105.20 In Shilpi Acharjee Vs Union of India And Ors., 2014 (4) GLT 12 , this Court finding that the husband of petitioner died within one day of release from the custody of army out of external and internal injuries, and holding it to be a custodial death, awarded a sum of Rs. 10,00,000/- (Rupees ten lakh only).

106. Thus, a cursory glance of the decisions referred to above, would show that there has been no uniformity as regards the quantum of compensation awarded and it has differed from case to case.

But nevertheless, what we could find is that this Court on these earlier occasions had awarded compensation ranging from 1 lakh to 10 lakhs and Hon'ble Supreme Court had granted compensation up to Rs.20 lakhs. But it may be also noted that these are decisions rendered about a decade ago and more.

107. The core question to be decided in the present case, therefore, is what would be the appropriate compensation to be paid to the petitioners in absence of any set of formula.

We are of the view while deciding the appropriate amount, we have to keep in mind the peculiar facts and circumstances obtaining in this case.

108. As mentioned above, the petitioners have claimed for a sum of Rs.20,00,000/- (Rupees twenty lakhs) to be awarded to each of the petitioners in terms of the decision by the Hon'ble Supreme Court in Rohtash Kumar (supra) rendered in the year 2013.

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109. On the other hand, considering the nature of the case as regards the quantum of compensation, though not without admitting any liability, Mr. R.K. D. Choudhury, learned ASGI has fairly submitted before this Court that if this Court is proposing to award compensation, this Court may pass appropriate order.

110. In this regard, the following paragraphs of Rohtash Kumar (supra) would be of great significance to consider the quantum of compensation in the present case.

> "14. Once we come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as rightly pointed out by learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. We are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage. Reliance placed by learned counsel for the appellant on Rubabbuddin Shaikh2 and Narmada Bai3 is misplaced. Those cases arose out of different fact situations. No parallel can be drawn from them.
>
> 15. We share the pain and anguish of the appellant, who has lost his son in what appears to be a fake encounter. He has conveyed to us that he is not interested in money but he wants a fresh investigation to be conducted. While we respect the feelings of the appellant, we are unable to direct fresh investigation for the reasons which we have already noted. In such situation, we turn to Nilabati Behera7, wherein the appellant's son had died in custody of the police. While noting that custodial death is a clear violation of prisoner's rights under Article 21 of the Constitution of

India, this Court moulded the relief by granting compensation to the appellant.

16. In the circumstances of the case we set aside the impugned judgment and order dated 13/9/20101 and in light of Nilabati Behera7, we direct respondent 1 - State of Haryana to pay a sum of Rs.20 lakhs to the appellant as compensation for the pain and suffering undergone by him on account of loss of his son - Sunil. The payment be made by demand draft drawn in favour of the appellant "Rohtash Kumar" within a period of one month from the date of the receipt of this order. The appeal is disposed of accordingly."

17. 2 : Rubabbudin Sheikh v. State of Gujarat, (2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006 3 :Narmada Bai V. State of Gujarat, (2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526 7 :Nilabati Behera Vs. State of Orissa, (1993) 2 SCC 746 : 1993 (Cri) 527.

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111. Having given our anxious thought on this issue of quantum of compensation, we are inclined to award a sum of Rs.20,00,000/- (Rupees twenty lakhs) to each of the petitioners for each of the victims who died in the custody of the army authorities as claimed by the petitioners by taking a cue from the decision of the Hon'ble Supreme Court in Rohtash Kumar (supra) which are to be paid jointly by the respondent Nos.1 and 2.

112. While awarding the aforesaid quantum of compensation, we have taken into consideration the peculiar facts and circumstances, and striking and disconcerting features obtaining in the present case.

112.1 The fact remains that these two deceased were in the prime of their lives in their early twenties and one of them was educated. Both of them were hale and hearty when they were picked up by army personnel. They were not armed when they were picked by the army personnel.

112.2 They were in the custody of the army for 2-3 days before they were killed. Keeping any person in custody by the army for such a prolonged period even if suspected of being a member of an insurgent group without handing them over to the civil police and Magistrate is against the mandate of law as held in Sebestian M. Hongray (supra) (1984). In the present case, they were kept in custody for 2-3 days without any authority of law after they were apprehended.

112.3 It is not a case of accidental death caused on being caught in the cross firing between the security forces and armed insurgents.

112.4 It is not a case of death which occurred on the spur of the moment during an Page No.# 94/97 encounter. There was no encounter. It was a planned execution. They were already in the custody of the army authorities for fairly a long period of time and were subjected to torture and thereafter, killed in cold blood as clearly revealed in the Inquiry Report. They thus, suffered an undeserved violent death.

