

(2021) 09 GAU CK 0054
In the Gauhati High Court
Case No : Writ Petition (Crl.) No. 2 Of 2018

Mamoni Kakoty

APPELLANT

Vs

State Of Assam And 6 Ors

RESPONDENT

Date of Decision : 28-09-2021

Acts Referred:

Constitution Of India, 1950 — Article 21, 32, 226
Evidence Act, 1872 — Section 108

Citation : (2021) 09 GAU CK 0054

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : B K Bhattacharjee

Judgement

1) Heard Dr. R. Sarmah, learned counsel for the petitioner and Mr. D. Nath, learned Senior Government Advocate appearing for all the respondents.

2) By filing this writ petition in the nature of habeas corpus, the petitioner has prayed for a direction to recover her son, namely, Bhaskar Jyoti Kakoty who had gone missing since 04.09.2016 for which an FIR was lodged on 05.09.2016; for freezing the loan account standing in the name of her missing son; and on failure of the State machinery to trace out the missing son of the petitioner, to pay compensation of Rs.50,00,000/- (Rupees Fifty lakh only) to the petitioner and the wife of the missing person. It may be mentioned that by order dated 26.07.2021, this Court had taken note of the fact that by order dated 21.03.2018, the name of respondent no. 7 was struck off and accordingly, it was observed that the prayer made in this writ petition for freezing the loan account standing in the name of the son of the petitioner has been rendered infructuous and that no such order can be passed in the absence of the concerned bank.

3) The case projected by the petitioner is that her missing son was working as a Manager of a private company and simultaneously, was also carrying on his own business with two trucks for carrying foodgrains to godowns of Food Corporation of India in the State of Manipur. In connection with his business, on or about

28.03.2016, the son of the petitioner had availed a loan of Rs.10,000/- as production credit and Rs.12,95,000/- as overdraft for agriculture from Axis Bank Ltd., Golaghat Branch, and that out of the said loan, the son of the petitioner had repaid a sum of Rs.1,00,000/- to the bank. On 04.09.2016, the son of the petitioner had gone out for business and never returned. After enquiry and on not being able to trace out her son, on the next day, her son-in-law had lodged an FIR with Golaghat Police Station, which was registered as MMR No. 53 dated 05.09.2016. It is claimed that wide media publicity was given regarding the missing son of the petitioner and his photos were also published. On 19.01.2018, a report was submitted by the Golaghat Police to the Superintendent of Police, Golaghat that the matter was referred to CID Branch but the missing person could not be traced out. The petitioner has expressed her apprehension that Manipur extremists may have been involved in her son being missing and may have been confined in hideout of the extremists in Manipur. In the meanwhile the Axis Bank officials were asking the petitioner to repay the dues of her son and the petitioner apprehends that her husband's property, which was transferred in the name of her missing son to enable him to avail loan is in jeopardy if the bank enforces mortgage.

4) The learned counsel for the petitioner has submitted that it was the responsibility of the Government to look after the security of its citizens and as the State could not provide security to the son of the petitioner, the State was duty bound to pay compensation. It is also submitted that by now more than 5 (five) years has gone by from the date when the son of the petitioner had gone missing and that this writ petition is pending for more than three years, but except for submitting status reports, the State Police could do nothing and was clueless about the missing person. In support of his submissions, the learned counsel for the petitioner has placed reliance of the following cases, viz., (i) Nilabati Behera vs. State of Orissa & Ors, (1993) 2 SCC 746, (ii) D.K. Basu vs. State of W.B., (1997) 1 SCC 416, (iii) Min Bahadur Thapa vs. State of Assam & Ors., 1999 (1) GLT 124, (iv) Chairman, Railway Board & Ors. vs. Chandrima Das & Ors, (2000) 2 SCC 465, (v) Deputy Commissioner, Dharwad & Ors. vs. Shivakka (2) & Ors., (2011) 12 SCC 419, (vi) Tolaram Ranka & Ors. vs. State of Assam & Ors., 2013 (5) GLT 602, (vii) Re: Inhuman conditions in 1382 Prisons, (2017) 10 SCC 658, (viii) Kaphot Dam vs. State of Assam & Ors, 2019 (3) GLT 404, (ix) Laishram (O) Prema Devi & Anr. vs. Union of India & Ors, 2020 (1) GLT (MN) 19, (x) Sabitri Brahma vs. Union of India & Ors., 2020 (4) GLT 261.

