
(2011) 12 GUJ CK 0039

In the Gujarat High Court

Case No : Special Civil Application No. 3633 of 1999

Jagjitsingh Aurora and Others

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 21, 226

Citation : (2012) 1 GLH 362

Hon'ble Judges : Bhaskar Bhattacharya, Acting C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Kishor M. Paul, for the Appellant; M.K. Vakharia, for the Respondent

Final Decision : Allowed

Judgement

Mr. Bhaskar Bhattacharya, A.C.J.

1. By this writ-application under Article 226 of the Constitution of India, the writ-petitioners have prayed for the following relief :- (1). That the Indian soldiers who had gone to fight for the cause of motherland at the war front in December, 1971 and during their course of the employment from their active duty they were arrested by the enemy and in spite of having the clear, clinching and solid evidence that 54 prisoners of war are in custody of Pakistan as POW and they are in the Pakistan jails. Action of Respondent Government vide letter dated 10th August, 1998 treating them presumed to be dead after 7 years may be quashed. They may be treated "on duty" for all purposes from the date of arrest till the date of retirement.

(2). 1C 23148 Capt. K.H. Rathod at 5th Regiment and other 53 Prisoners of War may please be ordered to be treated as on duty for all purpose from the date of arrest till the date of retirement. The respondent may be directed to treat them on duty and to pay full salary with all increments, promotion, D.A., etc. with all other fringe benefits which are given to their living colleagues.

(3). Their pension may be refixed on the salary which they ought to have drawn

on the date of actual retirement.

(4). The legal heirs, their family members of the soldiers and the officers whose names are declared as the prisoners of war in the Parliament vide unstarred question No. 6803 dated 12.4.1978 may be paid appropriate compensation for pain, shock and sufferings which they have suffered for the last 27 years due to the gross negligence, carelessness of the Indian Government and the politicians from 1971 to 1998.

(5). The names of missing 2238 soldiers and officers may please be declared and all concerning record may please be produced by the Respondent before the Hon"ble Court.

(6). Copy of Tashkant agreement of 1965, Simla agreement and all correspondence regarding exchange of prisoners of war between India and Pakistan may please be ordered to be produced by Respondent Government and copies of the same may please be supplied to the Petitioner No. 5.

(7). Respondent Government may be directed to refer this matter of prisoners of war to International Human Rights Committee immediately for repatriation of the prisoners of war of 1965 and 1971 who are rotting in Pakistan Jails for the last 27 years.

The case made out by the writ-petitioners in this application may be epitomized thus :-

(a). The petitioner No. 1 is a retired Lt. General of India. He is a Hero of 1971 Indo-Pakistan War. The petitioner No. 2 is a retired Brigadier of the Indian Army. Petitioner No. 3 is retired Colonel of the Indian Army and is the president of Missing Defence Personnel and Relative Association. Petitioner No. 4 is widowed mother and Petitioner No. 5 is brother of Capt. K.H. Rathod who was working in Indian Army in 5th Assam Regiment in December 1971 Indo-Pak war.

(b). The writ-petitioners complain that the action of the Ministry of Defence in treating Capt. K.H. Rathod as "presumed to be dead" without any cogent evidence is illegal in as much as there is ample evidence that Capt. K.H. Rathod was taken as Prisoner of War and has been detained in Pakistan Jail for the last 27 years.

(c) From 3rd December, 1971 till 16th December, 1971 the Indo-Pakistan War continued. The Pakistani Army had surrendered before the Indian Army on December 16, 1971 at Dacca (Bangladesh) before the Petitioner No. 1 when the Pakistani Gen. Ami Abdulla Niazi surrendered with 93000 Soldiers and a ceasefire was declared. The Indian Army had captured 93000 Pakistani Soldiers and they were treated as Prisoners of War and brought from Dhacca to India.

(d) From the Kashmir Front, 2238 Indian Military Officers and the Soldiers were found missing. However, their dead bodies were not recovered. There is no evidence that they were killed in action. Capt. Kalyansingh Rathod was one of

them. During the war-period, he was posted at CHHAMB JURIAN Sector.

(e) From the Chhamb Jurian Sector at the Kashmir Front, where the 5th Assam Regiment was protecting the motherland, many officers of the said Regiment were found missing from: December 2, 1971 to December 16, 1971. Neither their dead bodies were recovered nor were they traceable. There was no evidence regarding their death on the war front. The Indian Government had declared a total number of 2238 soldiers and Army Officers as missing from war front of Kashmir.

(f) No serious effort was made by the Indian Government to trace out those 2238 Army Soldiers and Officers or to enquire about their fate. Within a short period of time, their files were closed and without any evidence of the death, they were presumed to be dead by the Ministry of Defence.

(g) During the wartime from 3rd December, 1971 to 16th December, 1971, the Sunday Pakistan Observer of December 7, 1971 had published a news item that five Indian Pilots were captured alive and the name of one of such Pilots was Vasant V. Tambay, who happened to be the husband of petitioner No. 6.

(h) Major Ashok Suri of 5th Assam Regiment, who is son of petitioner No. 7, had written one letter from the Karachi Jail on June 16, 1975 and another letter on August 13, 1985, disclosing that he was in Karachi Jail along with 20 officers and he had requested his father, Dr. R.S. Suri, to contact the Defence Ministry for their release. The Petitioner No. 7 had given copy of the said letter to Smt. Indira Gandhi, the then Prime Minister of India.

(i) Similarly, one Shri Mohanlal Bhaskar of Firozpur, Punjab, was arrested by the Pakistani Intelligence Officers on June 17, 1968. He was detained in various Jails in Pakistan such as 596, FIC Lahore Central Jail, Kot-Lakhsapath, Lahore, Sahi Quilla, Lahore, FIC Raval-Pindi, Mianwali and Multan. In exchange of prisoners between India and Pakistan after Bangladesh war, he had returned to India on December 9, 1974 after a long stay in Pakistan jails. On his return to India, he had informed the Indian Government that in the various Jails in Pakistan, the Indian prisoners of war of the years 1965 and 1971 were still detained and those prisoners were treated inhumanly by the Pakistani Jail Authorities. Shri Mohanlal Bhaskar had given the names of two Pakistan Army Officers, one, Major Ayaz Ahmad Sipra of second Punjab Regiment and the other, Col. Ashif Shafi of Military Academy, Aftababad, who were arrested by the then Pakistani Government headed by Mr. Z.A. Bhutto, for revolution against the Government. The said two Pakistani Military Officers, who were co-prisoners with Shri Mohanlal Bhaskar, had told him that the Indian Government had returned all the 93000 soldiers of Pakistan but 45 Indian Officers were still detained in Shahi-quilla of Lahore. He had given specific name of Wing Commander G.S. Gill who had become friend of Major Ayaz Ahmad Sipra and Col. Ashif Shafi during their detention.

(j) On June 6, 1972 the name of Major Ashok Suri of Faridabad was mentioned in the Punjab Dharbar Programme of Lahore Radio, Pakistan. On December 26,

1974 Dr. R.S. Suri, the petitioner No. 7 had received a letter dated December 7, 1974 of his son. On August 13, 1975, Dr. Suri had received a note dated 14th/15th/16th June, 1975 written by his son, Major. Ashok Suri, from Karachi Jail. In 1976, Dr. R.S. Suri had received information from the contact that Major Ashok Suri was captured on December 2, 1971 before the actual war was declared. Major Ashok Suri was treated as a Spy of India by the Pakistani Army. Dr. R.S. Suri had received further information about his son, Major Ashok Suri, that he had been shifted from Karachi jail to ones situated in North West Frontier Province, viz. Kohat Sawabis, Mardan and Malakan.

