

(2005) 10 CAL CK 0008
In the Calcutta High Court
Case No : Writ Petition No. 12235 (W) of 2003

Smt. Mita Pal and Another	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 07-10-2005

Acts Referred:

Army Act, 1950 — Section 106
Constitution of India, 1950 — Article 14, 21, 226, 226(1), 32
Criminal Procedure Code, 1973 (CrPC) — Section 491

Citation : (2006) CriLJ 1647

Hon'ble Judges : Sankar Prasad Mitra, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Paresh Ch. Maity and B.C. Simai, for the Appellant; R.N. Das, P.K. Sen, D. Purkayastha and Ranjan Kumar Roy, for the Respondent

Judgement

1. Leave is granted to the learned Advocate for the petitioners to amend the cause title. Just desert.
2. While appreciating the anguish of the Petitioner, who has come up before this Court with a lurking apprehension of the loss of her Soul Mate, that should be the prime consideration of this Court.
3. Justice is always above law; yet it has to be in accordance with law.
4. We need not be caught between Scylla and Charybdis since we feel in this case we have to put justice above all. Normal claptrap of legal niceties have to be jettisoned so as to live up to the Constitutional mandate of the concluding line of Article 226(1) "and for any other purpose" which has been sought to be invoked before us.
5. In this Writ Application in the nature of a Habeas Corpus the Petitioners-Smt. Mita Pal, the young wife of Sepoy Tapas Kumar Pal along with her minor child being represented by her, has sought the following directions:
 - a) Issue a Writ and/or in the nature of a Writ of Habeas Corpus directing the

Respondents and each one of them and/or their subordinate and/or their officers to:

i) Produce the Body of Tapas Kumar Pal the husband of petitioner No. 1 before this Hon"ble High Court at Calcutta forthwith; and

ii) Hand over the Mortal remains of the body happened to be murdered in the Army barrack on 8th July, 2002;

iii) Issue directions by directing the Central Bureau of Investigation or any other Independent Agency, like Central Vigilance Commission apart from directing to form a High Power Committee of Senior Officers of Brigadier and equivalent rank drawn from Army, Navy and Air Force to enquire and submit reports in a manner the husband of the Petitioner No. 1 has been murdered in Army barrack on 8th July, 2002 and in a manner suppressed and hush-up such offence by declaring deserter by the Commanding Officer of the 664 ASC Coy (TK TPtr) Type-"C" C/o. 56 APO;

b) Issue a Writ and/or order and/or Direction in the nature of Mandamus directing the Central Bureau of Investigation or any or any other Independent Agency like Central Vigilance Commission to investigate/enquire in the instant case and initiate appropriate criminal prosecution against the respondents and/or other erring officers and submit a report before this Hon"ble Court within a stipulated time and by further directing the respondents to form a High Power Committee consisting of Senior Officers of Brigadier Rank and equivalent rank drawn from Army, Navy and Air Force to enquire and investigate in a manner Tapas Kumar Pal the husband of the Petitioner No. 1 has been murdered and hushed-up with suppression in the name of deserter;

6. Gleaning through the averments made in the Writ Application vis-a-vis the Returns speak about the facts of the husband of the Petitioner No. 1, Shri Tapas Kumar Pal being in the employment of the Army Authorities as a Sepoy Driver, attached to the Unit No. 664 Army Service Corps Coy (TK TP tr) Type-"C" C/o. 56 APO at Ambala Cantonment since 29-6-95. He was married with the Petitioner No. 1 on 15-7-98 and from the said wed-lock the Petitioner No. 2 was born. That Shri Tapas Kumar Pal, husband of the Petitioner No. 1 obtained a month's leave and came to his village home at Bankura and after expiry of the said leave he left Bankura on 6-5-02 for joining his Unit. Since he was unwell, he had to be hospitalized at the Military Hospital; Ambala and was treated there. On 7-7-02 she spoke over telephone from the Military Hospital and informed his family that he has recovered after receiving treatment and was to be discharged on the very next date and he would be joining active duty in his Unit.