5) Per contra, the learned Senior Government Advocate has submitted that the State or its machinery including the police personnel have not been accused of causing disappearance of the alleged victim. It is submitted that the police investigation carried out so far discloses that in the intervening night of 04.09.2016 and 05.09.2016, when the son of the petitioner had went missing, he was spotted in the CCTV footage of Thengal BOC at Golaghat (petrol pump), coming out from a truck with towel wrapped on his head and since then he was missing. It is also submitted that both the two trucks are with the petitioner and

have been given to others to operate and that the said trucks are still the source of earning of the petitioner. By referring to the statement of witnesses, including the petitioner and the wife of the missing son, it is submitted that the son of the petitioner had not only taken loan from the bank but he had also taken loan from many other private persons and had gone missing thereafter. It is also submitted that no apprehension was expressed by the petitioner in her FIR on when her statement was recorded by the police that her son might have been a victim of kidnapping and that no ransom demand was ever made from any quarter. It is submitted that not only missing person advertisement with photograph of the missing person was published in Assam, but it was also published in Sangai Express newspaper, published and widely circulated in the State of Manipur, but the missing person had not been traced out. It is also submitted that the son of the petitioner had never approached the police seeking any protection and as such the State did not owe any duty to keep the son of the petitioner under protective surveillance. It is also submitted that compensation can be granted only if right to life protected under Article 21 of the Constitution of India was violated by the State or its employees and public law remedy was not available to direct the State to pay compensation if a person goes missing out of his own volition. Accordingly, it is submitted that on facts the cases cited by the learned counsel for the petitioner was distinguishable and that the ratio of such cases would not apply in this case. In support of his submissions, the learned Senior Government Advocate has relied on the following cases, viz., (i) Rudul Sah vs. State of Bihar & Anr, (1983) 4 SCC 141; (ii) Bhim Singh, MLA vs. State of J&K & Ors., (1985) 4 SCC 677; (iii) Nisha Priya Bhatia Vs. Union of India & Ors., (2020) 13 SCC 56; (iv) Selvaraj vs. The State, represented by the Superintendent of Police & Anr., H.C.P. 2309/2016.

6) In course of the present proceeding the State through the Superintendent of Police, Golaghat/CID has submitted status reports dated 07.05.2018, 18.06.2018, 19.12.2018, 10.06.2019, 08.08.2019, 22.01.2021 and 10.09.2021. The learned Senior Government Advocate has submitted that the investigation is still in progress and no final report has been submitted. Hence, the Court does not intend to disclose the evidence collected so far. However, it would suffice to mention that the police had sent messages to all police stations in the State to cause an enquiry of the missing person. The statement of the inmates of the house of the petitioner discloses that her missing son had gone with the truck and motorcycle and that the handyman of the truck had, on instructions of the missing son, drove and brought the motorcycle back to the home. The handyman had also stated that the son of the petitioner had told him that he would be sleeping in the truck in the night. The police/ CID had examined several witnesses including the family members of the petitioner, the handyman of the truck who had last seen the missing person, other persons from whom the missing person had availed loan, his employer, etc. Moreover, it is reported that without any fruitful result, the State Disaster Response Force had made a search in the Dhansiri River. The call data of the mobile of the missing person has been

sent for CDR analysis. The CID has visited the Axis Bank to gather material. The photograph of the missing person has been widely circulated in the print and electronic media. However, no clue could be gathered about the missing person. It is worth mentioning that there is no material on record to even faintly suggest that the son of the petitioner had gone missing after any action taken by the State Administration including Police, Para-military and Armed Forces. There is no material to show that the missing person had any threat perception from any militant or extremist groups and the State Police had never been called upon to provide any police protection to the missing person. In other words, there is no material to show that the son of the petitioner had gone missing because of any negligence on part of the Police of State Administration.