112.5 That they were subjected to torture is clearly indicated by the medical reports apart from the oral testimonies.

112.6 The incident occurred in the year 2009 and now more than 12 years have passed and the parents had to undergo acute pain and mental suffering due to loss of their sons for so many years. There cannot be any wavering of thought or doubt about the ultimate cause of death of these two persons in view of the finding of the Inquiry Report. If there be any doubt, the same is put to rest by the specific stand taken by the State, the Crime Branch, CID in their affidavit, wherein it has been stated in categorical terms that the version of the army authorities that they died in a retaliatory fire cannot be sustained as there was no evidence of counter-fire from the part of the army personnel.

112.7 Thus, it has been firmly established that these two persons died in the hands of the army after being picked up and were kept in their custody for a long period of time and tortured and killed in an unwarranted manner without any cogent reason which would only lead to the inevitable conclusion that these two persons had met an untimely, unwarranted, undeserved violent death at the hands of the army personnel at the prime of their lives thus violating their fundamental right to life as guaranteed under Article 21 of the Constitution of India causing acute mental pain and suffering to their parents and near and dear ones.

Page No.# 95/97 112.8 Accordingly, under the aforesaid circumstances, we are of the view that awarding of Rs.20,00,000/- (Rupees twenty lakhs) as compensation in respect of each of the two deceased as claimed by the petitioners would meet the ends of justice. 112.9 We have been persuaded to take this view as the Hon'ble Supreme Court in Rohtash Kumar (supra) as far back in 2013 in the case of a fake encounter had awarded a sum of Rs.20 lakhs. In the aforesaid case of Rohtash Kumar (supra) there was no instance of the deceased being detained illegally for a prolonged period nor any instance of torture before the deceased was shot dead by the police in the fake encounter. 112.10 We accordingly, direct that the compensation is to be paid jointly by the respondent Nos.1 and 2. The respondent No.1 is vicariously liable for the aforesaid unwarranted and illegal acts committed by the personnel of the respondent No.2.

113. Accordingly, the respondent Nos.1 and 2 shall deposit the total amount of Rs.40,00,000/- (Rupees forty lakhs) with the Registry of this Court within a period of 2(two) months from today and Rs.20,00,000/- (Rupees twenty lakhs) each shall be released to the petitioner No.1 (Sri Konto Warisa) and petitioner No.2 (represented by Smt. Sopola Nunisa and Sri Kombo Nunisa) by cheque on being identified by the counsel for the petitioners.

We also direct that the petitioner No.1 (Sri Konto Warisa) and petitioner No.2 (represented by Smt. Sopola Nunisa and Sri Kombo Nunisa) shall deposit 50% of the amount each of them receive i.e. Rs.10,00,000/- (Rupees ten lakhs) in a scheduled bank or post office or any such nationalized financial institution at least for a period of 5 (five) years.

We also make it clear that if the aforesaid amount of Rs.40,00,000/- (Rupees forty lakhs) is not deposited by the respondent Nos.1 and 2 to the Registry of this Court within a Page No.# 96/97 period 2 (two) months as directed above, an interest at the rate of 6% per annum on the aforesaid

amount shall be paid by the respondent Nos.1 and 2, which shall in turn be paid to the petitioners.

114. Having decided the quantum of award, now this Court will consider the other claims made in this petition.

115. As far as taking necessary actions against the erring army personnel is concerned, we are of the opinion that it should be left to the wisdom of the army authorities. We are aware and acknowledge the yeoman service rendered by the valiant Indian army and the security forces especially in this part of the country, in upholding the integrity of our country and in maintaining peace and harmony. We are also aware of the fact that the Indian army is a highly professional and disciplined force and as such, we would consider the aforesaid unfortunate incident to be an aberration which does not deserve to be repeated in future.

Therefore, rather than us giving any direction to take specific action against the erring personnel, we will leave it to the wisdom of the army authorities to do the needful as we are confident that the Indian army, a highly professional and disciplined force, will take necessary domestic remedial and punitive actions, in the light of the findings in the Inquiry Report and also our observations in this judgment, keeping in mind the basic human rights and the dignity of the individuals and the security of the nation and operational sanctity of the armed forces.

116. As regards the F.I.Rs. which have been registered, let the law take its course and we hope and expect that the F.I.Rs. which have been lodged would be brought to their logical conclusions as expeditiously as possible.

117. With the above observations and directions, we allow this petition.

JUDGE JUDGE

Comparing Assistant