

IN THE HIGH COURT OF ORISSA AT CUTTACK
WPCRL No.124 of 2023

Nimananda Biswal ... **Petitioner**

Mr. A.K. Pandey, Advocate.

-versus-

State of Odisha & others **Opp. Parties**

Smt. Saswata Pattanaik,
Additional Government Advocate.

CORAM:
JUSTICE S.K. SAHOO
JUSTICE SIBO SANKAR MISHRA

ORDER
08.09.2023

Order No.

01.

This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Heard ★ Mr. A.K. Pandey, learned ★ counsel for the petitioner and Smt. Saswata Pattanaik, learned counsel for the State.

Mr. Pandey, learned counsel for the petitioner submitted that the daughter of the petitioner is untraceable since long, for which the petitioner had lodged a first information report on 12.10.2022 at the Bidanasi Police Station, Cuttack. However, he alleged that though almost a year has elapsed since the filing of the F.I.R., the Opposite Parties are not taking any efficacious step to trace out the daughter of the petitioner.

After hearing the submissions, it seems to be a case of 'missing person'. No material was produced to show that the daughter of the petitioner has been illegally detained by anyone. It is needless to say that the Court has to be satisfied

about the factum of 'illegal detention' before it proceeds to entertain a petition seeking issuance of the writ of habeas corpus. There is no dearth of precedents from the Hon'ble Supreme Court and different High Courts to support the above position of law and there is hardly any need to reproduce all of them. The Hon'ble Supreme Court in the case of **Union of India -Vrs.- Yumnam Anand M. alias Bocha alias Kora alias Suraj and another reported in (2007) 10 Supreme Court Cases 190** was of the opinion that a petitioner must show a prima facie case of 'unlawful detention' before it urges the Court to issue the prerogative writ of habeas corpus. The Apex Court elucidated the above mandate in a crisp and lucid manner and held as follows:

"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."

In the case of **Home Secretary (Prisons) and others -Vrs.- H. Nilofer Nisha reported in (2020) 14 Supreme Court Cases 161**, it is held as follows:

16. A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal

meaning of the Latin phrase habeas corpus is “to produce the body”, over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded, there are certain limitations to this writ and the most basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenu is under detention without any authority of law.

In the case of **Sulochana Bai -Vrs.- State of M.P. reported in 2008 (2) MPHT 233**, a Division Bench of Madhya Pradesh High Court presided over by Hon’ble Justice Dipak Misra (as His Lordship then was) held as follows:

“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."

In the case of **Selvaraj -Vrs.- State and others reported in (2018) 3 MLJ (Criminal) 712**, a Division Bench of Madras High Court held as follows:

19. 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."

In the case of **Jaymati Sahu -Vrs.- State of Chhattisgarh reported in 2022 SCC OnLine Chh 737**, a Division Bench of Chhattisgarh High Court held as follows:

"14. Thus, 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 not entertain a Habeas Corpus petition, where there is no allegation of "illegal detention" or suspicion about any such "illegal detention". Cases of missing persons cannot be brought under the provision of the Habeas Corpus petition. Cases of missing persons are to be registered under the regular provisions of the Penal Code, 1860 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 cases of missing persons.

15. It is seen in the instant case that the petitioner has not made any averment in the entire writ petition that her daughter Juhi Sahu has been illegally detained either by the official respondents or by the respondent No. 7. Averrment made in the writ petition, as a whole, do not disclose the illegal detention of Juhi Sahu by private or official respondents. The petitioner only apprehends that

the respondent No. 7 and his family members might have murdered Juhi Sahu. As such, unlawful detention of the petitioner's daughter, either by private person or custody/control/detention by the respondents is not pleaded, established or urged before this Court, only apprehension of alleged criminal act by respondent No. 7 and his family members has been expressed. As already observed in the 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. In the instant case, the petitioner has miserably failed to plead and establish the necessary ingredients for issuance of the writ of habeas corpus and as such, the extraordinary 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 daughter is missing since 10-2-2019.”

In the case of **Samir Kumar Paul -Vrs.- State and Others reported in MANU/WB/0139/2004**, a Division Bench of the Calcutta High Court that where prayer was made by the father of a ten years old missing girl for issuance of a writ of habeas corpus for tracing out the girl, it was held that in a habeas corpus proceeding the Court is required to consider the legality or otherwise of the detention of a particular person and since such a situation was not involved in the case, writ in the nature of habeas corpus cannot be issued as prayed for. Accordingly, it was held that the writ petition is not maintainable.

Writ of habeas corpus cannot be issued in a casual and routine manner. Though it is a writ of right, it is not a writ of

course. The writ of habeas corpus is festinum remedium and power can be exercised in clear case. Illegal confinement is a pre-condition to issue a writ of habeas corpus. It 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. On the basis of a habeas corpus petition, the power under Article 226 of the Constitution of India is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under Cr.P.C.

In this case, the petitioner has not established a prima facie case of 'unlawful detention' of his daughter by any particular person, rather it is submitted on his behalf that his daughter has been missing. Therefore, we are of the considered view that a petition seeking the issuance of the writ of habeas corpus cannot be entertained to trace out a missing person and for such purpose, the petitioner can pursue other effective remedy.

After arguing for a considerable period, being faced with the legal hurdle with respect to maintainability of the writ petition, learned counsel for the petitioner seeks permission to withdraw the writ petition at this stage with liberty to seek appropriate remedy in accordance with law.

Considering such submission, the writ petition is disposed of as withdrawn with the above liberty.

(S.K. Sahoo)
Judge

(S.S. Mishra)
Judge