

(1981) 09 GAU CK 0010
In the Gauhati High Court

Smt. Thokchom Ningol Kangujam Ongbi Thoibi Devi and etc.	APPELLANT
Vs	
General Officer Commanding and Others	RESPONDENT

Date of Decision : 08-09-1981

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 2, 3, 4, 5, 6
Constitution of India, 1950 — Article 226
Unlawful Activities (Prevention) Act, 1967 — Section 3

Citation : (1982) CriLJ 1675

Hon'ble Judges : K.N. Saikia, J

Bench : Single Bench

Judgement

K.N. Saikia, J.—Should a writ in the nature of habeas corpus issued when the alleged illegal detention has de facto ceased before the application for the writ is made? This is the precise question involved in these two analogous Civil Rules.

2. Three boys, namely, (1) Kangujam Loken Singh, alias Premjit Singh, aged 21 years, of Khongman Makha, (2) Thokchom Logendra Singh, aged 19 years, of Pebis Pandit Leikai, Singjamei Makha, and (3) Kangujam Iboyaima Singh, aged 19 years, of Khongman Okram Chuthek Makha, were taken into custody by army personnel belonging to the J. K. Army Rifle of Manipur, Imphal on 23-9-1980 from their houses. Of the three, the third, namely, Kangujam Iboyaima Singh, was admittedly released on 25-9-1980 and arrived back home on 26-9-1980 while the other two have not yet returned home

3. As regards Kangujam Loken Singh, alias Premjit Singh, Kangujam Joykumar Singh, his elder brother, on 24-9-1980 lodged a complaint to the Officer-in-charge, Singjamei Police Station, Imphal stating that on 23-9-1980 at about 3 P. M. some unidentified armed personnel, who came in three civilian vehicles (2 jeeps and one car), forcibly took away his younger brother, Kangujam Loken Singh, from their house and since then his whereabouts were not known. On 14-10-1980 the same Kangujam Joykumar Singh submitted an application to the Inspector General of Police, Government of Manipur making similar statements

and praying suitable action for recovery. On 25-2-1981 the mothers of the two boys, namely, Kangujam Loken Singh and Thokchom Lokendra Singh, submitted a joint application to the G.O.C. M-Sector, Imphal stating that they were at a loss to know the whereabouts of their sons and that the only information available with them was that they had already been released from army custody, but the boys never came back home and nobody saw them since their arrest. It was also stated that the third boy, Kangujam Iboyaima Singh, was released on 26-9-1980 and on 30-9-1980 some Army Jawans in uniform along with one police officer known as Peter came to their house at about 2 P. M. and informed them that their sons had already been released and asked whether they arrived; and were told that they had not. On 27-2-1981 both the mothers submitted another joint application to the Governor of Manipur making similar statements.

4. As regards Thokchom Lokendra Singh, an application was made to the I.G.P. Government of Manipur, Imphal by his father Th. Shamu Singh, stating that the three boys were arrested on 23-9-1980 and of them Kangujam Iboyaima Singh had been released but the whereabouts of his son were not known and praying that the whereabouts be made known to him. On 27-2-1981 a joint application by the two mothers, as stated earlier, was made to the G. O. C, M-Sector, Imphal. Another joint application by the two mothers was made to the Hon"ble Prime Minister of India requesting for the whereabouts of their sons.

5. Smt. Thokchom Ningol Kangujam Ongbi Thoibi Devi filed the Habeas Corpus petition (Civil Rule 128/81) for her son, Kangujam Loken Singh alias Premjit Singh, on 9-4-1981; while Smt. Potsangbam Ningol Thokchom Ongbi Ibecha Devi filed the Habeas Corpus petition (Civil Rule 129/81) on the same date for her son Thokchom Lokendra Singh.