7. Up to this it was the humdrum narration of a man's life (husband of the Petitioner No. 1).

8. Clouds began looming large on the mind of the Petitioner No. 1 when her geriatric Father-in-law received a copy of a Letter dated 19-7-02 (Annexure-P-1),

addressed to the Superintendent of Police, Bankura. It was learnt from the said letter that the husband of the Petitioner No. 1 absented himself without leave on and from 9-7-02. As it was beyond the comprehension of the entire family that after speaking over telephone on 7-7-02 how could he disappear after joining his duty on 8-7-02 without any rhyme or reason, agony gripped the Petitioner.

9. Compounding the agony of the Petitioner No. 1 the Respondent No. 4 informed that her husband was declared as a deserter by their letter dated 19-8-02, 30-1-03 and 27-2-03 (Annexure-"P-2").

10. It is the further case of the Petitioner No. 1 that her Father-in-law and brother-in-law went to meet Respondent No. 4 at Ambala on 26-10-02 to enquire about whereabouts of her husband. But the Respondent No. 4 refused to meet them.

11. Worsening the situation she received two anonymous letters (Annexure-"P-6") declaring that on 8-7-02 10/12 Army Jawans quarrelled between themselves and her husband was beaten to death and his body was sent to Sadar Police Station for post-mortem examination.

12. Added to her misery was the death of her Father-in-law on 22-2-03 who could not bear the shock of the purported loss of his son.

13. Repeated representations before the Army Authorities to bring out the truth yielded no result.

14. Left to fend for her soul and her little child in the absence of her Soul Mate in acute distress she has stood before the Majestic Portals of Justice.

15. Shri Paresh Chandra Maly learned Counsel appearing in support of the Writ Application duly assisted by Shri B.C. Simai submitted that the husband of the Petitioner No. 1, Shri Tapas Kumar Pal was released from the Ambala Cantonment Hospital on 8-7-02 and was thereafter found missing. He submitted that in Annexure-P/1 the Respondent No. 4 showed that on and from 9-7-02 the husband of the Petitioner No. 1 absented himself and thereafter was missing. The Army Authorities were trying to cover up the entire issue by taking different stands and ultimately declaring the husband of the Petitioner No. 1 as a deserter. He has submitted that it is quite clear from the Supplementary Affidavit relied upon by the Union of India that the husband of the Petitioner No. 1 was murdered and to screen the offence he was declared as a deserter so that no benefit could be given to his wife and minor son.

16. According to Shri Pal if the husband of the Petitioner No. 1 had deserted his post why the Identity Card would be found in the garage in November, 2002.

17. Lastly, Shri Pal submitted that the Deponent, who affirmed the Return on behalf of Col. J.P. Srivastav in his capacity as Respondent No. 4, had filed an incorrect Affidavit which was by itself highly illegal act and the two Affidavits filed were false.

18. Shri Pal, learned Counsel for the Petitioners referred to the decisions of Deputy Dy. General Manager, Redesignated as Dy. Director, Inter-State Bus Terminal and Others Vs. Sudershan Kumari (Smt) and Others, and Dhananjay Sharma v. State of Haryana. AIR 1995 SC 1795 In support of his aforesaid contentions.

19. Accordingly, Shri Pal has prayed for necessary directions.

20. Shri Rathindra Nath Das, learned Senior Counsel appearing for the Respondent Nos. 1, 2 and 4 along with Shri Pradip Kumar Sen submitted that at the very outset that the prayer (a) of the Writ Application cannot be considered under any circumstance. But, Shri Das, learned Senior Counsel was agreeable to the relief sought for in Prayer (b) of the Writ Application and he further submitted that if there is any direction by the Court for payment of the dues accrued in favour of the husband of the Petitioner No. 1 the same can be complied with. He has further agreed to an enquiry to be conducted by the Respondents Nos. 6 and 7.

21. Learned Senior Counsel for the Union of India submitted that the husband of the Petitioner No. 1 was admitted in the Hospital on 29-6-02 and after his discharge from the Hospital on 8-7-02 he absented himself from duty and ultimately he was declared as a deserter on and from 13-8-02. Since the husband of the Petitioner No. 1 was not traceable a Court of enquiry was held where he was found to be a deserter.

22. Learned Senior Counsel for the Union of India further submitted that there may be some discrepancies in the Discharge Certificate but it was not material and did not have any effect in the issue in question. He submitted that the Petitioner No. 1 would be entitled to all the benefits if it is proved that her husband is not alive; but, in the event he is continuing to be absconding there is technical difficulty in releasing payment in favour of the Petitioner No. 1 as death has to be ascertained at first.