(k) One Indian prisoner, viz. Mukhatyar Singh, who was repatriated from the Pakistan on January 15, 1988 had said that he had seen Major Ashok Suri in Kot-Lakhpath Jail.

(l) The Sunday Pakistan Observer dated December 5, 1971 published from Dhacca gave the Rawal Pindi news of December 4, 1971 that five Indian Pilots were captured alive and one of the names given was Flight Lt. V.V. Tambay. At the very same time, five Indian Air Force Pilots were declared missing by the Indian Air Force also. The petitioner No. 6 Smt. Damayanti V. Tambay had met one Bangaladeshi Naval Officer, Mr. T.A. Yusuf, in Jamnagar, who was detained in the custody by the Pakistan Government, for refusing to fight against the Indian Army because the Indian Army was supporting the cause of Bangladesh. Shri T.A. Yusuf was in Layalpur Jail in barrack No. 6. In the adjoining barrack, Indian Air Force Pilot Vasant V. Tambay was seen by him writing his name on the wall.

(m) Indian Prisoner, Daljit Singh, S/o Baldev Singh, who was repatriated from Pakistan on March 24, 1988 had seen Pilot V.V. Tambay at the Lahore Interrogation Centre in February, 1978. The details of the other Indian prisoners in Pakistan are given in the following paragraphs :-

(n) Flt./Lt Harvinder Singh

His name was announced by Pakistan Radio on December 5, 1971 as having been captured.

(o) Major Nawaljit Singh Sandhu

An Indian Prisoner released from Pakistan informed that he had met Sandhu in one of the Jails and that the Officer had lost one arm during the war. He was sentenced to 14 years imprisonment on the charge of espionage. One Iqbal Hussain Tantir Singh who was repatriated on March 24, 1988 claimed to have seen him in Kot Lakhpat Jail, Lahore.

(p) Flying Officer Sudhir Tyagi

His plane was shot down near Peshawar on December 4, 1971. His name was announced in Pakistan Radio on December 5, 1971 as captive. The Sunday Pakistan Observer of December 5, 1971 claimed that the Pakistani forces had captured five Indian Pilots alive. The Indian Government by December 5, 1971

had declared that only five Indian Pilots were missing and F/O Tyagi was one of those five pilots. One Ghulam Hussan S/o. Hayat Butt, who was repatriated from Pakistan on March 24, 1988, said that he had seen him at Shahi Quilla, Lahore in the year 1973.

(q) Major A.K. Ghosh

The Time magazine dated December 24, 1971 published a photograph of an Indian prisoner behind bars. This Photograph turned out to be that of Major A.K. Ghosh who did not return with the Indian POWs.

(r) Captain Ravinder Kaura

His name was announced in Lahore Radio on December 6, 1971. His photograph in a Pakistani Jail was smuggled into India and was published by a newspaper in Ambala in the year 1972. Further information came that he was kept in the Jails at Lahore, Multan, Sahiwal and Raval-Pindi. One Mukhtyar Singh, who was repatriated from Pakistan on July 5, 1988, said that Capt. Kaura was in Multan Jail around the year 1981 and was presently in Kot Lakhpat Jail.

(s) Wing Commander H.S. Gill

His plane was shot down at Badin on December 13, 1971. The Pakistan Radio gave the news of his capture on the same day. A Pakistani Major, Ayaz Ahmed Sipra, of Second Punjab Regiment of Pakistan and Col. Asif Shaffi of Eptabad Military Training School of Pakistan, who were co-prisoners with Shri Mohanlal Bhaskar in Attack Jail had told him that Wing Commander H. S. Gill was in Attack Jail.

(t) Flt. Lt. Sudhir K. Goswami

His plane was shot down in Sargodha on December 5, 1971 at about 7.00 p.m. and on the same day at 11.30 p.m. (IST), the Radio Lahore announced his name as one having been captured.

(u) Major S.P.S. Warriach

Mohinder Singh s/o Banka Singh, who was repatriated from Pakistan on March 24, 1988, said that he had seen Major Warriach in Multan Jail in January, 1983 and he had again seen him in Kot Lakhpat Jail in February, 1988.

(v) Capt. Kalvan Singh Rathor

Natha Ram, S/o Anant Ram, who was repatriated on March 24, 1988, had seen Capt. Rathor at Rawalpindi Interrogation Centre in November, 1983. One Mukhatiyar Singh, who was repatriated from Pakistan on July 5, 1988 had seen him in Kot Lakhpat Jail, Lahore.

(w) Captain Giriraj Singh

One Mukhatyar Singh, who was repatriated from Pakistan on July 5, 1988, said

that Capt. Singh was in Kot-Lakhpat Jail at that time. A Pakistani Major, Ayub Ahmed Sipra, reported to have been acquainted with him in Attack Jail in 1973 as told by an Indian Prisoners, Shri Mohanlal Bhaskar, who was repatriated in 1974.

(x) Captain Kamal Bakshi

Mukhatyar Singh, who was repatriated from Pakistan on July 5, 1988, saw Capt. Bakshi in Multan Jail around the year 1983. He said that Capt. Bakshi was at that time imprisoned either in Multan Jail or Bhawalpur Jail.

(y) Fig. Officer Krishnan Lakimaj Malkani

Mukhatyar Singh, who was repatriated from Pakistan on July 5, 1988, saw Flg. Officer Malkani in Multan Jail around 1983. He said that he was at that time either in Multan Jail or Bhawalpur Jail.

(z) Flt. Lt. Babul Guha

Mukhatyar Singh, who was repatriated from Pakistan on July 5, 1988, said that Flt. Lt. Guha was at that time imprisoned in Kot Lakhpat Jail.

(aa) L.N.K. Hazoor Singh

Preetam Singh, S/o Kartar Singh, who was repatriated from Pakistan on March 24, 1988 had seen him in Gora Jail, in Sialkot in March, 1984.

(bb) Flt. Lt. Gurdev Singh Rai

Mukhatyar Singh, who was repatriated from Pakistan on July 5, 1988, said that Flt. Lt. Singh Rai was at that time imprisoned in Kot Lakhpat Jail, Lahore.

(cc) Sep. Madan Mohan

Sooram Singh, S/o. Dharam Chand, who was repatriated from Pakistan on March 24, 1988, had seen him in Multan Jail around 1978-79.

(dd) Flt Lt. T.S. Dandass

His aircraft was hit by ground antiaircraft guns and crashed near Narowal Station on 16th December, 1971, at about 17.15 hrs. Pakistan Army Intercept of the following day clearly indicated that an Indian Pilot had been shot down at village Narowal Police Station, Narowal, and had been arrested. The obvious presumption is that this pilot was Flt. Lt. T.S. Dandass.

A fortnight after the ceasefire, an Indian Army Major was captured by Pakistani troops on the border and was released on the following day. He informed on return that he had heard conversation in the Officer's mess at Zafarwal that they had captured IAF Pilots- Perulkar and Dandass. The former was repatriated to India in December, 1972, but the latter is still missing. It would appear that he is none other than Flt. Lt. Dandass.

(cc) In the Lok Sabha on August 14, 1978 vide un-starred question No. 6803, the following reply was given.