6. On 9-4-1981 notices of motion were issued in both the Civil Rules returnable by 25-4-1981. In both the Rules affidavits-in-opposition were filed on 22-4-1981 on behalf of respondents Nos. 1 and 2, namely, G. O. C, M-Sector, Manipur and Brigade Major, Manipur Sector, Imphal stating that all the three boys were released on 25-9-1980 and the members of their families were also informed on 30-9-1980. The copies of the application to the G.O.C. M-Sector dated 25-2-1981 and their reply thereto dated 8-3-1981 stating that the petitioners' sons were released on 25-9-1980 and expressing concern that they had not returned home, and assuring that they would inform immediately should they get any further news about them, were enclosed to the affidavits-in-op-position. The respondent No. 4, I. G. P., Manipur, filed his affidavit-in-opposition on 25-4-1981 stating that on 23-10-1980 he directed the two mothers to report to the S. P. (Central) who in his turn contacted the army authorities and that a D. O. letter addressed to the I. G. P. dated 9-12-1980 from Shri O. Joay Singh, M, L. A. requesting for whereabouts of their sons was received by him and forwarded to the Special Secretary (Home) for taking the matter with the army authority. The respondent No. 5 in Civil Rule 128/81, namely, the Superintendent of Police (Central) Manipur in his affidavit filed on 25-4-1981 stated that he personally

contacted the Brigade Major of 61 MTN. BDE over phone and requested him to help the two old ladies and directed the ladies to contact the Brigade Major. The respondent No. 6, namely, the Officer-in-charge, Singjamei Police Station, Imphal in his affidavit-in-opposition filed on 4-5-1981 stated that the allegations did not concern him and that on receipt of the copy of the writ petition he sent hue and cry notices on 1st May, 1981 to all the Police Stations within the State of Manipur to ascertain the whereabouts of the two boys.

7. Affidavit-in-reply in both the cases were filed on 11-5-1981 annexing thereto an affidavit sworn by Kangujam Iboyaima Singh, the boy who was released, stating that after their arrest on 23-9-1980 they were taken blindfolded in a jeep to the compound of 4th Assam Rifles, Imphal where they were physically tortured and that while he was released on 26-9-1980 near Moirangkhom Petrol Pump between 6 to 7 P. M., the other two boys had not yet been released and that they had not come back home. It was further stated that when he came back to his house after release he narrated all the facts to Thoibi Devi, the mother of Loken alias Premjit, and informed that her son and Lokendra Singh were kept behind.

8. The fact of the boys being taken into army custody having thus been admitted in the relevant returns, though they were stated to have been released on 25-9-1980, Rules nisi were issued in both these cases on 11-5-1981, returnable by 15th June, 1981.

9. On 22-7-1981 affidavits-in-opposition to both the Rules were filed by respondents Nos. 1 and 2 denying the allegation of physical torture and keeping behind, and reiterating that on verification of records it was revealed that the boys were released on 25-9-1980 and that on-30-9-1980 the family members of the three boys were also informed at their residences by army personnel. The Notification No. S. O. 500 (E) dated 26th October, 1979 and extracts from secret army records showing that the apprehended boys were released as "white", were annexed.

10. On 24-7-1981 affidavits-in-opposition were filed on behalf of respondent No. 3, namely, the Chief Secretary to the Govt. of Manipur stating that in reply to the Home Department letter No. 1 (D/61/79-H dated 23-12-1980 forwarded to the G. O. C. (respondent No. 1) the army authorities have apprised that the petitioners' sons had already been released on 25-9-1980.

11. When the petitions were taken up for hearing on 4-8-1981 the learned Counsel for the petitioners prayed that the affidavits-in-reply, along with the affidavit of K. Iboyaima Singh annexed thereto, filed at the notice of motion stage should be treated as the affidavit-in-reply to the Rules. The prayer was allowed. Mr. R. K. Manisana Singh, the learned Advocate General prayed that he be allowed to file a rejoinder to K. Iboyaima Singh's affidavit as well as the affidavit-in-reply. Allowed, he filed affidavits-in-rejoinder on behalf of respondents Nos. 1 and 2 on 11-8-1981 denying the allegations of torture and

retention made in K. Iboyama Singh's affidavit and reiterating that all the three boys were released on "white" on 25-9-1980 and their families informed on 30-9-1980.

12. Thus, there is no dispute that the three boys were taken into custody by army personnel on 23-9-1980. Admittedly K. Iboyaima Singh was released, but according to army, on 25-9-1980 while according to the petitioners on 26-9-1980.

13. Mr. L. Nandakumar Singh, the learned Counsel for the petitioners, submits: that the army authorities have admitted that the boys were taken to custody by J. K. Army personnel; that the petitioners' applications to different authorities have been of no avail and the parents of the two boys are still unaware of their whereabouts; that u/s 5 of the Armed Forces Special Powers Act any person arrested and taken into custody under this Act has to be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest, and this provision has clearly been violated in respect of the two boys; that the allegations of physical torture and non-release of the two boys when Iboyaima was released, though denied by the army authorities, are proved by the circumstances; that no affidavit has been filed by the army jawans or officers who actually took the boys into custody and who released them; that it is not stated where and when they were released; and that there is room for causing an enquiry to be made so as to ascertain the truth of the affidavits.