23. In course of hearing of this Application before the First Bench leave was granted to implead the Officer-in-Charge, Mahesh Nagar Police Station, Ambala Cantt. as a party/respondent and pursuant thereof notices were sent.

24. Accordingly, in terms of the direction of the First Bench the said Officer was impleaded as Respondent No. 9.

25. Shri D. Purkayastha learned Senior Counsel for the Respondent No. 9 with Shri J.H. Mallick on the basis of an affidavit affirmed by the said Respondent submitted that no communication was received by them from Respondent No. 4 with regard to the death of the husband of the Petitioner No. 1. Learned Senior Counsel for the Respondent No. 9 further submitted that whatsoever no information was received from the Army Authorities about either missing of the said Sepoy Shri Tapas Kumar Pal or his death from the records available in the said Police Station.

26. Learned Junior Government Advocate Shri Debasish Kar Gupta with Shri Somnath De for the Respondent No. 5 on the basis of an Affidavit submitted that the Application in its present form is liable to be dismissed. But, however, confirmed the despatch made by the Army Authorities to the family of the Petitioner No. 1.

27. Shri Ranjan Kumar Roy, learned Special Counsel for the Respondent Nos. 6 and 7 (Director and Joint Director of the Central Bureau of Investigation respectively) submitted that the circumstances were indeed very suspicious under which the Sepoy Tapas Kumar Pal was missing. He submitted that the defence taken by the Army Authorities with regard to the missing of the said Sepoy two contrary views are available from Annexure-R4. As such, it is quite confusing with regard to the actual incident. Shri Roy referred to the Court of Enquiry and wondered how far the same is acceptable as it creates a cloud of suspicion.

28. Shri Roy, learned Senior Counsel took a lot of pains in taking us through the Affidavits and the Reply and submitted that in view of Section 106 of the Army Act, 1950 (for short, the said Act) the purported gap of the proceeding (Annexure-R4) shows that the provisions of the said Act was not properly followed. He referred to the decision of Capt. Virendra Kumar through his wife Vs. Chief of The Army Staff, New Delhi, , and submitted that desertion and absence without leave are two distinct procedures. In this context he referred to the provisions of Section 106 of the said Act and submitted that the two aspects, i.e. desertion and absence without leave cannot be confused.

29. Written notes of argument have been exchanged.

30. Return and Counter have been used by the contesting Parties.

31. On 8-8-05 learned Senior Counsel for the Union of India prayed for filing an Additional Affidavit to put certain new facts. The Court was of the view that the same would not be permissible as already Affidavits were exchanged between the Parties earlier; but, the additional facts could be brought in at the time of the hearing. It appears in the said Supplementary Affidavit certain additional facts have been brought in which were already on the existing record and nothing new has been sought to be imported.

32. A Reply was also used by the Petitioners controverting the same. As such, it was kept on record.

33. By way of a corrigendum the Respondent No. 9 also used an Affidavit which we will deal later.

34. We have heard the submissions made at the Bar and considered the Affidavits exchanged between the Parties.

35. Access to Justice and securing the personal liberty is the very essence of the concept of the Law of Habeas Corpus. A Writ in the nature of Habeas Corpus is

one of the famous Writs in English Law, which existed even before the Days of Magna Carta (i.e. 1215, prior to the Era of King John). It is one of the high prerogative writs. Whilst under the old Code (Code of 1898) the provisions of Section 491 empowered the High Court to issue directions in the nature of Habeas Corpus in respect of illegal detention but after the advent of the Constitution, the High Court in exercise of its powers under Article 226 has been conferred with the discretionary powers not only for the enforcement of the Fundamental Rights but also for any other purpose for which the Writ or an Order in the nature of Habeas Corpus may be issued.

36. Over the years the Law of Habeas Corpus has been expanded from the preliminary concept of a Writ of such nature calling upon the person or the Authority who has detained another person to produce the latter before it and on the basis of the Return filed if it is satisfied that the detention is illegal, at once set free the detained person.

37. Now, the broader horizon of the Writ in the nature of Habeas Corpus are spread out beyond the orbit of release from illegal custody into every spear of pains and suffering of persons even in legal custody and has even been further widened with liberal Interpretation of Article 21 of the Constitution "as to what is the concept of life.

