

(1993) 10 MAD CK 0041
In the Madras High Court
Case No : H.C.P. No. 892 of 1993

High Court Legal Aid Centre

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 28-10-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 3

Citation : (1993) 10 MAD CK 0041

Hon'ble Judges : Thanikkachalam, J;Srinivasan, J

Bench : Division Bench

Advocate : M. Bhaskar, for the Appellant; I. Subramanian, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Srinivasan, J.—This is a petition registered on a telegram purporting to have been sent by one Sarasu, wife of Perumal, Udayapatti near Kandashramam, Salem, According to the telegram her son Rajendran was taken into custody by Shanmugam, Inspector, Kitchipalayam Police Station for interrogation on 1.4.1993 in connection with a jewel theft case and that he was arrested on suspicion, illegally confined, brutally beaten and kept under illegal custody till 13.5.1993 by two policemen, whose identity was not known. He was tortured everyday and he was murdered. She was not permitted to cremate her son according to her religious rites. Police burnt the dead body of her son offering Rs. 20,000/- as bribe to her through some panchayatdars. During inquest the Revenue Divisional Officer compelled her to give evidence as desired by the Police and she was lured that if she deposed infavour of police she would be paid Rs. 15,000/- more as bribe. The telegram prayed for an investigation and further action through CB CID police.

2. The case has been registered with High Court Legal Aid Centre, Madras represented by its Secretary, Mr. P.C. Varadarajan as petitioner. The respondents are shown as State, represented by Inspector of Police, Kitchipalayam police

station, Superintendent of Police, Salem District, Revenue Divisional Officer, Salem District and the Superintendent of Police, C.B., C.I.D., Madras.

3. Even at the outset, we would like to point out that this petition ought not to have been registered as one for issue of Habeas Corpus as, even according to the telegram, the person concerned was dead and he was not in the custody of either the respondents or any other human being. The strange feature is that the petition is presented by the High Court Legal Aid Centre, represented by its Secretary, P.C. Varadarajan, as the petitioner. An affidavit is filed in support of the petition by the said Secretary and the same has not been attested by any Advocate as required by law. Yet, the Registry has chosen to pass the papers and take on file the petition.

4. It is too elementary to point out that an affidavit should be filed by a person who has personal knowledge about the facts or who has acquainted himself with the facts from authentic records. In fact, Order 19, Rule 3 of the Code of Civil Procedure, 1908 enjoins that "affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated." In this case, the Secretary to the High Court Legal Aid Centre has chosen to file the affidavit as if he has personal knowledge about the facts stated therein. In paragraph 6 of the affidavit filed in support of the petition, it is averred that he is filing the affidavit since the mother viz., Sarasu, who sent the telegram, is not traceable. It is further stated that due to the importance of the case the petition is being filed on behalf of Rajendran. We have already noticed that the allegation contained in the telegram is that Rajendran was murdered and he was no more. In those circumstances, we are baffled as to how a Habeas Corpus petition could be filed on behalf of a dead person by the Legal Aid Centre. Further, in paragraph 9 it is stated that from the contents of the telegram whole thing looks fishy and that the inquest conducted by the Revenue Divisional Officer looks suspicious. That Rajendran has died under suspicious circumstances. It is doubtful whether inquest conducted in question is on Rajendran himself or not." It is not stated anywhere in the affidavit that the deponent made an enquiry and ascertained that inquest conducted over the dead body of Rajendran was suspicious or that the Revenue Divisional Officer did not conduct any proper enquiry. Without setting out all these facts, the deponent has chosen to file a sworn affidavit containing allegations as mentioned above against responsible officials of the State Government. It is not open to any person to file an affidavit with regard to matters which are not within his personal knowledge. In particular, when the deponent is holding the post of Secretary of the High Court Legal Aid Centre, he ought not to have indulged in filing an affidavit of this type making such serious allegations against responsible officials of the Government. For that matter, he should not have made such allegations against any other individual, be he an official of the State or not. It is stated in paragraph 9 that provisions of S.57 of the CrI.P.C. 1973 or not followed. It is further stated in paragraph 10 that the 1st

respondent, viz., State represented by Inspector of Police, Kitchipalayam Police Station, Salem has arrested the detenu in violation and not in accordance with procedure established by law within the meaning of Art.21 of the Constitution. Apart from the fact that the said averment is wholly unintelligible, it is beyond our comprehension as to how the deponent could assert that the first respondent arrested the detenu in violation of the procedure established by law. We have already stated that the first respondent is the State represented by Inspector of Police, Kitchipalayam police station, Salem. Even that description is erroneous. An Inspector of Police cannot represent the State Government. There is a prescribed procedure for impleading the State Government as a party in proceedings like this and the officers mentioned by the relevant provisions of law should have been impleaded as representing the State Government. If the petitioner had desired to implead Inspector of Police, Kitchipalayam Police Station, he should have impleaded him as an independent party to the petition. The other portions of the affidavit are only extracts from S.174 of the C.P.C.

