

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (*Habeas Corpus*) No.13 of 2016

Smt. Nirmala Patel, aged about 40 years, W/o Ramadheen,
R/o Village Tilaervar, Dongargaon, Distt. Rajnandgaon

---- Petitioner

Versus

1. The State of Chhattisgarh, through Secretary, Home Department, Mantralaya, Naya Raipur, Distt. Raipur
2. The Collector, Rajnandgaon
3. The Director General of Police, Raipur
4. Superintendent of Police, Rajnandgaon
5. Town Inspector, Dongargaon Police Station, Dongargaon, Distt. Rajnandgaon
6. Chandra Kumar Sahu, Sarpanch Village Tilaervar, Dongargaon, Distt. Rajnandgaon
7. Champaram Sahu,
8. Shekhar Agrawal,
9. Resham Patel,
10. Bhushan Sahu,
11. Reklam Patel,
12. Kaliram Nirmalkar
13. Sudarshan Saha

Respondents No.7 to 13 R/o Village Tilaervar, Dongargaon,
Distt. Rajnandgaon

---- Respondents

For Petitioner: Mr. Parag Kotecha, Advocate.

For State/Respondents No.1 to 5: -

Mr. Y.S. Thakur, Addl. Advocate General.

For Respondents No.6 to 13: -

Mr. B.D. Guru, Advocate.

Hon'ble the Acting Chief Justice and
Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

Sanjay K. Agrawal, J

28/02/2017

1. Habeas corpus “*ad subjiciendum*” means “that you have the body to submit or answer” which is called as *Festinum Remedium* – A speedy remedy, which has been sought by the petitioner in this instant case. The aforesaid writ of Habeas Corpus has been sought by the petitioner on the following factual backdrop: -
2. The petitioner has filed this writ petition stating inter alia that she and her husband are residents of Village Tilaervar, Police Station Dongargaon, Distt. Rajnandgaon and her husband went missing since 15-1-2016, his whereabouts are unknown to her since that date and she has lodged report to the official respondents but there is complete inaction and indifferent attitude on the part of the State and its authorities who have not taken any steps to find out her missing husband and she apprehends that respondents No.6 to 13 had taken away her husband and had done some wrongful act with him, as they used to harass her and her husband. It has been further pleaded that respondents No.6 to 13 have encroached upon the petitioner's land and started construction over it and they are very politically influential persons and had also withdrawn

all the relations with the petitioner and her husband at village level. The petitioner further apprehends that respondents No.6 to 13 have murdered her husband Ramadheen and the police has only registered missing report and therefore appropriate writ of Habeas Corpus be issued by directing respondents No.1 to 5 to produce Ramadheen before this Court and also sought registration of criminal case against respondents No.6 to 13.

3. On being noticed, the State and its authorities have filed their return clearly stating inter alia that the petitioner and her husband have encroached upon the Government land on which a community hall has to be constructed by the Gram Panchayat but that could not be constructed on account of dispute being raised by the petitioner and her husband. Police Station Dongargaon has filed as many as three *istegashas* against the petitioner and her husband. Sarpanch of Village Tilaervar – respondent No.6 has also registered cognizable case against the petitioner and her husband on 11-6-2015 under Sections 294, 506 and 323 read with Section 34 of the IPC. A case under Sections 107 and 116 of the CrPC has also been registered vide Annexure R-6. It has been said that there is no violation of any fundamental right of the petitioner as alleged by her in the petition, rather the petitioner and her husband are rank encroachers upon the Government land and the petitioner has also filed complaint case before the Judicial

Magistrate First Class, Rajnandgaon in which the Judicial Magistrate has directed for enquiry by order dated 17-9-2015 and enquiry report has also been submitted to the Judicial Magistrate which has been filed along with the return.

4. The private respondents have also filed their return and made averments in line with the return filed by the State Government.
5. Mr. Parag Kotecha, learned counsel appearing for the petitioner, would submit that respondents No.6 to 13 are very influential persons and they have encroached upon the Government land. He would further submit that the petitioner's husband is missing since 15-1-2016 and police has not taken any action except registering a missing report and as such, appropriate writ of Habeas Corpus be issued directing respondents No.1 to 5 to produce petitioner's missing husband Ramadheen.
6. Mr. Y.S. Thakur, learned Additional Advocate General appearing on behalf of the State/respondents No.1 to 5, would submit that it is not the case of the petitioner that Ramadheen, the missing person, has been unauthorisedly detained either by the official respondents or by respondents No.6 to 13 or he has been detained otherwise except in accordance with law by the State authorities and therefore no writ of Habeas Corpus can be issued and the writ petition is liable to be dismissed.