14. The learned Advocate General for the respondents answers that the fact of the boys being released on 25-9-1980 was intimated to their families as far back on 30-9-1980 and thereafter the two boys have no longer been in custody or control of the army authorities; that the families were informed has been admitted by the petitioners in their applications to different authorities; that the respondents 1 and 2 have in their affidavits clearly stated from the records that the boys were released as "white" on 25-9-1980 annexing relevant extracts from secret reports; that there are reliable contemporaneous reports of the release sent to different offices in the army hierarchy; that even thereafter the army authorities have been informing the parents of the two boys whenever any insurgent is being killed or arrested, to come, see and identify whether they are their sons and will continue to do so; that the affidavits filed by responsible Army Officers are reliable; that the Chief Secretary and the Home Department took up the matter with the army authorities and were apprised about the release of the boys; and as such, there is no negligence or inaction on the part of the State Government or its officers in this regard; that Iboyaima Singh's allegations were never mentioned in any of the earlier applications of the petitioners to different authorities, and as such, those must be regarded as afterthoughts; and that no writ of habeas corpus should issue when the alleged detention has ceased before the writ application was made. Hence the aforesaid question.

15. The story of physical torture of the boys after tying their eyes, hands and legs at the compound of the 4th Assam Rifles, Imphal, and keeping back of the

two boys when Iboyaima Singh was released on 26-9-1980, was never mentioned in any of the applications of the petitioners to different authorities. In his affidavit Iboyaima Singh states that when he arrived back home on 26-9-1980 he found Toibi Devi, mother of I.oken alias Premjit at his residence and that when she enquired about her son, he narrated the facts to her and informed her that her son and Lokendra Singh were not released with him by the army. Had he really done so, petitioners would naturally have mentioned those in their applications. But instead of that the petitioners all along repeated that some army jawans along with one police officer, Peter, came and informed on 30-9-1980 that they were released and their whereabouts were not known. Iboyaima's allegations have to be doubted under these circumstances.

16. The learned Counsel for the petitioners laid emphasis on the letter dated 9-12-1980 written by Shri O. Joay Singh, M. L. A. to the I. G. P. who forwarded it to the Special Secretary (Home), who in turn took up the matter with the army authorities. It is, however, admitted that in the petitions or in the affidavits there is no statement whatsoever as to what was the reply received by Shri O. Joay Singh himself. Similarly the police officer, named Peter, admittedly came on 30-9-1980 with the Jawans to inform the families about the release of the boys on 25-9-1980. Peter, though was expected to know something from the jawans he accompanied, has not been made a party to this petition; nor is there any statement as regards what he said or knew about the release. The petitioners only assert that nobody has seen the boys since their arrest, It is further to be noted that the statements by the petitioners that some army jawans along with a police officer named Peter came and informed on 30-9-1980 that the boys were released on 25-9-1980, were made by the petitioners months prior to the writ petitions being filed. The army authorities admittedly informed the families not during the pendency of these writ petitions, but far ahead. The fact of this information is, therefore, not subject to any doubt.

17. The extracts of the secret reports annexed to the affidavits-in-opposition of respondents Nos. 1 and 2 have been explained clearly by the learned Advocate General. "Sitrep" means situation report and such reports are sent with fixed times to different offices contemporaneously. It is explained that in the army hierarchy in this area at the top is the Eastern Command, below which is the Mountain Divisions whereunder are the Brigades and at the base are the Units. J. K. Army Rifles forms such a unit. Each has to report situation upwards within fixed time, so that corresponding contemporaneous reports are recorded.