5. On this affidavit and petition, notice was ordered by this Court on 3.6.1993 and the Public Prosecutor having taken notice has been good enough to file a counter affidavit sworn to by the Inspector of Police, Kitchipalayam Police Station by name Shanmugam. In the counter affidavit, the averments made in the affidavit of the petitioner are denied and it is stated as follows:

...inquest was done by the Revenue Divisional Officer himself in the presence of the respective Panchayatars and the report was drawn up thereafter. After the inquest was over, the dead body was duly handed over to the mother and brother of the deceased for performing the funeral rites and they have acknowledged also the same as under:

6. It is also stated in the counter affidavit that the procedure as prescribed by law has been fully complied with and there was no question of any illegal arrest or illegal detention of the said Rajendran. It is seen from the counter affidavit that the deceased Rajendran was involved in two cases, viz., Cr. No. 1212 of 1992 for an offence under Ss.457 and 380 I.P.C. on the file of the Kitchipalayam Police Station and Cr. No. 1501 of 1992 for an offence under Ss.457 and 380 I.P.C. on the file of the Ammapettai Police Station. The value of the stolen articles in the above two cases will be around Rs. 2,00,000/- It is also averred in the counter affidavit that there were sufficient materials disclosing the involvement of the said Rajendran in the said two criminal cases and the police officials were in search of him as he was not available. He was apprehended on 13.5.1993 when he came in a drunken state to the Kitchipalayam Police Station. It is also averred that he admitted having received a diamond earstud from one Sivamani and thereafter the police made investigation. It is further stated that during the course of the apprehension of the deceased minimum force was used on him. But unfortunately he died on 13.5.1993 at about 6.30 a.m. A special report was given to the authorities concerned and a case was registered under Cr. No. 781 of 1993 under S.174 of the Code of Criminal Procedure. The other allegations

made in the affidavit filed in support of the petition have been denied.

7. The Secretary to High Court Legal Aid Centre was not satisfied with the affidavit filed by him earlier and he proceeded to file a reply affidavit denying the contents of the counter affidavit filed on behalf of the respondents. In the reply affidavit it is alleged that there is no proof to show that the body of the deceased was handed over to his relatives. Once again it is asserted that there was violation of the provisions of the Code and that Rajendran died due to police torture. Finally it is prayed in the reply affidavit that the respondents must be directed to produce Mrs. Sarasu for clarification and further orders must be passed by this Court. Reply affidavit does not disclose the materials from which the deponent has gathered the information which he seeks to place before the Court. He has not disclosed the basis on which he has made the allegations in the said affidavit. It is highly improper on the part of the Secretary to High Court Legal Aid Centre to file affidavits in this court setting out matters which were not within his personal knowledge. He has made surmises and he has chosen to draw several unwarranted inferences from the contents of the telegram. Admittedly, the person who sent the telegram could not be traced by him. She was not traceable by the respondents also. In these circumstances, it is not known as to how any person could assert certain matters on the basis of the contents of such telegram. If really the person who sent the telegram is one aggrieved by the death of her son in police custody, she would have certainly approached this court with an application or she would have made herself available after sending the telegram when the petitioner wanted to find out the facts from her. In the circumstances, the only inference that could be drawn is that the telegram has been sent by a busybody just for the purpose of setting on motion the machinery of this Court on a fishing expedition. It is unfortunate that the precious time of this court has been wasted on this matter over such a long period. This petition ought to have been dismissed in limine as there is no question of issuing a Habeas Corpus when even according to the telegram the person concerned was not alive.

8. In cases where an allegation is made that a person in custody had died the proper procedure to be adopted by the Registry is to register it as a writ of mandamus if sufficient facts are made available to the court by the said communication. There is no question of registering it as a petition for Habeas Corpus. There cannot be a Habeas Corpus in the case of a person who is not alive.

9. The Federal Court had occasion to say in *Keshav Talpade v. The King Emperor* (1944 MWN Cri.32) that "if the applicant is no longer in custody, no order can thereafter be made on the habeas Corpus application. "In the case before the Federal Court, it was an appeal against the order of the High court dismissing a writ petition for a writ of Habeas Corpus. It was brought to the notice of the Federal Court that the detenu had been released after the order of the High Court, the Federal Court said that the detenu having been released there was no

question of entertaining the appeal and issuing a writ of Habeas Corpus. Hence it was dismissed. It goes without saying that in a case where the person concerned is not alive, no Habeas Corpus petition can be entertained.

10. The Supreme Court considered the matter in *Ghulam Sarwar Vs. Union of India (UOI) and Others*, . The relevant passage in the judgment reads thus:

This leads us to the consideration of the scope of a writ of habeas corpus. The nature of the writ of habeas corpus has been neatly summarised in *Corpus Juris Secundum*, Vol.39 at p.424 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 designated 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.

Blackstone in his *Commentaries* said of this writ thus:

It is a writ antecedent to statute, and throwing its roof deep into the genus of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I,.

This writ has been described by John Marshall, C.J., as "a great constitutional privilege." An eminent judge observed "there is no higher duty than to maintain it unimpaired." It was described as a magna carta of British liberty. Heavy penalties are imposed on a Judge who wrongfully refuses to entertain an application for a writ of habeas corpus. The history of the writ is the history of the conflict between power and liberty. The writ provides a prompt and affective remedy against illegal restraints. It is in extricably inter-twined with the fundamental right of personal liberty. "Habeas Corpus" literally means "have his 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."

11. In W.P. No. 10242 of 1992 (*Muniyandi Pillai v. Inspector of Police, Madurai South Gate Police Station, Madurai*) a Division Bench of this court passed an order on 20.11.1992 that a petition for habeas corpus is not maintainable after the death of the alleged detenu. The court said, "the respondents filed counters denying the allegations of the petitioner. It is needless to state the details of the counters since it is stated that the deceased was done to death and he is no longer available for production before this Court. It is stated that the matter is pending judicial enquiry before the Executive Magistrate, the Revenue Divisional Officer. We feel that it is just and proper to await the report before even directing enquiry by any C.B.I., or any higher authority as prayed for by the petitioner and

the question of paying compensation will arise only after the enquiry was over. Hence we dismiss the writ petition as not maintainable as the relief prayed for cannot be granted by this Court."

12. In the result, we have no hesitation in dismissing this petition. Before parting with it, we would like to observe that if the relatives of the deceased Rajendran are aggrieved by any report of the Revenue Divisional Officer or the action taken by the Government, it is open to them to resort to appropriate remedies before the appropriate authorities which may be available to them in law. Petition dismissed. No costs.