7. Argument in similar line has been made by Mr. B.D. Guru, learned counsel appearing for respondents No.6 to 13.
8. We have heard learned counsel for the parties and considered the rival submissions made on their behalf and also gone through the record with utmost circumspection.
9. Habeas Corpus is Latin for “you have the body”. The writ is referred to in full in legal texts as *habeas corpus ad subjiciendum* or more rarely *ad subjiciendum et recipiendum*. It is sometimes described as the “great writ”. It is considered as a most expeditious remedy available under the law.
10. The meaning of the term habeas corpus is “you must have the body”. Halsbury in his **Laws of England**, 4th Edition, observed as follows: -

“The writ of *habeas corpus ad subjiciendum* which is commonly known as the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the queen has a right to inquire into the laws for which any of her subjects are deprived of their liberty.”

11. In **Corpus Juris Secundum**, the nature of the writ of habeas corpus is summarized thus: -

“The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designate time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. 'Habeas corpus'

literally means “have the body”. By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon Jurisprudence.”

12. In the Constitutional and Administrative Law by Hood Phillips and Jackson it was stated as under: - (Relied upon by the Supreme Court in the matter of **Surinderjit Singh Mand and another v. State of Punjab and another**¹, to highlight the importance and significance of personal liberty, specially with reference to unlawful detention.)

“10. The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. Habeas corpus was a prerogative writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant’s claim for freedom has been asserted frequently by judges (sic) and writers. Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a public authority may be acting and the willingness of the courts to examine the legality of decision made in reliance on wide-ranging statutory provision. It has been suggested that the need for the “blunt remedy” of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction. Procedural reform of the writ may be appropriate, but it is important not to lose sight of substantive differences between habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds; habeas corpus is a writ of right, granted ex debito justitiae.

(emphasis supplied)

¹ (2016) 8 SCC 722

13. Lord Halsbury LC in **Cox v. Hates**² held that “the right to an instant determination as to lawfulness of an existing imprisonment” is the substantial right made available by this writ.
14. Likewise in **Barnardo v. Ford**³ the writ of habeas corpus has been described as a writ of right which is to be granted *ex debito justitiae*. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of his unlawful detention. Once, however, he shows such a case and the return is not good and sufficient he is entitled to this writ as a matter of right.
15. In **R. v. Secy. of State for Home Affairs**⁴ it has been held that a person is not entitled to be released on a petition of habeas corpus if there is no illegal restraint. “The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue.”
16. Likewise in **Cox v. Hakes**⁵ it has been held that the writ of habeas corpus is an effective means of immediate release from unlawful detention, whether in prison or private custody. Physical confinement is not necessary to constitute detention. Control and custody are sufficient.

2 (1890) 15 AC 506

3 (1862) AC 326

4 (1941) 3 All ER 104, 105

5 (1890) 15 AC 506 (HL)

17. A Constitution Bench judgment of the Supreme Court in the matter of Kanu Sanyal v. District Magistrate, Darjeeling and others⁶ traced the history, nature and scope of the writ of habeas corpus. It has been held by Their Lordships that it is a writ of immemorial antiquity whose first threads are woven deeply “within the seamless web of history and untraceable among countless incidents that constituted a total historical pattern of Anglo-Saxon jurisprudence”. Their Lordships further held that the primary object of this writ is the immediate determination of the right of the applicant's freedom and that was its substance and its end. Their Lordships further explaining the nature and scope of a writ of habeas corpus held as under: -

“The writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, “in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain”. But the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory

6 (1973) 2 SCC 674

of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained."

18. In the matter of **Union of India v. Yumnam Anand M. alias Bocha alias Kora alias Suraj and another**⁷ while explaining the nature of writ of habeas corpus, Their Lordships of the Supreme Court held that though it is a writ of right, it is not a writ of course and the applicant must show a *prima facie* case of his unlawful detention. Paragraph 7 of the report states as under: -

"7. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement". The writ has been described as a writ of right which is grantable ex debito justitiae. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right."

19. A writ of habeas corpus is not be issued as a matter of course.

Clear grounds must be made out for issuance of such writ.

(See **Dushyant Somal v. Sushma Somal**⁸.)