7) It is seen that the police has not been able to close the investigation. In this regard, it would be pertinent to note that the provisions of Section 108 of the Evidence Act, 1872 perhaps is coming in the way for the police to close the investigation. It is for the Court of competent jurisdiction to give a declaration to the effect that the person is presumed to be dead. The said provision is as under:

"108. Burden of proving that person is alive who has not been heard of for seven years.

Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

8) It would now be appropriate to take a look into the cases cited by the learned counsel for the petitioner. It is seen that in the case of Min Bahadur Thapa (supra), no facts of the case was discussed and without any discussion on facts and law, a direction was issued to the State to pay compensation. With all respect to the said authority, the said decision did not have any precedential value. Nonetheless, in the said case, the Division Bench of this Court had made an observation to the effect that after recording evidence the inquiry officer had come to a conclusion that on account of negligence on part of the police on duty that the victim had disappeared. This is where the facts of the present case are found distinguishable.

9) In the case of Nilabati Behera (supra), the deceased was taken in police custody and he was found dead the next day on the railway track. In the case of D.K. Basu (supra), the Supreme Court had taken note of frequent complaints regarding custodial violence and deaths in police lock-up. In the case of Chandrima Das (supra) the facts is to the effect that a lady H had arrived at Howrah Station from Bangladesh to catch a train to Ajmer. She was taken to Rail Yatri Niwas by some railway employees and the room was booked in the name of the railway employee against railway pass. She was raped by four employees. The case of Deputy Commissioner, Dharwad (supra), the deceased B was mercilessly beaten-up by one S. The police instead of arresting S, wrongfully

confined B and he died while in police custody. In the case of Tolaram Ranka (supra), the son of the petitioner was kidnapped and an FIR was lodged with the police. A ransom call was received by the employer. The petitioner came to learn that his son was kept concealed in a particular house in Diyung Village. The police was informed, but police failed to take any steps. The petitioner submitted applications before the Superintendent of Police, Dima Hasao, Deputy Commissioner, Dima Hasao and Director General of Police, Assam, but nothing happened. Under such factual circumstances this Court had held that the investigation was not satisfactory and compensation was granted. In the case of Kaphot Dam (supra), the husband of the petitioner was kidnapped by extremist group and under such circumstances, this Court had directed that compensation be paid to the petitioner for not being able to protect the life and liberty guaranteed under Article 21 of the Constitution of India. In the case of Re: Inhuman Conditions in 1382 Prisons (supra), the issue of handling suicides, inquiry into every unnatural death in prisons, issue of overcrowding in prison, etc. was taken up and remedy by way of compensation in the cases of unlawful arrest, detention, custodial harm/ death under public law remedy was discussed. In the case of Laishram (O) Prema Devi (supra), it was a case of abduction and killing of the husband of the petitioner by personnel of the Assam Rifles in fake encounter. The case of Sabitri Brahma (supra) was also a case of loss of life by custodial death.

10) In the case of Rudul Sah (supra), cited by the learned Senior Government Advocate, the Three Judge Bench of the Supreme Court of India had laid down the principles of granting compensation for violation of Article 21 of the Constitution of India. The relevant observation of the Supreme Court of India is quoted below:-

"9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of Courts, Civil and Criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such, cases. The petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full-dressed trial. He filed a Habeas Corpus petition in this Court for his release from illegal detention. He obtained that relief, our finding being that his detention in the prison after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this Habeas Corpus petition itself.

10. We cannot resist this argument. We see no effective answer to it save the stale, and sterile objection that the petitioner may, if so advised, file a suit to

recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

11) In the case of Nisha Priya Bhatia (supra), the denial of timely inquiry and by a competent forum on allegations of sexual harassment at workplace was held to have inevitably resulting in denial of justice and violation of fundamental right and accordingly, compensation was awarded.

12) Reference may also be made to the case of S. Nambi Narayanan vs. Siby Mathews & Ors., (2018) 10 SCC 804, where the Supreme Court of India had exercised its power to invoke the public law remedy for the grant of compensation for the violation of the right to life by observing that life itself commands self-respect. It was observed as follows:-

"40. ... The dignity of a person gets shocked when psycho-pathological treatment is meted out to him. A human being cries for justice when he feels that the insensible act has crucified his self-respect. That warrants grant of compensation under the public law remedy. ..."