38. Now, the Law of Writ in the nature of Habeas Corpus has functional plurality and constitutional regard for human decency and dignity. The said Writ lies for variety of purposes relating to life and liberty of a person.

39. There has been a galaxy of decisions of the Hon''ble Apex Court enlarging the canvas.

40. As perceived by Chief Justice Sher Singh and Others Vs. State of Punjab, :

The horizons of Article 21 are ever widening and the final word of its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation.

41. The said observation has square impact in the present Application.

42. Ever broadening horizon of Article 21 of the Constitution of India gives plenary powers on the Courts to decide the question of infringement of the Fundamental Rights of a citizen. While exercising the powers under Article 226 of the Constitution of India, which is a sovereign duty, it has to be for the enforcement of the Rights under Articles 21 and 14 of the Constitution of India as well as Ex Debito Justitiae, as found by the First Bench of this Court (consisting of Probha Shanker Mishra, C. J. & Ghosh, J.) in Lakhi Chand Paswan and Anr. v. The State of West Bengal and Ors. 1998 (2) Cal LJ 155.

43. In Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others, a three Judge Bench of the Supreme Court found that (Para 33 of Cri LJ):

34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen.

Their Lordships further held that (Para 9 of Cri LJ):

...that, award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution Is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be based on tort.

44. In *Chairman, The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others*, the Supreme Court referred to the decision of *Nilabati Behera (Smt.) v. State of Orissa (supra)* and discussed the concept of the right to life in the light of Article 21 and the public law remedies available and the question of payment of compensation.

45. Similar view was also expressed by the Supreme Court in *People's Union for Civil Liberties Vs. Union of India* and another, .

46. Keeping this concept in mind let us now proceed to appreciate the claim of the Petitioner; per contra the objection of the Union of India.

47. Before doing that we have to clarify the question of our jurisdiction as to whether we can exercise our powers on the basis of the prayer made by the Petitioner No. 1 where part cause of action appears to have taken place at Ambala which is far beyond our territorial jurisdiction. We find from the core area of the case of the Petitioner No. 1 that her husband was a resident of Bankura District within the State of West Bengal and after obtaining leave he came from Ambala to his village at Bankura and after exhausting it he left on 6-5-02 from his home to join his duty at Ambala wherefrom his whereabouts became unknown. As such the cause of action very much arises within the territories of the State of West Bengal as it is in this State where the husband of the Petitioner No. 1 is to be reported back and from where he has left purportedly for the last time for his place of work from where he is not found since then.

48. From the materials available on the basis of Affidavits we find that the husband of the Petitioner No. 1 had left his home at Bankura District on 6-5-02 for attending his duty at Ambala. He rang up his home on 7-7-02 and it further appears that he was unwell and was admitted at the Military Hospital at Ambala on 29-6-02 and was discharged on 8-7-02 on which date he Joined his duty.

49. It is the case of the Army Authorities that on and from 9-7-02 the said Sepoy was found absent. As such, intimation was given to the Superintendent of Police,

Bankura by the Army Authorities on 19-7-02 seeking his whereabouts upon a copy endorsed to the Father-in-law of the Petitioner No. 1. Ultimately as the husband of the Petitioner No. 1 did not report for duty a Court of Enquiry was instituted and he was declared a deserter on 9-8-02.

50. From an appraisal of the aforesaid factual matrix three things become very much apparent. At the first instance we find that the husband of the Petitioner No. 1, being an Army Personnel after exhausting his accrued leave at his home village/town at Bankura left for the last time for Ambala Cantonment on 6-5-02 and from the record it can be seen that the husband of the Petitioner No. 1 was in a Military Hospital, Ambala till 8-7-02 for treatment. On the second instance we find that on and from 8-7-02, after being discharged from the Military Hospital, Ambala the Husband of the Petitioner No. 1 had joined duty but thereafter went missing from the said position, it is clearly discernible that from the custody of the Respondent No. 4 the husband of the Petitioner has gone missing. In the third instance it is quite discernible that when for the last time on completion of his leave the husband of the Petitioner No. 1 left on 6-5-02 from Bankura to join his duty at Ambala since the time he was interned in the Military Hospital, Ambala till 8-7-02 when he joined his duty; and on and from 9-7-02 when he purportedly went missing he was all along under the care and custody and control of the Respondent No. 4.

