

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.06.2018

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM
and
THE HONOURABLE MRS.JUSTICE S.RAMATHILAGAM

H.C.P.No.1369/2017

Syed Imran

..Petitioner

vs.

1.The Commissioner of Police,
Vepery, Chennai.

2.Inspector of Police,
D-5, Marrina Police Station,
Chennai.

..Respondents/Complainant

Prayer: Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Habeas Corpus, directing the first respondent herein to produce the corpus or body of the petitioner mother namely Gowhar Afshana aged 60 years before this Court and set her at liberty.

For petitioner : Mr.N.Sudharsan

For Respondents: Mr.R.Ravichandran,
GA [Crl.Side]

ORDER

(Order of the Court was made by S.M.SUBRAMANIAM, J.)

The present habeas corpus petition has been filed seeking a direction to the 1st respondent to produce the corpus or body of the petitioner's mother viz., Gowhar Afshana, aged about 60 years before this Court and set her at liberty.

2. The affidavit filed in support of this habeas corpus petition states that the petitioner is living with his family members at Royapettah, Chennai. On 27.11.2012, the mother of the petitioner was found missing from his residence. With the help of the family members, the petitioner searched his mother in so many places and their entire efforts to trace out the whereabouts of his mother/detenuue went in vain. Thus, the petitioner lodged a compliant before the 2nd respondent/Police on 27.11.2012 itself.

3. The grievance expressed by the petitioner is that the respondents/Police had not taken appropriate initiatives to trace out the whereabouts of the mother of the petitioner. Further it is contended that the 2nd respondent has not investigated the case properly, so as to find out the missing mother of the writ petitioner.

4. The learned Government Advocate appearing on behalf of the respondents/Police relying on the status report filed by one M.Elavarasu, Inspector Of Police, D-5, Marina Police Station, Chennai City and contended that the respondents/Police have taken all sincere efforts to trace out the whereabouts of the Detenue and the efforts taken by the Police are narrated in the status report and the same is extracted hereunder:

3. I submit that during the course of enquiry, a case was registered in D-5, Marina Police Station, Crime No.2021 of 2015 under Section "'Woman Missing" by Tr.Iyaappan, then Sub Inspector of Police on 29.06.2015 at 13.45 hours and he took up investigation.

4. I submit that the then Sub Inspector of Police has visited to the scene of occurrence and prepared a rough sketch and observation mahazar in the present of the witnesses, namely, 1) Tr.Gowsh Basha and 2) Tr.Syed Raffiq and recorded their statements.

Also, the then Sub Inspector of Police has examined the following witnesses, namely,

1. Tr.Syed Imran-complainant,
 2. Tmt.Swapnam Fathima-relative of the detenue,
 3. Tmt.Musifa Esthana-sister of the detenue
 4. Tmt.Raisa Risvana-sister of the detenue and recorded their statements.
5. I submit that on 29.06.2015, I have given the detenue-Gowhar Afshana's photo along with requisition letter to the CRB (Crime Record Bureau) for sending the same all over the Tamil Nadu Police Stations. But, no clue was obtained so far.

6. I submit that the then Inspector of Police has re-examined the following witnesses, namely,

1. Tr.Syed Imran-complainant,
2. Tmt.Swapnam Fathima-relative of the detenue,
3. Tmt.Musifa Esthana-sister of the detenue
4. Tmt.Raisa Risvana-sister of the detenue and recorded their further statements.

7. I submit that the then Inspector of Police has examined Dr.Masiga Sulthana-sister of the detenue and recorded her statements.

8. I submit that the then Inspector of police has sent the requisition letters to News Papers, namely, Dinamalar, Dinadhandhi, Indian Express, Dinakaran, Tamil Murasu to publish news about the Detenue/missing woman Gowhar Afshana.

9. I submit that the then Inspector of Police has formed the special team and they have visited to many places and enquired about the detenue, but no clue was obtained.