UNSTARRED QUESTION NO. 6803

LOK SABHA

UNSTARRED QUESTION NO. 6803

TO BE ANSWERED ON THE 12TH

APRIL, 1978 INDIANS IN

PAKISTANI JAILS

6803 SHRI AMARSINE PATHAWA

Will the Minister of External Affairs be pleased to refer to the reply given to part (d) of Unstarred Question No. 3575 on the 14th December, 1978 and state :-

- a. the names of the persons held in Pakistan and since when under what charges;
- b. whether Government is aware that certain prisoners are locked up in Pakistan Jails particularly in Multan Jail for the last 5-6 years without putting any charge on them and
- c. whether the Hon''ble Minister will look into the matter personally and get these persons transferred to India.

ANSWER

THE MINISTER OF STATE IN THE MINISTRY OF EXTERNAL AFFAIRS

(SHRI SAMARENDRAH KUNDU)

(a) & (b) while reply to the Unstarred Question No. 3575 dated December, 1978, I had stated that about 250 Indians were still in Pakistani Jails according to information received from Government of Pakistan and other sources. Meanwhile, we have received information regarding some more persons reportedly detained in Pakistan, According to our recent information, 250 Indian nationals are stated to be in Pakistani Jails. This number includes 158 names conveyed to us by the Pakistan and is in the process of being verified through the State Authorities. The remaining names are based on information received from relatives etc. of the detainers and conveyed to the Pakistan Government. While we do not have precise information in regard to the dates since when they are under detention and also the charges under which they have been detained, their names and parentage as well as the names of the jails in which some of them are reported to be held are given in list attached.

(c) We are in constant touch with the Government of Pakistan through their Embassy in New Delhi and our Embassy in Islamabad for the release and repatriation of the Indian detainees.

MISSING DEFENCE PERSONNEL

NO.	I.C. NO.	Name of the Officials	Parentage
241	IC-12712	Maj. S.P.S. Waraiah	15 Punjab
242	IC-14590	Maj. Kanwaljit Singh	15 Punjab
243	IC-14457	Maj. J.S. Mallik & Raj Rif	
244	IC-23148	Capt. K.S. Rathod	5, Assam
245	IC-23283	Cap. G.R. Singh	5, Assam
246	SS-23957	Lt. S.M. Sabharwal	87, Lt. Regt.
247	IC-19294	Capt. Kamal	Ranchi, 5, Sikh
248	SS-22490	S/Lt. Parsh Ram Sharma	5/8 GR
249	IC-20230	Maj.S.C.Galari	9, Jat
250	IC-13780	Maj. A.K. Ghosh	15, Rajput
251	S.S. 19807	Maj. A.K. Suri	5, Assam
252	Sq. Ldt. M.K. Jain		
253	Ft. Lt. Sundhir K. Goswami		
254	Naval Pilot Commanding Officer Ashok Roy		
255	Fit. Lt. R.V. Singh (9441)		7 F(P)
256	FG. Officer Sudhir Tyagi (Lo 871)		F (O)
257	Flt. Lt. V.V. Tamnbay (7662)		F (P)
258	Flt. Lt. L.M. Sasson (7419)		F (P)
259	Flt. Lt. Ram Advani (7612)		F (P)
260	Flt. Lt. N. Shankar (9773)		F (P)
261	Flt. Lt. S.C. Sendal (5559)		F (P)
262	Flt. Lt. K.S. Nanda (7819)		F(N)
263	Wing Cmmdr. H.S. Gill (4557)		
264	Flt. Lt. (8160) T.S. Dandass		
265	Capt. (299995) Raminder Kaura		
266	Sqr. Leader (5005) Jal Manlkehaw Mistry		
267	Flt. Lt. (8404) R.S. Kadam		
268	Flt. Officer (0578) K.L. Malkani		

- 269 Flt. Lt. Babul Guha
270 L/Naik (882211303) Hazoor Singh
271 Sq. Ldr. J.D. Kumar (4885)
272 Flt. Lt. Gurdev Singh Rai (9015)
273 Flt. Lt. A.C. Dalwani Dhavile (9030)
274 Flt. Lt. S.C. Mahajan (10239)
275 Flt. Lt. K.P. Mulidharan (10757)
276 Capt. Washist Nath
277 L/Nk. Jagdish Raj s/o Ralu Ran Attock
278 Sep. Madan Mohan Mianwali
279 Sep. Pal Singh Mianwali
280 Sep. Dalar Singh Multan or Lyallpur

In spite of the above referred cogent and convincing documentary evidence, the Pakistani Government for the last 27 years and till today asserts that they have no Indian Prisoners in their custody. While one BBC London reporter, Miss. Victoria Schofield, in her book, BHUTTO EXECUTION and TRIAL at Page No. 59 has written the following facts :-

In addition to this condition at Kotlakhpath for three month,. Bhutto was subjected to peculiar kind of harassment, which he thought was especially for his benefit. His cell separated from barrack area by 10 ft. high wall, did not prevent him from hearing horrific shrieks and screams at night from other side of the walls. One of Mr. Bhutto's lawyer made an enquiry amongst jail staff and ascertained that they were in fact Indian Prisoners of war but had been rendered delinquent and mental during the course of 1971 war. When the time came to exchange prisoners Indian Government would not accept these lunatics, who had no recollection of their place of origin, and so they were retained as Prisoners to EKE out their existence in Kot Lakhpath.

Bhutto discovering the precise temperament of the inmates wrote to the Jail Superintendent with a copy of the letter addressed to his lawyer (which was released by the press) requesting that they may be moved-finally. They were obviously the Authorities would not accept that Mr. Bhutto's sleep was disturbed on purpose, but Bhutto did not forget the sleepless nights he spent and referred often to the lunatics in other letters of complaint. 50 odd lunatics were lodged in the Ward next to mine. Their screams, Shrieks in the dead of night are shooting. I will not forgot, he wrote.

(ff) The above writings proved beyond reasonable doubt that when Mr.: Z.A. Bhutto, the late Prime Minister of Pakistan, was in Kot Lakhpat Jail in the year

1980, till that time the Indian Prisoners were languishing in the same Kot Lakhpat Jail. They were weeping,; crying and screaming and Mr. Bhutto's sleep was disturbed and he was forced to pass sleepless and restless nights during the last days of his life before execution. When the 1971 war was fought between India and Pakistan, Mr. Bhutto was the Prime Minister of Pakistan and he had signed the Simla Agreement on July 3, 1972 with the late Smt. Indira Gandhi regarding return of the prisoners of war captured by both the countries. As per international Geneva Convention, the Indian Government treated all the Pakistani 93000 Prisoners with due respect and observed all the norms, rules and regulations of the International laws regarding the Prisoners of War. There were 2238 Indian Soldiers missing from the War front whose dead bodies were not recovered. So it should be presumed that those 2238 missing soldiers are in the Jails in Pakistan. The Pakistani Government returned only 616 Indian soldiers. When the first train bringing back the Indian Soldiers came to Delhi Cantonment, Dr. Ram Swaroop Suri of Faridabad (Father of Major Ashok Suri of 5, Assam Regiment), Mrs. Damayanti Tambay of Delhi (Wife of Pilot V.V. Tambay) and Shri G.S. Gill from Chandigarh (Brother of Wing Commander H.S. Gill) with many other family members of the missing Army Officers went to Delhi Cantonment to enquire from the fortunate soldiers who returned from Pakistan alive about their family members, they were told by the soldiers that in the first train only soldiers had come and the officers would come in the second train. When the second train came, again all of them went to Delhi Cantonment to enquire but the officers had not come and they were again told that in the second train also soldiers alone had come and the officers would come in the third train. The International Red Cross had also declared and shown the list of officers of the third train to Dr. R.S. Suri and others but the third train never came to India. The Indian Government had returned all the 93000 prisoners of war to Pakistan in haste without verifying properly and correctly the list of Indian prisoners of war in Pakistan. Indian Army intelligence was so much careless at that time, that the family members of the victim army officers were having more information than the Intelligence Department.