51. A very basic thing which emerges from our perception from the discussion is that the husband of the Petitioner No. 1 is not found on and from 9-7-02 after he had joined duty on 8-7-02 consequent to his discharge from the Military Hospital, Ambala.

52. Whilst it is the case of the Petitioner No. 1 that her husband has talked with the family over telephone on 7-7-02 and was quite hale and hearty and thereafter he went missing and following the letter, addressed to the Superintendent of Police, Bankura the father-in-law and brother-in-law of the Petitioner No. 1 went to meet Srivastav but was turned away; on the other hand it is the stand of the Army Authorities that the husband of the Petitioner No. 1 absented himself from duty and attempts to locate him having failed on the basis of the finding of the Court of Enquiry he was declared as a deserter and subsequently his Identity Card was found in the Garage on 28-12-02.

53. We have now to placate the actual fact without being oblivious of the position that in exercise of our power for Judicial Review we cannot investigate into pure question of facts but, have to strictly address ourselves within the Constitutional mandate.

54. On the basis of the Affidavits it has to be decided as to whether the husband of the Petitioner No. 1 was actually a deserter or he was done away with, which lurking suspicion is shared by the Petitioner No. 1 in this Application.

55. But that again would be dangling with facts also.

56. Walking within the peripheries of Article 226 of the Constitution of India we have to salvage the truth without stepping on the field of fact and undergoing a exercise of investigation.

57. Mysteiously we find that the main Affidavit-in-opposition was affirmed by one Capt. G.K. Mahajan of Unit 613 Company Army Service Corps being authorize by Col. J. P. Srivastav. The entire gamut of his main Affidavit-in-opposition starting from the facts and controvert the averments everything has been affirmed as "true to my knowledge and derived from the records and reports as received from the unit....

58. Similarly, in the Supplementary Affidavit affirmed by the said Army Officer, who described himself as a Major being Second-in-Command of 613 TPT Company and have been "authorized by the Col. J.P. Srivastav, who was Commanding Officer, 664 Company Army Service Corps., Respondent No. 4 to affirm this affidavit on behalf of Respondent No. 4....

59. It is beyond the imagination of this Court to understand as to why the Affidavit-in-opposition as well as the Supplementary Affidavit could not be affirmed by the said Col. J.P. Srivastav (Respondent No. 4) himself. There is no explanation to that effect. It is also not understood that why he has authorized the present Deponent Shri Mahajan and has not himself affirmed either of the Affidavits. This has not been clarified by the Deponent.

60. This situation definitely raises a question of suspicion in the mind of the Court that the said Respondent (Respondent No. 4) is shying away from the Court and feels reluctant to controvert the position shown by the Petitioners on oath.

61. It has been specifically averred by the Petitioner No. 1 herself in Paragraph 11 of the Writ Application that her father-in-law and brother-in-law reached Ambala on 26-10-02 where the Unit No. 664 Company Army Service Corps was situated for enquiring about the whereabouts of her husband but the Respondent No. 4-Commanding Officer, Col. J.P. Srivastav with whom attempt was made for meeting him "not only refused but did not allow any other Officer to discuss anything and forcibly asked to leave the place immediately in a most inhuman manner....

62. In Para 17 of the Affidavit-in-opposition of 30-1-04 showing that Col. J.P. Srivastav was on two days casual leave it is quite surprising that when a specific imputation have been made against a particular Officer, moreso when he was the Commanding Officer under whom the husband of the Petitioner employed what prevented him from filing the Affidavit or controvert the most important portion of the statement made in paragraph 11 of the Writ Application.

63. This is really an unexplained situation, which remains on the face of it.

64. In the Supplementary Affidavit in paragraph 3 (i) it was stated that on 9-9-02 the unit authority lodged an FIR at Mahesh Nagar Police Station, Ambala

Cantt. (Annexure-"R-5") which has also been affirmed as "true to my knowledge and derived from the records" by the Deponent Shri Mahajan.