10. I submit that I have joined as Inspector of Police, D-5, Marina Police Station, Chennai City on 10.01.2018 and taken up further investigation and instructed the earlier special team and monitored their day today activities.

11. I submit that I have collected the photos of unidentified of the dead bodies same age group of the detenue from Tamil nadu Police Citizen Portal and the same was comparison with the detenue's photo. But no clue was available.

12. I submit that the then Inspector of Police has been formed special team and they have visited to the following places from during the month of December, 2015 to till date and they have circulated the pamphlets along with details of the detenue/missing woman and her photo at public gathering places, namely, 1) Railway stations, 2) Bus stands 3) Temples, 4) Markets 5) Theatres, 6) Hospitals, 7) Auto stands, 7) Masque. But no clue was obtained.

13 I submit that the petitioner/complainant not co-operate with the investigation officer from date of the complaint. Further, the investigation reveals that during the year 2014, the detenue's sister Dr.Masiga Sulthana approached the complainant/petitioner and asked the voter I.D., Ration card of the detenue to sale their ancestral property, at that time the complainant informed that the detenue was missing from home during the year 2012. Due to the share of ancestral property of the detenue obtained from the said witness, the complainant/petitioner approached the respondent police and registered the F.I.R.

14. I submit that though all the efforts taken by the Special Team ended in vain, I am still taking continuous and sincere steps to trace the Detenue/missing women-Gowhar Afshana by putting my best efforts possible. Once the detenue/missing woman is traced, she will be produced before this Court in accordance with law.

5. The father of the writ petitioner / Husband of the missing person one Mr. Maghul given a submission to the Inspector of Police, D-5, Marina Police Station, Mylapore, Chennai-14, on 05.05.2018, stating that his son has furnished false information before the Police. Further, it is stated that the father of the petitioner is totally away from him and further contended that the petitioner has filed a complaint with incorrect facts and details.

6. We are in doubt, whether the present habeas corpus petition is maintainable under Article 226 of the Constitution of India. In this regard, we have carefully gone through the affidavit filed in support of this petition. Except the statement that the mother of the writ petitioner was found missing on 27.11.2012, there is no allegation of illegal detention has been established by the petitioner in the present petition. In the absence of any such illegal detention or establishing a strong suspicion of any such illegal detention, no habeas corpus petition can be entertained.

7. This Court is frequently witnessing that Man/Women Missing cases are converted as Habeas Corpus petitions. Two aspects are to be considered, fundamental right of a citizen for free movement is also a fundamental right, enshrined under the Constitution of India. Personal liberty is also a fundamental right enshrined in Part III of the Constitution of India. It is to be co-related that personal liberty must have a cogent and harmonious understanding in respect of the freedom to move anywhere across the country. A person, who voluntarily moving from home or anywhere to a place of his own choice, then the family members or any other person concerned with such a person can file a case for Man missing, if the Police is able to investigate the matter and find that the person moved at his own volition and is not illegally detained, then the question of entertaining the Habeas Corpus petition would not arise at all. Therefore, it is a condition precedent that a person filing a Habeas Corpus petition should establish that there is a prima facie case of "illegal detention" or at least a suspicion in respect of such illegal detention. In the absence of any of these ingredients, no Habeas Corpus petition can be entertained under Article 226 of the Constitution of India.

8. 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 the instant case."

9. It is necessary that violation of the fundamental rights enshrined under Part III of the Constitution of India must be established for the purpose of filing the Habeas Corpus petition.

10. The High Court of Chhattisgarh, Bilaspur, in the case of Smt.Nirmala Patel Vs. The State of Chhattisgarh in Writ Petition (Habeas Corpus) No.13 of 2016, dated 28.02.2017, and the relevant paragraphs are held as follows:

"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, reported in (2016) 8 SCC 722, 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

<https://hcservices.ecourts.gov.in/hcservices/> 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*.