(gg) Mrs. Damayanti Tambay, a Senior Sports Coach in Jawaharlal Nehru University, who was an international Badminton Player of India, was married in April, 1970 to Air Force Pilot V.V. Tambay who was based at Ambala Cantonment. In December, 1971 when her husband went on war she said that her husband had told her, "Damayanti, I am going for a Special Mission. I may return, I may not return; take care of yourself." Mrs. Damayanti said that she had told her husband, "Vasant, "V" for Victory; carry on, the entire nation is behind you". Lastly Mrs. Damayanti said that she was very sorry to inform with heavy heart that her husband's plane was shot down on December 4, 1971 and this news was published in leading Pakistani news paper named Sunday Observer from Dacca on December 5, 1971 disclosing that five Indian Pilots were captured alive. Mrs. Tambay had met one Bangladeshi Naval Officer, Mr. T. Yusuf, at Jamnagar in 1978, who had stated that her husband was with him in Barrack No. 6 of

Layalpar Jail of Pakistan. One prisoner, Daljit Singh, S/o Baro Singh, who was repatriated from Pakistan on March 24, 1988, had seen Flight Lt. V.V. Tambay in Lahore Interrogation Centre in February, 1978.

(hh) The fifty-four brave sons of Bharat Mata are thus languishing in the Jails in Pakistan for the last 27 years. Their only fault was that they had gone for fighting on the border for the protection of their motherland at the cost and risk of their lives.

(ii) On 20th February 1999, Shri Atal Bihari Vajpaaeeji, the then Prime Minister of India, had gone to Lahore (Pakistan) on friendly visit on the invitation of Shri Nawaz Sharieff, the then Prime Minister of Pakistan. The Petitioner No. 5 had sent telegrams on February 19, 1999 at Wagah Border and at Amritsar to the Prime Minister of India, which reads as under :-

DT: 19.2.99

HON. SHRI A.B. VAJPAYEE JI

P.M. OF INDIA AT WAGAH BORDER (PUNJAB)

GOOD WISHES FOR IMPROVING FRIENDLY RELATIONS WITH PAKISTAN AFTER 52 YEARS. PLEASE REQUEST SHRI NAWAZ SHAREIF HON. PRIME MINISTER OF PAKISTAN TO RETURN ALL PRISONERS OF 1971 WAR WHO ARE ROTTING IN PAKISTAN JAILS FOR 27 YEARS.

M.K. PAUL

VICE PRESIDENT

MISSING DEFENCE

PERSONNEL

RELATIVES ASSOCIATION.

DT: 20.2.99

SHRI ATAL BEHARI JI VAJPAYEE HON. PRIME MINISTER OF INDIA AT AMRISTAR

HEARTIEST GREETINGS AND GOOD WISHES FOR HISTORICAL FRIENDLY VISIT TO PAKISTAN. PLEASE READ MY ARTICLES DT. 3RD- 10TH JANUARY, 1999 AND 14TH FEBRUARY, 1999 PUBLISHED IN PUNJAB KESRI REQUESTED TO TAKE SUITABLE EARLY ACTION FOR REPATRIATION OF 54 INDIAN PRISONERS OF WAR WHO ARE ROTTING IN PAKISTAN JAILS FOR 27 YEARS.

REGARDS.

M.K. PAUL

VICE PRESIDENT

MISSING DEFENCE PERSONNEL

RELATIVES ASSOCIATION.

(jj) In the meeting at Lahore on February 20, 1999 between the two Prime Ministers, it was agreed by both the Prime Ministers in the agreement signed at Lahore that the committee of two members would be formed for investigation of Civilians as well as the missing prisoners of War. It was also agreed between both the Prime Ministers for implementing the Simla Agreement dated July 3, 1972. It goes without saying that even after 27 years, the Pakistani Government has not acted upon and not implemented honestly the Simla Agreement dated July 3, 1972. One of the conditions in the Simla Agreement was that both the countries would return the prisoners of war captured by the respective country. Indian Government returned all 93000 soldiers who were captured in Pakistan (Dhacca) by the Petitioner No. 2. But the Pakistani Government had not acted honestly and not adhered to the fact that according to the Simla Agreement, from the Kashmir Front of Chhamb Jurian Sector two thousand two hundred and thirty-eight officers and soldiers of the Indian Army were found missing and even their dead bodies were not recovered from the warfront while the Pakistani Government had returned only six hundred and seventeen prisoners to Indian Government on December 2, 1972.

(kk) Looking into the above referred admitted facts, which are not denied by the Indian Government till today, it is apparent that the Indian prisoners of war are detained in the Jails of Pakistan due to the gross negligence and carelessness of the Government of India and its officers at the time of exchange of prisoners of war. The victim families have collected more evidence from the various sources which the Government was supposed to collect in larger interest of the nation.

(11) Dr. R.S. Suri, Col. R.K. Pattu, Mr. Gill and Mrs. Damayanti Tambay had moved from pillar to post and right from Smt. Indira Gandhi up to the Prime Minister Shri A.B. Vajpayee, and they requested with the folded hands for doing the needful for repatriation of their loving relations but the Government or their officers have not at all cared to take the matter seriously and in routine course, the files were closed for ever.

2. The aforesaid writ-application has been contested by the Union of India, by filing two affidavits, one dated February 17, 2010 and the other, dated February 10, 2011 and its defence may be summarized thus :-

(a) The respondents are very much concerned and anxious about the release of their defence personnel and all the evidence/materials mentioned in the application filed by the petitioners have repeatedly been provided to the Government of Pakistan while making demarche for the whereabouts and repatriation of our 54 missing defence personnel. The matter has been taken up with the Government of Pakistan at the highest level of Prime Minister on a number of occasions. The issue was also taken up by the Indian Prime Minister with the then Prime Minister of Pakistan. A two members committee at the Ministerial level was constituted to examine humanitarian issues including that of

the Missing Defence Personnel.

(b) As a follow up to the Prime Minister's visit to Lahore, prior to the Ministerial Committee-meeting, the officials from the Ministry of Home Affairs, Government of India and Ministry of Interior, Government of Pakistan, met at Islamabad on March 5/ 6, 1999. During the meeting, the Indian side again handed over to the Pakistani side, all available documents regarding Missing Defence Personnel. The Pakistani side responded that according to its information, there was no Indian Missing Defence Personnel in its custody, but it agreed to re-examine the matter.

(c) It has been proposed to Pakistan for holding the Ministerial Committee meeting. However, the date proposed by the Indian Government was not acceptable to the Pakistani side. In the wake of the public concern for the issue, a series of meetings were taken by the Ministry of External Affairs, with members from RAW, IB, MHA and representatives of MOD. Pursuant to the meetings held in MEA, a list of 54 defence personnel believed to be in the Jails at Pakistan was prepared by MEA in 1985. Thereafter, MEA has been taking up the issue with Pakistan at appropriate levels from time to time. However, as per information furnished by MEA, the Pakistan Government has been consistently denying the presence of any Missing Defence Personnel (PoWs) in their custody.