65. An Affidavit has been filed by the added Respondent No. 9, who was the Officer -in-charge of Mahesh Nagar Police Station, Ambala Cantt., Ambala. He has specifically stated in his Affidavit that no complaint has been made before the Mahesh Nagar Police Station as has been shown in Annexure-"R-5".

66. Respondent No. 9 has stated in his main Affidavit, affirmed on 28th June, 2005 in Paragraph 3(1) that -- "after having gone through the record of Mahesh Nagar Police Station, Ambala Cantt., found no record in respect of dead body of any Sepoy by the name of Tapas Kumar Pal was entrusted by the Army Authorities at Ambala Cantt. for getting the Post-Mortem examination done or sent to laboratory test at Madhubani (Kamal)....

67. In reply to the Supplementary Affidavit on behalf of the Respondent No. 4 on 6-9-05 the Respondent No. 9 reiterated his earlier version and in paragraphs 5 and 7 denied about the fact of any report before Mahesh Nagar Police Station at the behest of the Army Authorities.

68. This creates a ripple of doubt in the mind of the Court and it appears that there has been flurry of activities to conceal the actual incident.

69. We cannot look into the correctness of the Enquiry proceeding under the said Act as it would be beyond the scope of our consideration but from the records, which have been made available to his supplementary Affidavit dated 13-8-05, we do not feel that everything has been done in a very clear and transparent fashion. There are discrepancies prima facie on the record which definitely create a doubt in the mind of a prudent man as to what was the exact position.

70. At the very outset when the learned Senior Counsel appearing on behalf of the Union of India finally rose for his Reply he categorically admitted, it is also in the Written notes of argument, that they are agreeable to the prayer (b) made by the Petitioners in the Writ Application.

71. Earlier during the course of hearing before us question of lack of territorial jurisdiction was raised. The question of maintainability of the Writ was also pointed out by him. But at the time of his final argument a dramatic change in the stance was taken on behalf of the Union of India.

72. From the materials that have been perceived by us we prima facie form an opinion that the husband of the Petitioner Sepoy Tapas Kumar Pal left his home at Bankura on 6-5-02 for joining his duty and after reaching Ambala and being treated at the Military Hospital, Ambala he joined his duty on 8-7-02 and since then his whereabouts are not known.

73. Perhaps the Petitioner No. 1 has reconciled with her fate and in the penultimate portion of her Writ Application has accepted with the former as ordained for her and also in her prayer (b) prayed for investigation and

compensation on account of her dire financial stringencies.

74. Circumstances are revealing as has been shown in her Reply that the husband of the Petitioner who recuperated from a major illness and joined duty on 8-7-02 would without any rhyme and reason evaporate; moreso, when he required sustained attention and rest which could not have been provided any better than the Army Authorities.

75. It cannot also be understood that after the husband of the Petitioner No. 1 was not available on and from 9-7-02 how could after a long gap the Identity Card of the Husband of the Petitioner No. 1 could be traced in the Garage of the Unit on 28-11-02, as shown in Paragraph 5(j) of the Affidavit-in-opposition dated 30-1-04.

76. It is also not understandable that a person who has recovered from a major illness would absent himself, by whatever term it may look at. either desertion or absenteeism, fact remains as to why he would leave his Parents, a young child and his wife in the lurch and hide himself.

77. There are several unanswered questions, which have been faced by us while dealing with this Application.

78. If we have to form an opinion that Shri Tapas Kumar Pal, husband of the Petitioner No. 1 is no more obviously this Writ Application has to suffer a different fate as it would no longer be maintainable.

79. But, till such time the said fact is conclusively proved; moreso, in the absence of any material before us, we cannot investigate into the said question. However, we are prima facie of the considered opinion that the husband of the Petitioner No. 1 has gone missing while he was still in the custody of the Army Authorities on and from 9-7-02 and till date his whereabouts are not known.

80. We find an ominous overture in the concession of the learned Senior Counsel for the Union of India that they are agreeable to the relief as claimed in prayer (b) of the Writ Application.

81. It is by now a trite position that a Court of law cannot be guided by the concession of a Counsel and has to act on the basis of the materials before it.