13. Lord Halsbury LC in *Cox v. Hates* reported in (1890) 15 AC 506, 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*, reported in (1862) AC 326, 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 of Home Affairs* reported in (1941) 3 All ER 104, 105, 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* reported in (1980) 15 AC 506 (HL), 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.

17. A Constitution Bench judgment of the Supreme Court in the matter of Kanu Sanyal v. District Magistrate, Darjeeling and others reported in (1973) 2 SCC 674, 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 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 reported in (2007) 10 SCC 190, 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:

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"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.), reported in (1981) 2 SCC 277.

20. In the matter of Usharani v. The Commissioner of Police, Bangalore and others, reported in ILR 2014 Kar 3312, 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."

11. The High Court of Karnataka, Gulbarga Bench, in the case of Sudharani vs. The State of Karnataka, reported in ILR 2016 KAR 731, the Hon'ble Division Bench relying on S.K.Naik Vs. The Police Sub-Inspector(WPHC No.194/2012) dated 26.03.2014, held as follows:

"5. We find there is absolutely no occasion to issue a writ of habeas corpus, as the writ petitioners do not allege or aver in the petition that the police or any third party has held the missing person in illegal custody.

6. A writ of habeas corpus cannot be issued in respect of any and every missing person more so when no named person is alleged to be responsible for the illegal detention of the person for whose production before the Court a writ is to be issued."

"The following observations made by the Calcutta High Court in Swapandas(supra) may also be noticed:

".....On the basis of a habeas corpus petition, the power under art. 226 is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under the Code of Criminal Procedure, 1973. The investigation, if in progress, is to be overseen by the criminal court. Here the petitioner is asking this court to direct the police to track down his missing son."

4. Habeas Corpus is a writ calling upon the person who has detained another to produce the latter before the Court, in order to let the Court know on what ground he has been detained, and to set him free if there is no

legal justification for the detention. 'Habeas Corpus' literally means "have the body". Writ of habeas corpus is also known as a "writ of liberty". A writ of habeas corpus is issued for release of a person who has been detained unlawfully by the State or by any private individual. A writ of habeas corpus is not issued if the person concerned is not in unlawful detention.

12. The High Court of Calcutta, in the case of Swapan Das vs. The State of West Bengal & others, in W.P.No.17965(W) of 2013 dated 28.06.2013, made an observation, which reads as follows:

"A habeas corpus writ is to be issued only when the person concerning whose liberty the petition has been filed is illegally detained by a respondent in the petition. On the basis of a habeas corpus petition the power under art.226 is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under the Code of Criminal Procedure, 1973. The investigation, if in progress, is to be overseen by the criminal court. Here the petitioner is asking this court to direct the police to track down his missing son. For these reasons, we dismiss the WP. No costs. Certified xerox."

13. The High Court of Madhya Pradesh, in the case of Sulochana Bai vs. State of Madhya Pradesh and Others, reported in 2008(2) MPHT 233, made an observation, which reads as follows:

12. We have referred to the aforesaid decisions only to highlight that the writ of habeas corpus can only be issued when there is assertion of wrongful confinement. In the present case what has been asserted in the writ petition is that her father-in-law has been missing for last four years and a missing report has been lodged at the Police Station. What action should have been taken by the Police that cannot be the matter of habeas corpus because there is no allegation whatsoever that there has been wrongful confinement by the police or any private person. In the result, the writ petition is not maintainable and is accordingly dismissed.

14. The constitutional Courts across the country predominantly held in catena of judgments that establishing a ground of illegal detention and a strong suspicion about any such illegal detention is a condition precedent for moving a

Habeas Corpus petition and the Constitutional Courts shall be restrained in entertaining such Habeas Corpus petition, where there is no allegation of illegal detention or suspicion about any such illegal detention. Man/Women missing cases cannot be brought under the provision of the Habeas Corpus petition. Man/Women missing cases are to be registered under the regular provisions of the Indian Penal Code and the Police officials concerned are bound to investigate the same in the manner prescribed under the Code of Criminal Procedure. Such cases are to be dealt as regular cases by the competent Court of Law and the extraordinary jurisdiction of the Constitutional Courts cannot be invoked for the purpose of dealing with such Man/Women Missing cases.