(d) During the visit of the then External Affairs Minister to Pakistan in January, 2007, the Pakistan Government had agreed to receive a delegation of family members and permit them to visit the prisons where the Indian POWs are believed to be incarcerated. Accordingly, the matter was further processed in consultation with MEA and MHA and the visit of a delegation consisting of 14 relatives was arranged under the aegis of Ministry of Defence, Govt. of India to Pakistan between June 1, 2007 and June 14, 2007. Prior to the departure, the delegation was briefed by the officials of MEA, MHA, MOD, MI, IB as also by PRO of Tihar Jail, Delhi as to the ways and means of ascertaining the presence of any Missing Indian Defence Personnel of 1971 war in Pakistan Jails. Dossiers containing available evidence about the presence of Missing Personnel were also handed over to the delegation.

(e) The delegation visited 10 jails in Pakistan from June 1, 2007 to June 14, 2007. The itinerary in Pakistan was co-coordinated by the Counselor (Pol. & Visa), High Commission of India, Islamabad. On return of the delegation, a detailed debriefing was taken by the Army Headquarters. The delegation was not happy with the restricted mode of conduct by the Pakistani Authorities. The outcome of the visit of the: delegation was inconclusive.

(f) Thereafter, with the approval of Raksha Mantri, a Tri-Service Committee for monitoring of matters relating to Missing Defence Personnel was set up in the Headquarters of Integrated Defence Services in March 2009. The Committee has been meeting on a regular basis and it obtains inputs on a continuous basis from the concerned Ministries.

(g) From the above facts, it would be amply clear that the Government of India

has made serious, sustained and continuous efforts to ascertain the whereabouts of our missing defence personnel.

(h) It is not disputed that Capt. K.S. Rathod was initially found missing and he was declared so accordingly. Later, after about two years when no news was heard about him, he was declared presumed to be killed.

(i) In a war, it is not necessary that a person can be declared "presumed to be dead" only after recovery of his dead body. If a person is missing and there is no cogent and reliable circumstantial evidence that he has been taken prisoner and nothing is heard about him for a specified time, then with a view to grant financial assistance to the next of kin of such a person, he is presumed to be dead.

(j) It is specifically denied that no serious efforts were made to trace out missing Indian soldiers and officer. In fact efforts are still on to ascertain the whereabouts of 54 missing defence personnel. The Pakistan Government has been repeatedly approached to find out the whereabouts of our Missing Defence Personnel, in Pakistan Jails and the Pakistan Government has time and again denied the same.

(k) Sincere efforts are still going on to find out the whereabouts of the Missing Defence Personnel. As regards the names of the 40 missing defence personnel mentioned in the application, as per the record available with the office of the respondents, the respondents are able to get the following details regarding the Missing Defence Personnel :-

ARMY

[a]. Total No. of Army Personnel -29

[b]. Presumed Killed - 10

[c]. Confirmed killed - 15

[d]. Records not traceable - 04

AIR FORCE

[a]. Total No. of Air Force Personnel 24

[b]. Presumed killed 24

NAVY-1

(1) The kin of the Missing Defence Personnel are given liberalized family pension and other benefits, so that the lifestyle of the family members of the Missing Defence Personnel is not affected. All the next of kin of the Missing Defence Personnel are provided with benefits of Liberalized Family Pension, Monetary alice for Gallantry award, Family gratuity, Death gratuity, ACWF & NDF, AFPP Fund & FSA, Ex-gratia (ACWF), Army Relief fund, Centre Benevolent fund and any other Monetary relief, as are applicable to them,. Further, the reply given by the

Minister of State in the Ministry of External Affairs itself indicates that the Government of India is in constant touch with the Government of Pakistan through their High Commission in New Delhi and High Commission in Islamabad for the release of repatriation of the Indian detainees, if any.

(m) The Pakistan Government has been repeatedly approached at highest level to return out Missing Defence Personnel but every time they have denied having any Indian prisoner in their captivity. It is not correct to state that the Indian Government has not made serious efforts to get back our Missing Defence Personnel. As stated above, the matter had been taken up with Pakistan Government at the highest level of Prime Ministers and efforts are still on to ascertain the whereabouts of our Missing Defence Personnel.

(n) The matter was taken up by the Prime Minister with his Pakistani counterpart during his visit to Lahore on 20/21 Feb 99 and pursuant to the discussion between the two Prime Ministers, two members committee at the Ministerial level was constituted to examine humanitarian issues, including the missing Indian Defence personnel. As regards the other allegations against the Pakistan Government for not adhering to the Simla agreement, the respondents cannot comment on that.

(o) With reference to the reliefs sought by the petitioners, those depend upon the fact as to whether these Missing Defence Personnel are alive or not. As submitted above, the Pakistani Government has denied having these 54 defence personnel in their captivity. The petitioner has sought for the direction that the matter may be referred to International Human Rights Commission. In this regards, it is submitted that United Nations Human Rights Commission or any other agency would hardly have a role to play in the matter as Government of India is committed to resolve all matters with Pakistan on bilateral basis without third party mediation and Government of India has been taking all possible steps to sort out this issue.

(p) In the procedure for personnel reported in operational area while in action, with regard to the procedure for presumption of death, it is clearly stated that once the sufficient time has elapsed during which all practicable method of investigation have been tried and no evidence could be obtained, as to the effect that person is still alive, but not later than six months from the death following that on which the person was reported missing, action should be initiated to presume him killed in action for all official purposes. For the sake of convenience, para - 12 is produced hereunder :-

The Adjutant General's Branch or the Record Office concerned as the case may be, will examine the case of missing personnel by stages on the basis of the evidence which it has been possible to obtain from Headquarters of the force concerned and from other sources e.g. Red Cross Society. After sufficient time has elapsed during which all practicable methods of investigation have been tried and no evidence can be obtained to the effect that person is still alive but not

later than six months from the date following that on which a person was reported missing action should be initiated to presume him killed in action for all official purposes. The date of presumption of death will, however, be that original date e.g. the orders for the presumption of death in respect of personnel reported missing with effect from 1st January 1964 will be issued on or after 2nd July, 1964. The personnel will, however, be presumed killed in action with effect from 1st January 1964. The circumstances in which the person became missing will determine to a considerable extent whether it is necessary or not wait for full six months before taking steps for presuming death. If for instance other persons who were reported missing at the same area continue to be reported as alive, the presumption of death may have to be kept pending for the full period prescribed.

(q) Once the missing defence person is not found in spite of all practicable method of investigation and no evidence could be obtained to the effect that person is alive for the prescribed period of six months, the missing defence personnel is presumed to have been killed in action for all official purposes and the next of kin (NOK.) of personnel killed/presumed killed are extended the following monetary relief :-

- (a) Liberalized family Pension.
- (b) Monetary Alice for Gallantry award.
- (c) Family gratuity.
- (d) Death gratuity.
- (e) ACWF & NDF.
- (f) AFPP Fund & FSA.
- (g) Ex- Gratia (ACWF).
- (h) Army relief fund.
- (i) Centre Benevolent fund.
- (j) Any other Monetary relief.