82. We on our part from the experience gained in course of the hearing and availability of the materials have by now formed an opinion that the relief as claimed for by the Petitioner No. 1 has to be moulded notwithstanding the concession of the learned Senior Counsel for the Union of India. The first Bench of this Court in Lakhi Chand Paswan and Anr. v. The State of West Bengal and Ors. 1998 (2) Cal LJ 155 (supra) while considering a Writ in the nature of Habeas Corpus held --

The Court's power to issue a prerogative under Article 226 of the Constitution, as we have noticed above, does not confine to the types of writs mentioned in the Article, but other types of orders and directions for depending upon the facts

and circumstances of the case and when a Mandamus is the appropriate relief on the fact that are presented before the Court, if Habeas Corpus is asked for, the Court can always mould the relief and Issue Mandamus instead of Habeas Corpus.

83. Whereby we would be quite within the realms of law if we mould a relief and for any other purpose pass certain other necessary directions.

84. It has been prima facie established that the husband of the petitioner No. 1 has been missing while being under the care control and custody of the Respondent No. 4. On account of such position the right to live of the petitioner, as guaranteed under Article 21 of the Constitution of India has been adversely affected since it can be taken judicial notice of the fact that the Petitioner No. 1 is without financial support which her husband -- a serving Army Personnel used to provide while in active service, but since 9-7-2002 after his unexplained absence from the life of the Petitioners there is no such source of sustenance for the petitioner No. 1.

85. Not only the word "life" in Article 21 has to be understood in the modern context in the light of several landmark decisions of the Apex Court to convey the idea of a dignified life not merely one of animal existence. To her what was the concept of a dignified life?

86. Certainly the life of a proud wife of a serving Army Personnel which gave her a sense of dignity and the happiness of a Soul Mate then there is a question of material existence which as a wife of an Army Personnel she was used to by way of sustenance from the salary drawn by her husband in course of his service in the Army.

87. By virtue of the unexplained missing of the husband of the Petitioner No. 1 from the custody of the Respondent No. 4 the Petitioner No. 1 has suffered the trauma of being separated from her life partner and also denied the right to live decently since it can be well perceived what financial stringency she has to face since the fateful day of July 9, 2002 when her husband was missing and later on declared as a "deserter"; as such she is neither provided with her monthly sustenance by way of her husband's salary nor being the deserter's wife she has received any pensionary benefits.

88. Article 21 of the Constitution must have stood as a testing mirage in the arid desert of the life of the Petitioner No. 1 in the remote corner of a desolate village in Bankura, who is faced with each day's pain of her Soul Mate's absence and the grippling fear of her uncertain future with no aid from the Authorities. The observation of the First Bench in Lakhi Chand Paswan and Ann v. The State of West Bengal and Ors. 1998 (2) Cal LJ 155 (supra) the following observation seems to be of axiomatic truth in this Application--

Under Article 21 of the Constitution, the Courts read in it that anything intended to affect life or persona! liberty which is not in accordance with the procedure established by law is impermissible and invalid. The expression "procedure

established by law" in Article 21 of the Constitution is read as the procedure which is reasonable and conforms to the requirement of the principles of natural Justice. Such as the rule of Audi Alteram Partem. Anything that is done without conforming to the procedure established by law and without being reasonable and conforming to the requirements of the principles of natural justice is impermissible and illegal

89. Definitely the Petitioners have been denied the right to live a meaningful life, a wholesome life by virtue of a procedure, which is not established by law on account of the acts of the Respondent No. 4.

90. In a classic situation we could have issued a Writ outright for producing the body of the husband of the petitioner No. 1. That would have perhaps been a taciturn situation before us. However, in the grim circumstances we find that the learned Senior Counsel for the Union of India has agreed to the issuance of prayer (b) of the Writ Application. We feel if we straightway abide by the same and reconcile ourselves with the situation it will not be a wholesome decision on our part. To be agreeable with the situation of the death of the husband of the Petitioner No. 1, which we in our inner recess of our mind feel, that it be not true, could not be a very appropriate step; in the absence of any investigation in that direction we should not form an opinion. On the contrary, the stand taken by the Respondents/Union of India in abiding by the prayer (b) of the Writ Application manifests the dark situation.

91. A Writ in the nature of Habeas Corpus issued by us would have in the ordinary situation of the matter served the purpose. But we feel that in the peculiar facts and circumstances of this particular case it would not be of any meaning to the Petitioner No. 1 who is pursuing her remedy since the year 2003 with tears and tolls. In our humble view it would not be a pragmatic approach, even though we do not share the dark circumstances with which, perhaps by now the Petitioner No. 1 has reconciled herself; but at the same time we cannot lose sight of the reality.