15. We have noticed in many number of cases that the Police people are spending lot of time and wasting their time by travelling across the Country under the guise of Man/Women missing cases. It causes lots of concern and expenditures to the State Ex-Chequer. This apart, the efforts taken without any basis, causes a concern for prosecution and also to the investigating authorities. Thus, the Police force must be used potentially to trace out the cases, where there is a genuine allegation of illegal detention, and in the event of such a relief has been sought for by the petitioners in these kind of Habeas Corpus petitions.

16. This being the scope of the Habeas Corpus petition, we are of the strong opinion that the Constitutional Courts should show some restraint in entertaining such Habeas Corpus petitions in relation to Man/Women missing cases.

17. Accordingly, the present Habeas Corpus petition, there is not even an iota of doubt in respect of any illegal detention nor any such allegations are made out in the petition. This being the factum of the case, the petitioner has not established any cause for the purpose of entertaining the present Habeas Corpus petition and accordingly, the same stands dismissed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

sk/abr

To

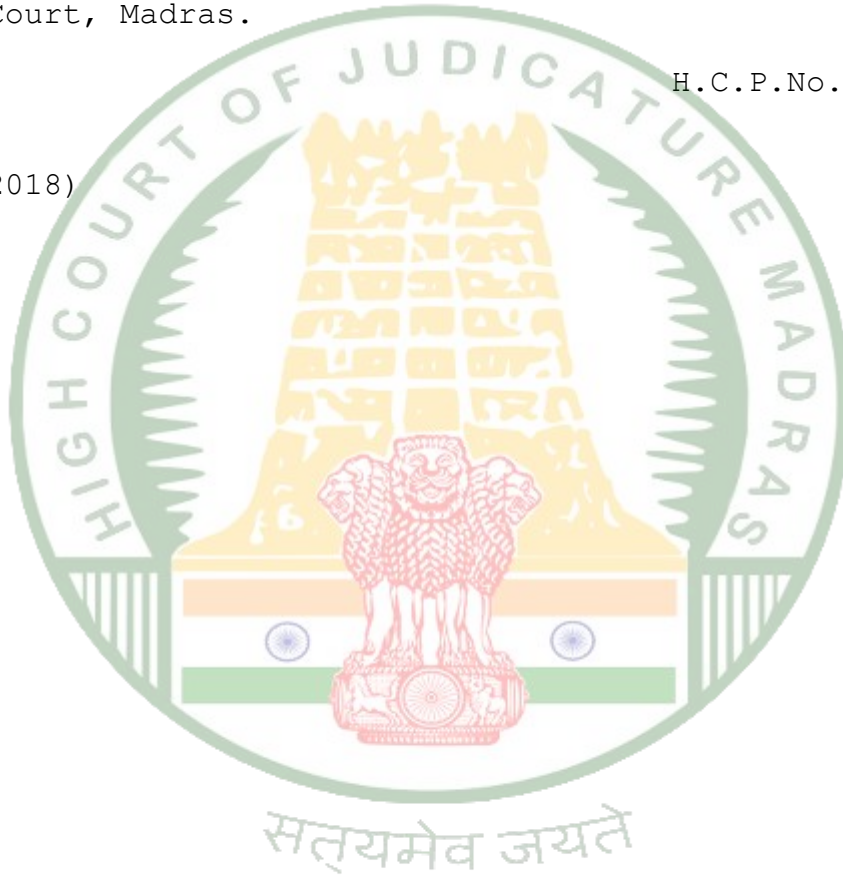
1.The Commissioner of Police,
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3.The Public Prosecutor,
High Court, Madras.

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