13) Therefore, from the cases discussed above, there is no room for doubt that the Supreme Court of India, over the course of time, evolved the judicial policy of remedying grave violations of the right to life by providing compensation in monetary terms, apart from other reliefs.

14) In the case of Selvaraj (supra), relied upon by the learned Senior Government Advocate, a habeas corpus petition was filed to direct the respondent authorities to produce the body of the son of the petitioner before the Madras High Court and to set him free. The missing person had completed his B.E., Mechanical Engineering Course. He had gone on his bicycle to buy vegetables and did not return. The police had taken all possible steps to trace him out and the photograph of the missing person was circulated in print and electronic media. The Division Bench of the Madras High Court had held that in such cases a habeas corpus petition would not be maintainable and that it would only be maintainable under Article 226 of the Constitution of India only if the personal life and liberty guaranteed under Article 21 is infringed by State or by any private individual. In the said judgment, the Madras High Court has discussed a few judgments of various Courts, as such, it would be relevant to quote paragraphs 13 to 25 thereof is quoted below:-

"13. The Courts are frequently witnessing that Man/Women Missing cases are mostly converted as Habeas Corpus Petitions under Article 226 of the Constitution of India. Mainly, two aspects are to be considered in such cases. Right of every citizen for free movement is also enshrined in Part III of the Constitution as a fundamental right. Personal liberty means that any person on attaining the age of majority is at liberty to move to a place of his choice. It is not necessary that a person has to inform each and every one of his desire or decision to his kith and kin or to the other persons. Way of life is also a part of personal liberty and a citizen of this Country shall choose a path or way of his own choice for leading his life as per his own mind set and wishes. Merely because a person was not found in his usual dwelling place, that does not mean that always an element of illegal detention is involved. For establishing an illegal detention, it is necessary that substantial materials are to be furnished by the person, who approaches the Courts by filing Habeas Corpus Petitions. Thus, the personal liberty includes free movement of a citizen of his own choice and no other person has got any right to interfere with the right of a person to move freely anywhere at his own choice. A Man/Women voluntarily moving from their dwelling house to any other place of his/her own choice, then his/her family members or other person concerned with such a person can file a case for Man missing and on receipt of any such complaint, the Police having jurisdiction has to investigate the matter in the manner known to law. Under these circumstances, question of entertaining a Habeas Corpus Petition by the High Courts would not arise at all. Thus, it is a condition precedent that a person filing a Habeas Corpus Petition should establish that there is a prima facie case of illegal detention or at least a strong and reliable suspicion in respect of such illegal detention. In the absence of any of these illegal ingredients, no Habeas Corpus petition can be entertained under Article 226 of the Constitution of India.

14. Habeas Corpus "ad subjiciendum" means "that you have the body to submit or answer which is called as Festinum Remedium - A Speedy remedy, which has been sought by the petitioner in the instant case."

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

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

10. The meaning of the term habeas corpus is "you must have the body". Halsbury in his Laws of England, 4th Edition, observed as follows: -

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

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

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designate time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. 'Habeas corpus' literally means "have the body". By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon Jurisprudence."

12. In the Constitutional and Administrative Law by O. Hood Phillips and Paul Jackson it was stated as under:- (Relied upon by the Supreme Court in the matter of Surinderjit Singh Mand and another v. State of Punjab and another, reported in (2016) 8 SCC 722, to highlight the importance and significance of personal liberty, specially with reference to unlawful detention.)

"10. The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. Habeas corpus was a prerogative writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant's claim for freedom has been asserted frequently by judges (sic) and writers. Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a public authority may be acting and the willingness of the courts to examine the legality of decision made in reliance on wide- ranging statutory provision. It has been suggested that the need for the "blunt remedy" of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction. Procedural reform of the writ may be

appropriate, but it is important not to lose sight of substantive differences between habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds; habeas corpus is a writ of right, granted *ex debito justitiae*.

13. Lord Halsbury LC in *Cox v. Hates*, reported in (1890) 15 AC 506, held that "the right to an instant determination as to lawfulness of an existing imprisonment" is the substantial right made available by this writ.