3. Mr. Paul, the learned Advocate appearing on behalf of the petitioners, has strenuously contended before us that from the materials placed above, it is clear that the Union of India does not dispute the fact that there is every possibility of the missing persons mentioned in this application being detained in Pakistan and that no materials are available in the hand of the Union of India justifying the conclusion that they died in the warfront. Mr. Paul points out that simply because the Pakistani Authorities deny the fact of detention of those persons in the jails in Pakistan, the Union of India is expressing its inability to proceed further. Mr. Paul contends that it will appear from the materials on record that the Union of India is also not satisfied with the explanation given by the Pakistani Authorities. In such circumstances, Mr. Paul contends that it is a fit case where the Union of

India should approach the International Court of Justice for appropriate action against Pakistan for return of those Indian prisoners. Mr. Paul submits that in view of the Simla Agreement between India and Pakistan, the disputes involved herein regarding repatriation of POWs are covered by the said agreement and this type of dispute can be referred to the International Court of Justice for investigation. Mr. Paul, therefore, prays for a direction upon the Union of India to refer the matter to the International Court of Justice by making the Government of Pakistan a party. Mr. Paul further submits that the kin of the missing Indian soldiers mentioned in the application are getting Family Pension on the basis of their salary as existed in the year 1971 and not according to the existing scale of salary and thus, a specific direction should be given to the Union of India to pay Family Pension and other benefits as if the missing soldiers retired on attaining the prescribed age of superannuation.

4. Mr. Vakharia, the learned Counsel appearing on behalf of the Union of India has, however, opposed the aforesaid contentions of Mr. Paul and has contended that within the scope of International Human Rights Charter, this case cannot be referred to the International Court of Justice. According to him, unless both the India and Pakistan jointly agree, the matter Cannot be referred to the International Court of Justice. As regards the other part of the submission of Mr. Paul, Mr. Vakharia submits that the next of the kin of the missing soldiers are given Family Pension in accordance with the existing rules.

5. Therefore, the only question that arises for determination in this application is whether there is any scope of passing any direction upon the Union of India for referring the dispute to the International Court of Justice thereby praying for an enquiry and for enforcing the Government of Pakistan to handover those persons to the Government of India.

6. In order to appreciate the aforesaid question, it would be profitable to refer to the following provisions of the Simla Pact entered into between India and Pakistan.

In order to achieve this objective, the Government of India and the Government of Pakistan have agreed as follows :-

(i). That the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries.

(ii). That the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them. Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peace and harmonious relations.

(iii). That the prerequisite for reconciliation, good neighbourliness and durable peace between them is a commitment by both the countries to peaceful

coexistence respect for each other's territorial integrity and sovereignty and noninterference in each other's internal affairs, on the basis of equality and mutual benefit.

(iv). That the basic issues and causes of conflict which have bedeviled the relations between the two countries for the last 25 years shall be resolved by peaceful means.

(v). That they shall always respect each other's national unity, territorial integrity, political independence and sovereign equality.

(vi). That in accordance with the Charter of the United Nations, they will refrain from the threat or use of force against the territorial integrity or political independence of each other.

Both Governments will take all steps within their power to prevent hostile propaganda directed against each other. Both countries will encourage the dissemination of such information as would promote the development of friendly relations between them.

In order progressively to restore and normalise relations between the two countries step by step, it was agreed that :-

(i). Steps shall be taken to resume communications, postal, telegraphic, sea, land including border posts, and air links, including over flights.

(ii). Appropriate steps shall be taken to promote travel facilities for the nationals of the other country.

(iii). Trade and cooperation in economic and other agreed fields will be resumed as far as possible.

(iv). Exchange in the fields of science and culture will be promoted.

In this connection delegations from the two countries will meet from time to time to work out the necessary details.

In order to initiate the process of the establishment of durable peace, both the Governments agree that :-

(i). Indian and Pakistani forces shall be withdrawn to their side of the international border.

(ii). In Jammu and Kashmir, the line of control resulting from the ceasefire of December 17, 1971, shall be respected by both sides without prejudice to the recognised position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this line.

(iii). The withdrawals shall commence upon entry into force of this agreement and shall be completed within a period of 30 days thereof.

This agreement will be subject to ratification by both countries in accordance with their respective constitutional procedures, and will come into force with effect from the date on which the instruments of ratification are exchanged.

Both Governments agree that their respective heads will meet again at a mutually convenient time in the future and that in the meanwhile the representatives of the two sides will meet to discuss further the modalities and arrangements for the establishment of durable peace and normalisation of relations, including the questions of repatriation of prisoners of war and civilian internees, a final settlement of Jammu and Kashmir and the resumption of diplomatic relations.

Quaid-e-Awam President Islamic Republic of Pakistan

Indira Gandhi Prime Minister Republic of India

Simla, the 2nd July 1972.

7. The following provisions of the statute of the International Court of Justice which is the integral part of the charter of the United Nation are also relevant, and those are quoted below :-

CHAPTER II - COMPETENCE OF THE COURT.

Article 34

1. Only states may parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organization on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning.
 - a. the interpretation of a treaty;
 - b. any question of international law;

c. the existence of any fact, which, if established, would constitute a breach of an international obligation;.

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court

xxxxx xxxxx xxxxx xxxxx xxxxx

CHAPTER III - PROCEDURE.

xxxxx xxxxx xxxxx xxxxx xxxxx

Article 40

1. Cases are brought before the Court, as the case may be, either by notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of Counsel or Advocates before the Court.

3. The agents, Counsel, and Advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

(Emphasis supplied).

8. After hearing the learned Counsel for the parties and after going through the aforesaid materials on record we find that the writ-petitioners have sufficiently proved that in the hands of the Government of India there is no material to conclude that the soldiers mentioned in the writ-application had actually died in the warfront at the time of Indo-Pakistan war of 1971 and that their whereabouts are not otherwise available notwithstanding the fact that they were actually all involved in the warfront at the relevant point of time. It is not even the suspicion of the Union of India that those soldiers are deserter from the warfront. Their dead bodies have not been recovered within the territories of India and at the same time, the Government of Pakistan has also not claimed that they captured them while they were seriously injured and ultimately succumbed to the injury. The Government of Pakistan has simply denied that those soldiers were ever captured by them. It appears from the answer given by the Defence Minister on the floor of Parliament that the Government of India also reasonably believes that those persons are in the custody of the Government of Pakistan. The letter written by Mrs. Gandhi, the former Prime Minister of India, which is annexed to the writ-application also supports the case of the writ-petitioners where she assured that all possible steps would be taken on the part of the Government for repatriation of those persons from Pakistan and in none of those documents, the Government of India has raised any doubt about the claim of the writ-petitioners that those persons had not actually died in the Warfield.

9. In the affidavits filed before this Court, it is not the case of the Union of India that the assertion of the writ-petitioners is unfounded. All that has been alleged is that as the Government of Pakistan has denied their captivity in Pakistan, the Government of India is helpless. As regards the prayer for referring the matter to the United Nations Human Rights Commission or other agencies it has been contended that United Nations Human Rights Commission or any other agency would hardly have a role to play in the matter as Government of India is committed to resolve all matters with Pakistan on bilateral basis without third party mediation and Government of India has been taking all possible steps to sort out this issue. The learned Advocate for the respondent at the stage of arguments laboriously contented before us that there is no scope of passing any

direction upon the Union of India to refer the dispute before the International Court of Justice complaining human right-violation as according to him, such reference can be made only on the joint prayer of both the countries and thus, it is not possible for the Indian Government alone to approach the International Court of Justice without the concurrence of the Government of Pakistan.

10. From the above stance taken by the Union of India, we propose to consider whether this Court should pass any direction on this writ-application in favour of the writ-petitioners.