92. Facts may not be stranger than fiction on some occasions; yet such facts are facts which should be left for the purpose of a proper investigation.

93. We feel that some consequential direction can be passed, although we have not persuaded ourselves for issuance of a Writ in the nature of Habeas Corpus. In this connection we are emboldened by the second decision of Sebastian M. Hongray Vs. Union of India (UOI), .

94. Just Justice. We feel would be the concomitant action which is the felt need of the hour.

95. From our perception of the entire perspective of the matter what we have seen, felt and have experienced the Writ Application should be disposed of on the following terms:

A. It is now directed that the Respondent No. 6 would depute an Officer, not

below the rank of Superintendent of Police attached to in any of its Wings to conduct a Preliminary Enquiry with regard to the missing of her husband, Sepoy Tapas Kumal Pal and the apprehension of his death during a course of scuffle within the Cantonment area on the basis of the Annexures and averments made in the Writ Application and Affidavits.

B. Keeping in mind the agony of the Petitioner No. 1 it would not be most appropriate that such Preliminary Enquiry should be completed by the Officer concerned within a period of six weeks from the date of communication of the Order.

C. In the event if it is established that the husband of the Petitioner No. 1 has been actually murdered while still in the care and custody of the Respondent No. 4 In course of his employment, a Regular Case (R.C. Case) would be registered for investigation against the persons found to be guilty on the basis of such Enquiry and they will be booked for the said offence in accordance with law.

D. Upon Investigation being taken up by the Officer entrusted by the Respondent No. 6 in pursuance of the registration of the Regular Case (R.C. Case) after the same reaches its logical conclusion on the basis of formation of an opinion by the said Officer, report in Final Form against the guilty persons should be, needless to say, be laid before the jurisdictional Chief Judicial Magistrate.

E. Till such time the preliminary enquiry is complete as per Written Notes of Argument the Petitioner No. 1 would be entitled to "accumulated AFPP Fund for a Sum of Rs. 43.078/- after a stipulated period of three years from the date of desertion i.e. Oct 2005, as per army Instructions.

F. Respondent No. 2 would release all the legal dues of the Petitioner No. 1 forthwith without raising any hassle keeping in mind the distress the Petitioner No. 1 has to suffer in view of the aforesaid situation, mandatorily within a period of two months from this day, subject to her giving undertaking awaiting the Report in Final Form submitted by the C.B.I. establishing the fact of death of her husband.

In view of the totality of the circumstances and the balance of convenience we do not feel even for a moment inclined to arrest our attention to the Affidavit on behalf of the Respondent No. 4, Shri Mahajan raising an eyebrow about the marital status of the Petitioner No. 1.

G. Since the Petitioner No. 1 has been conducting an in equal battle with the Respondents for a pretty length of time spread over since the year 2003 since she filed this Application before this Court and has undergone extreme mental anguish and pain and has suffered both mentally and financially we are of the considered view that she should be paid some costs. We take this decision keeping in mind the horrendous situation the Petitioner is exposed to with her little child (Petitioner No. 2). Faced with the situation fate has saddled upon her, on the one hand she has to fend for herself and on the other hand she has to

fend to her little child in the process perhaps forgetting her sorrow. Tears, perhaps by now, are a luxury for this defenceless woman. Money, in any form, perhaps would rub salt on her mental wound; but even if we cannot restore her smile and bring back her yesterdays, we can at least secure her tomorrows.

96. We for one, in spite of the frustrating sequence of events noticed earlier, feel the Petitioner No. 1 should have some succour to face the future ahead. She should not be left to have her tryst with destiny and resign to the situation that some day her "hope remains love would make them meet again !

97. Accordingly, we are of the considered view that a sum of Rs. 75.000/- be forthwith paid to the Petitioner No. 1 by the concerned Respondent No. 2, which we feel would be Just Justice.

98. Remedial measures as known to law which would be available to the Petitioner No. 1 in terms of the Report submitted by the Respondent No. 6 can be pursued before the appropriate Forum Irrespective, needless to say, disposal of this Application.

99. With this observation we dispose of this Writ Application.