14. Likewise in *Barnardo v. Ford*, reported in (1862) AC 326, the writ of habeas corpus has been described as a writ of right which is to be granted *ex debito justitiae*. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of his unlawful detention. Once, however, he shows such a case and the return is not good and sufficient he is entitled to this writ as a matter of right.

15. In *R. v. Secy. of State of Home Affairs*, reported in (1941) 3 All ER 104, 105, it has been held that a person is not entitled to be released on a petition of habeas corpus if there is no illegal restraint. "The question for a habeas corpus court is whether the subject is lawfully detained. If he is, the writ cannot issue, if he is not, it must issue."

16. Likewise in *Cox v. Hakes*, reported in (1980) 15 AC 506 (HL), it has been held that the writ of habeas corpus is an effective means of immediate release from unlawful detention, whether in prison or private custody. Physical confinement is not necessary to constitute detention. Control and custody are sufficient.

17. A Constitution Bench judgment of the Supreme Court in the matter of *Kanu Sanyal v. District Magistrate, Darjeeling and others*, reported in (1973) 2 SCC 674, traced the history, nature and scope of the writ of habeas corpus. It has been held by their Lordships that it is a writ of immemorial antiquity whose first threads are woven deeply "within the seamless web of history and untraceable among countless incidents that constituted a total historical pattern of Anglo-Saxon jurisprudence". Their Lordships further held that the primary object of this writ is the immediate determination of the right of the applicant's freedom and that was its substance and its end. Their Lordships further explaining the nature and scope of a writ of habeas corpus held as under: -

"The writ of habeas corpus is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in the order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restrain". But the writ is primarily designed to

give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness. The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ, that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained."

18. In the matter of Union of India v. Yumnam Anand M. alias Bocha alias Kora alias Suraj and another, reported in (2007) 10 SCC 190, while explaining the nature of writ of habeas corpus, Their Lordships of the Supreme Court held that though it is a writ of right, it is not a writ of course and the applicant must show a prima facie case of his unlawful detention. Paragraph 7 of the report states as under: -

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

19. A writ of habeas corpus is not be issued as a matter of course. Clear grounds must be made out for issuance of such writ. [See Dushyant Somal v. Sushma Somal, reported in (1981) 2 SCC 277].

20. In the matter of Usharani v. The Commissioner of Police, Bangalore and others, reported in ILR 2014 Kar 3312, the writ of habeas corpus has been defined very lucidly as under: -

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

11. The ancient prerogative writ of habeas corpus takes its name from the two

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

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

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

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

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

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

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

A habeas corpus writ is to be issued only when the person concerning whose liberty the petition has been filed is illegally detained by a respondent in the petition. On the basis of a habeas corpus petition the power under art.226 is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under the Code of Criminal Procedure, 1973. The investigation, if in progress, is to be overseen by the criminal court. Here the petitioner is asking this court to direct the police to track down his missing son.

For these reasons, we dismiss the WP. No costs. Certified xerox.

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

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

15) On overall consideration of the cases referred herein before, it appears that the Constitutional Courts across the Country have held 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. Thus, the legal proposition would be that the Constitutional Courts would not entertain habeas corpus petitions where there is no allegation of illegal detention or suspicion regarding illegal detention. Thus, missing person cases would not come within the ambit of a habeas corpus petition, but such cases are required to be registered under the regular provisions of the Indian Penal Code and the police and other investigating agencies would investigate the same in the manner prescribed under the Code of Criminal Procedure.

16) As noted in this case, no apprehension of kidnapping of illegal detention was made when the FIR had been lodged and at no point of time till date any witness examined by the police so far had expressed their apprehension that the son of the petitioner was kidnapped by any person including extremists. Accordingly, there being no iota of doubt that the son of the petitioner had suffered any illegal detention, this habeas corpus petition stands dismissed.

17) The status reports dated 07.05.2018, 18.06.2018, 19.12.2018, 10.06.2019, 08.08.2019, 22.01.2021 and 10.09.2021 shall be kept in a sealed cover in the record. However, in the interest of investigation, the photocopy/ extract of case diary is returned to the learned Senior Government Advocate to be kept in safe custody.

18) Before parting with the records, it is made clear that in the event the petitioner is advised to approach a competent Court of law to seek monetary compensation, such a claim shall be decided in its own merit without being influenced by any observations made herein.