11. It is now a settled law that a citizen has a right to approach a High Court under Article 226 of the Constitution of India if by the inaction or the illegal action on the part of the "State" within the meaning of Article 12 of the Constitution, any of his legal or fundamental rights has been infringed.

12. At this stage, it will be profitable to refer to the following observations of the Supreme Court in a recent case of Secretary, Cannanore District Muslim Educational Association v. State of Kerala Imported in AIR 2010 SC 1955 where the Court discussed in detail the scope of jurisdiction of High Courts under Article 226 of the Constitution of India :-

The writ of Mandamus was originally a common law remedy, based on Royal Authority. In England, the writ is widely used in public law to prevent failure of justice in a wide variety of cases.

36. In England this writ was and still remains a prerogative writ. In America it is a writ of right. (Law of Mandamus by S.S. Merrill, Chicago, T.H. Flood and Company, 1892, para 62, page 71).

37. About this writ, SA de Smith in "Judicial Review of Administrative Action", 2nd edn., pp 378 and 379 said that this writ was devised to prevent disorder from a failure of justice and defect of police and was used to compel the performance of a specific duty.

38. About this writ in 1762 Lord Mansfield observed that "within the past century it had been liberally interposed for the benefit of the subject and advancement of justice".

39. The exact observations of Lord Mansfield about this writ has been quoted in Wade's "Administrative Law, Tenth Edition" and those observations are still relevant in understanding the scope of Mandamus. Those observations are quoted below :-

It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good Government there ought to be one. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific-remedy, this should not be denied. Writs of mandamus have been

granted, to admit lecturers, clerks, sextons, and scavengers and c, to restore an alderman to precedence, an attorney to practice in an inferior Court, and c.

(H.W.R. Wade and C.F. Forsyth: Administrative Law, 10th Edition, page 522-23).

40. De Smith in Judicial Review, Sixth Edition has also acknowledged the contribution of Lord Mansfield which led to the development of law on Writ of Mandamus. The speech of Lord Mansfield in R v. Blore (1760) 2 Burr, runs as under :-

a prerogative writ flowing from the King himself, sitting in his Court, superintending the police and preserving the peace of this country.

(See De Smith's Judicial Review 6th Edition, Sweet and Maxwell page 795 para 15- 036.

41. Almost a century ago, Darling J quoted the observations in Rex v. The Justices of Denbighshire (1803) 4 East 142, in The King v. The Revising Barrister etc. {(1912) 3 King's Bench 518} which explains the wide sweep of Mandamus. The relevant observations are :-

..Instead of being astute to discover reasons for not applying this great constitutional remedy for error and miss Government, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable...." (See page 529)

42. At page 531 of the report, Channell, J said about Mandamus :-

It is most useful jurisdiction which enables this Court to set right mistakes.

43. In Dwarka Nath v. Income Tax Officer, Special Circle, D. Ward, Kanpur and Another AIR 1966 SC 81, a three-Judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this Article is deliberately couched in comprehensive language so that it confers wide power on High Court to "reach injustice whenever it is found".

44. Delivering the judgment Justice Subba Rao (as His Lordship then was) held that the Constitution designedly used such wide language in describing the nature of the power. The learned Judge further held that the High Court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writ in India has been widened by the use of the expression "nature".

45. Learned Judge made it very clear that the said expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. The learned Judge then clarifies the entire position as follows :-

..It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the

English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself...

(See para 4, page 85)

46. Same view was also expressed subsequently by this Court in *J.R. Raghupathy etc. v. State of A.P. and Ors.* AIR 1988 SC 1681. Speaking for the Bench, Justice A.P. Sen, after an exhaustive analysis of the trend of Administrative Law in England, gave His Lordship's opinion in paragraph (29) at page 1697 thus :-

29. Much of the above discussion is of little or academic interest as the jurisdiction of the High Court to grant an appropriate writ, direction or order under Article 226 of the Constitution is not subject to the archaic constraints on which prerogative writs were issued in England. Most of the cases in which the English Courts had earlier enunciated their limited power to pass on the legality of the exercise of the prerogative were decided at a time when the Courts took a generally rather circumscribed view of their ability to review Ministerial statutory discretion. The decision of the House of Lords in *Padfield's case* (1968 AC 997) marks the emergence of the interventionist judicial attitude that has characterized many recent judgments.

47. In the Constitution Bench judgment of this Court in *Life Insurance Corporation of India v. Escorts Limited and Others* [(1986) 1 SCC 264] : (AIR 1986 SC 1370), this Court expressed the same opinion that in Constitution and Administrative Law, law in India forged ahead of the law in England

(para 101, page 344).

48. This Court has also taken a very broad view of the writ of *Mandamus* in several decisions. In the case of *The Comptroller and Auditor General of India, Gian Prakash, New Delhi and Another v. K.S. Jagannathan and Another* - (AIR 1987 SC 537), a three-Judge Bench of this Court referred to *Halsbury's Laws of England*, Fourth Edition, Volume I paragraph 89 to illustrate the range of this remedy and quoted with approval the following passage from *Halsbury* about the efficacy of *Mandamus* :--

..is to remedy defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient beneficial and effectual.

See para 19, page 546 of the report)

49. In paragraph 20, in the same page of the report, this Court further held :-

...and in a proper case, in order to prevent injustice resulting to the concerned

parties, the Court may itself pass an order or give directions which the Government or the public Authority should have passed or given had it properly and lawfully exercised its discretion.

50. In a subsequent judgment also in *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V.R. Rudani and Ors.* - AIR 1989 SC 1607, this Court examined the development of the law of Mandamus and held as under :-

21.....mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter common law, custom or even contract." (Judicial Review of Administrative Act 4th Ed. P. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition." (See page 1613 para 21).

13. Bearing the above well-settled principles in our mind, we find that in the case before us, some of the writ-petitioners are the next of kin of those unfortunate soldiers of this country who are unable to present this petition personally before us and thus, the writ-petitioners can in no way be described as a busybody so as to dismiss the application on the ground of locus standi. Moreover, a Division Bench of this Court by order dated October 12, 2010 treated this writ-application as a Public Interest Litigation and thereafter the Bench presided over by the then Chief Justice of this Court by order dated December 22, 2010 passed fresh directions for filing affidavit upon the Union of India on certain points. The Union of India has pursuant to such order also filed supplementary affidavit. Thus the writ-application in the present form is quite maintainable in view of the above well-settled law laid down by the Supreme Court.

14. Therefore, the question which remains to be answered by us in this application is whether there is inaction on the part of the Union of India in not referring the matter to the International Court of Justice complaining violation of the human rights or terms of the Simla Agreement at the instance of Pakistan.

15. According to the learned Counsel appearing on behalf of the Union of India, no reference is permissible under law without the concurrence of Pakistan although such point has not been taken in the affidavit. We, however, find no substance in the aforesaid contention of the learned Counsel for the Respondent for the following reasons :-

15.1 As pointed out above, according to very first clause of the Simla Agreement,

the principles and purposes of the Charter of the United Nations shall govern the relations between the two countries.

15.2 A conjoint reading of articles 34 and 36 of the statute of the International Court of Justice which is integral part of the Charter of the United Nations makes it abundantly clear that it is only the States which can approach the International Court in respect of the matters specially provided in the Charter of the United Nations or in the treaties or conventions in force. There is no dispute that the Simla agreement entered into between the two countries is a treaty in force and binding between the two States. At the end of the 1971 Indo-Pakistan war, the said treaty was entered into for resolving the disputes arisen consequent to the said war between the parties. The parties agreed before us that the repatriation of the POWs of the two countries in the past was made pursuant to the said treaty.