⁷ (2007) 10 SCC 190

⁸ (1981) 2 SCC 277

20. In the matter of **Usharani v. The Commissioner of Police,**

Bangalore and others⁹, the writ of habeas corpus has been

defined very lucidly as under: -

“The claim (for habeas corpus) has been expressed and pressed in terms of concrete legal standards and procedures. Most notably, the right of personal liberty is connected in both the legal and popular sense with procedures upon the Writ of habeas corpus. The writ is simply a judicial command directed to a specific jailer directing him or her to produce the named prisoner together with the legal cause of detention in order that the legal warrant of detention might be examined. The said detention may be legal or illegal. The right which is sought to be enforced by such a writ is a fundamental right of a citizen conferred under Article 21 of the Constitution of India.

11. The ancient prerogative writ of habeas corpus takes its name from the two mandatory words “habeas” and “corpus”. “Habeas Corpus” literally means “have his body”. The general purpose of these writs as their name indicates was to obtain the production of the individual before a Court or a Judge. This is a prerogative process for securing the liberty of the subject by affording an effective relief of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. This is a writ of such a sovereign and transcendent authority that no privilege of power or place can stand against it. It is a very powerful safeguard of the subject against arbitrary acts not only of private individuals but also of the executive, the greatest safeguard for personal liberty, according to all constitutional jurists. The writ is a prerogative one obtainable by its own procedure. ... In our country, it is this prerogative writ which has been given a constitutional status under Articles 32 and 226 of the Constitution. Therefore, it is an extraordinary remedy available to a citizen of this country, which he can enforce under [Article 226](#) or under [Article 32](#) of the Constitution of India.”

21. Thus, the writ of habeas corpus is a process by which a

person who is confined without legal justification may secure a release from his confinement. The writ is, in form, an order issued by the High Court calling upon the person by whom a person is alleged to be kept in confinement to bring such person before the court and to let the court know on what ground the person is confined. If there is no legal justification for the detention, the person is ordered to be released. However, the production of the body of the person alleged to be unlawfully detained is not essential before an application for a writ of habeas corpus can be finally heard and disposed of by the court. {See **Kanu Sanyal** (supra).}

22. Taking note of the aforesaid judgments of the Supreme Court and the principles laid down in the afore-stated cases for grant of writ of habeas corpus, it appears that the condition precedent for instituting a petition seeking writ of habeas corpus is the person for whose release, the writ of habeas corpus is sought must be in detention and he must be under detention by the authorities or by any private individual. It is his detention which gives the cause of action for maintaining the writ of habeas corpus. If the allegations in the writ of habeas corpus read as a whole do not disclose the detention, in other words, if there is no allegation of illegal detention, the writ petition seeking writ of habeas corpus is liable to be rejected summarily. Such writ is available against any person who is suspected of detaining another unlawfully and the

habeas corpus Court must issue it, if it is shown that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ can be addressed to any person whatever -an official or a private individual-who has another in his custody.

23. Applying the principle of law laid down by Their Lordships of the Supreme Court in the aforesaid cases, qua the writ of habeas corpus, to the factual matrix of the present case, it is quite vivid that the petitioner has not made any averment in the entire writ petition that her husband has been illegally detained either by the official respondents or by the private respondents, as the writ petition is blissfully silent in this regard. Reading the averments in the writ petition as a whole, it does not disclose the illegal detention by private or official respondents. The writ petitioner only apprehends that as the relations of her and her husband with respondents No.6 to 13 are not good, therefore, they might have murdered her husband as such unlawful detention of the petitioner's husband either by private person and custody / control / detention by the private respondents is not pleaded, established or urged before this Court, only apprehension of criminal act by respondents No.6 to 13 has been expressed. As already held in above-stated paragraphs, a writ of habeas corpus is not to be issued as a matter of course and clear grounds must be made out for issuance of a writ of habeas

corpus. The petitioner has even failed to plead and establish the necessary ingredients for issuance of the writ of habeas corpus and as such the extraordinary writ / expeditious writ cannot be issued at the instance of the petitioner for production of a missing person, as it is the case of the petitioner herself that her husband is missing since 15-1-2016.

24. In view of the aforesaid legal analysis, we do not find any good and valid ground for issuance of a writ of habeas corpus. We hereby decline to exercise the jurisdiction for issuance of writ of habeas corpus by dismissing the writ petition leaving it open to the petitioner to proceed in accordance with law for search of her missing husband.

Sd/-
(Pritinker Diwaker)
Acting Chief Justice

Sd/-
(Sanjay K. Agrawal)
Judge