15.3 Thus, for enforcement of the said agreement alleging breach of the terms of the same at the instance of one of the parties to the treaty, the other party can surely approach the International Court of Justice. Article 40 of the Statute, quoted above, clearly demonstrates that an action can be brought by either the notification of special agreement or by a written application addressed to the Registrar indicating the subject of the disputes and the parties thereto. There is no mandate of only the consensus application by both the parties before the Court as the condition of presentation of such application either in the treaty or in the Statute. Thus, we do not find any substance in the contention of the learned Counsel for the Union of India that the International Court of Justice can in this case be approached only by joint application of the two States the specific defence of the Respondent that United Nations Human Rights Commission or any other agency would hardly have a role to play in the matter as Government of India is committed to resolve all matters with Pakistan on bilateral basis without third party mediation and Government of India has been taking all possible steps to sort out this issue.

16. We now propose to deal with the specific defence of the Respondent United Nations Human Rights Commission or any other agency would hardly have a role to play in the matter as Government of India is committed to resolve all matters with Pakistan on bilateral basis without third party mediation and Government of India has been taking all possible steps to sort out this issue.

17. In the case before us, there is no dispute that according to the decision taken by the Union of India all the war-prisoners captured by the Indian Army have been released in lieu of the captured Indian prisoners. There is also no dispute that even according to the decision taken by the Government of India and the Government of Pakistan, all the Indian war prisoners captured by the Pakistani Army should be released. Only dispute is as regards the existence of those war prisoners in Pakistan. It is admitted in the affidavit filed by the Respondent that the Pakistan Government has been repeatedly approached at highest level to return our missing Defence Personnel but every time they have denied having

any Indian prisoner in their captivity and that it is not correct to state that the Indian Government has not made serious efforts to get back our missing Defence Personnel. According to the affidavit, as a matter of fact, the matter had been taken up with Pakistan Government at the highest level of Prime Ministers and efforts are still on to ascertain the whereabouts of our Missing Defence Personnel.

18. Now the question is whether after the expiry of forty years of ceasefire and execution of the treaty enabling any of the parties to approach the International Court, the Union of India can successfully resist the claim of the next of the kin of the war-prisoners by taking the defence that it is committed to resolve all matters with Pakistan on bilateral basis without third party mediation and Government of India has been taking all possible steps to sort out this issue.

19. In our opinion, the act of approaching the International Court of Justice is not an instance of third-party-mediation but one of enforcement of the right of the State to have its imprisoned soldiers returned back to their motherland and to enable them to live with dignity, an obligation cast upon the State under Article 21 of the Constitution. The Simla Agreement has conferred upon the Union of India a; right to enforce its prerogative right to have custody of all the imprisoned defence personnel, if denied by the other signatory to the Agreement by approaching the International Court of; Justice and inaction on the part of the Union of India to enforce such right amounts to failure on its part to protect the life and liberty of its citizen definitely enabling the next of kin of the imprisoned soldiers to approach a High Court under Article 226 of the Constitution of India and pray for a direction upon the Central Government to approach the lawful forum for enforcement of the fundamental right of protection of life and personal liberty of its imprisoned soldiers. It is needless to mention that the imprisoned Indian soldiers in Pakistan are the real beneficiaries of the rights accrued in favour of the Government of India for the breach of the terms of Simla Agreement at the instance of Pakistan.

20. We are quite conscious of the position of law that a writ-Court cannot direct the Union of India to take any decision in a particular way regarding any of its policy towards the neighbouring country or as regards its war policy. But where the concerned ministry has already taken a decision regarding release of its war-prisoners in lieu of transfer of imprisoned Pakistani soldiers, such a decision casts a duty upon it to take step for release of its own soldiers who are allegedly captivated in Pakistan. Thus, a prayer made by next of kin of such imprisoned soldiers to enforce the said agreement by approaching International Court of Justice for proper investigation and direction for repatriation is maintainable when the Union of India is also satisfied that the grievance of the next of kin is justified and at the same time, the agreement provides for approaching the International Court of justice.

21. We cannot lose sight of the fact that unlawful imprisonment for more than 40 years is a gross violation of human right and in a case, where the Union of India is itself satisfied that there is sufficient material to conclude that the version of

the Government of Pakistan is not correct, it must make out specific defence for not availing of its lawful remedy provided in the treaty for protecting the life and personal liberty of its soldiers before asseverating before the writ-Court that the writ-application should be dismissed.

22. After having admitted on the floor of Parliament that it believes that the soldiers are imprisoned in the jails of Pakistan and that it is making all efforts to get them back, and the then Prime Minister of the Country having also supported the grievance of the imprisoned soldiers, the Union of India now cannot desist itself from approaching the only lawful forum for protecting the life and personal liberty of its soldiers when long forty years have elapsed in the meantime.

23. Thus, this is not a case of interference at the instance of a writ-Court with the policy-decision of the: Union of India but is one of inaction on its part in not taking lawful step for protecting the life and personal liberty of its citizens who did not hesitate to risk their life and comfort for protecting their motherland.

24. The Union of India not having been satisfied from the materials on record that the persons indicated in the list mentioned in answers made on the floor of Lok Sabha on August 14, 1978 vide un-starred question No. 6803 did not die in the Warfield, and even thereafter, till today, no material having been received by the Respondent confirming that they actually died at the warfront, no presumption of death should be drawn and they should be treated to have retired on superannuation on the usual date of superannuation prevailing at the relevant point of time and full service benefit including retirement benefits should be given as if they were in service. Since there was no fault on their part for not resuming the duty on the ceasefire, they should not be deprived of their full service benefits.

25. Similarly, the fact that the delegation of the relatives of the alleged imprisoned defence personnel were permitted to visit the various jails in Pakistan does not lead to a conclusion that they are not imprisoned there. It is absurd to suggest that at the time of their visit, the Government of Pakistan would keep those defence personnel in jails visited by the delegation to falsify their claim or that there is no other place in the Pakistan to hide them temporarily for justifying their defence. Moreover, the respondent in its affidavit has admitted that on return of the delegation, a detailed debriefing was taken by the Army Headquarters which indicated that the delegation was not happy with the restricted mode of conduct by the Pakistani Authorities and that the outcome of the visit of the delegation was inconclusive. We, therefore, find substance in the writ-application and allow the same by passing the following directions :-

1. The Union of India shall within two months from today approach the International Court of Justice alleging breach of the Simla Agreement at the instance of Pakistan for not releasing the Soldiers as mentioned in the answer in the Lok Sabha on August 14, 1978 vide un-starred question No. 6803 after complying with all the requirements of the law provided in the relevant statute.

2. All the next of kin of the above soldiers should be paid the service and retirement benefits in accordance with the existing provisions applicable to the soldiers, as if they retired on superannuation on the relevant date in accordance with the respective date of birth available in their official service record, within three months from today. If for the intervention of the International Court of justice, they come back, the next of the kin shall be bound to handover the benefits that they will receive on behalf of those soldiers to them and those soldiers would not be entitled to claim the benefit over again from the respondent; however, they will be entitled to realize those amounts from their next of kin who received such amount on their behalf, if not given back to them on demand, in accordance with law as if a trustee has unlawfully retained the benefits available to the beneficiary in breach of trust.

In the facts and circumstances, there will be, however, no order as to costs.