18. Annexure B-1 is the Notification No. S. O. 500 (E) dated 26th Oct., 1979; B-2 is sitrep from 61 Mtn Bde to 8 Min Div. ser 284 as at 231600. In brave (.) one (.) coins 15 JAK RIF apprehended 9 persons in Manipur Valley between 222100 to 231430 (.) six handed over civ police (.) three under interrogation (.) B-3 is the secret sitrep 168 from 15 JAK RIF to 61 Mtn Bde as at 241200 (dated 24, hours 1200) It reports Charlia (.) one coin carried out search on rd Bashikbong-Lilong between 231300 to 231430 (.) Three suspects apprehended (.) Interrogation in

progress (.) B-4 is secret sitrep from 15 JAK RIF to 61 MTN Bde ser No. 169 as at 251200 (dated 25, hours 1200) (.) echo (.) three pers namely Thok-chom Lokendro Singh comma Kamujam paramjit Singh @ Loken and Kamujam Iboyaima Singh being released at white (.). B-5 is sitrep ser 286 as at 251600 (date 25, hours 1600) from 61 MTN Bde to 8 MTN Div. At delta (.) our ser 284 part two secondly brave one (.) three pers released white. B-6 is sitrep ser 170 as at 261200 (dated 26 hours 1200) from 15 JAK RIF to 61 MTN Bde (.) At foxtrot (.) ref our sitrep ser 169 part two echo (,) three pers released (.) B-7 is sitrep at 241200 from 8 MTN Div to eastoom shows "six persons handed over to, Civ police on sep 23 and remaining three per-sons held own custody". B-8 is from 8 Mtn Div to eastcom at 261200 - "on sep 25 remaining three persons released being white". B-9 is Page No. 16 with seal of the Unit. No. 76 22/23 Sept Col. (c) Premjit Singh, Lokendro Singh, Iboyaima Singh 6 names in Release Arrests file. At col. (o) six pers. handed over to civ police on 23 Sep 80. Three released being white. The second shoot of B-9 is extract from summary and shows col. (c) 3 persons apprehended on suspicion, col (c) 3 released as white, 25th Sept

19. The Armed Forces (Special Powers) Act, 1958, earlier called the Armed Farces (Assam and Manipur) Special Powers Act, 1958, though originally extended to the whole of State of Assam and the Union Territory only, now extends to the States of Assam, Mantpur, Meghalaya, Nagaland and Tripura and the Union Territories of Arunachal Pradesh and Mizoram. It is an Act to enable certain special powers to be conferred upon members of the armed forces in disturbed, areas in the States to which it is applicable.

20. Annexure B-I to the affidavit-in-op-position on behalf of respondents 1 and 2 is the Notification No. S. O. 500 (E) dated 26th Oct. 1979 issued in exercise of the powers conferred by Sub-section (1) of Section 3 of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), whereby the Central Government declared "the Revolutionary People's Front (formerly known as the Armed Revolutionary Government of Manipur), the People's Liberation Army, People's Revolutionary Party of Kangleipak, and the Red Army and other bodies set by the them""to be unlawful associations. Annexure B-II to the further affidavit oft behalf of respondents 1 and 2 is the Notification No. 7/20/67-POL. 1 (Pt) dated 8th Sept., 1980 issued by the Government of Manipur, Home Department, in exercise of the powers conferred by Section 3 of ifae Armed Forces (Special Powers) Act, 1958 declaring the entire Manipur Central District except Jiribam Sub-Division for which a separate Notification had already been published on 30-5-1978, to be disturbed area with immediate effect until further orders. The villages of the three boys fall in the Manipur Central District.

21. The three boys were taken to custody on 23-9-1980 after the above notification. As defined in Section 2(b) of the Armed Forces (Special Powers) Act, 1958 (hereinafter referred to as "the Act"), "disturbed area" means art area which is for the time being declared by notification u/s 3 to be a disturbed area.

u/s 4 of that Act any commissioned officer, warrant officer, noncommissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest, and enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substance believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.

22. The entire Manipur Central District having been declared a disturbed area, as aforesaid, the J, K. Army personnel took into custody of the three boys on 23-9-1980. Section 5 of the Act provides that arrested persons be made over to the police as follows:

5. Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

23. Learned counsel for the petitioner emphasises that the authorities violated this provision by not making over the arrested boys to the Officer-in-charge of the nearest Police Station. Section 6 of the Act, however, provides that no prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act. Those persons acting under the Act are protected except when prosecuted or sued with the previous sanction of the Central Government.

24. From the above facts and circumstances there arises no doubt that the boys were released as far back as on 25-9-1980 and their families were informed on 30-9-1980 and thus their detention ceased before these writ applications were made on 9-4-1981. It is true that instead of the boys being released as "white" they should have been made over to the Officer-in-charge of the nearest police station in compliance with provisions of Section 5.

25. The writ of habeas corpus is an ancient safeguard of the liberty of the subject and it lies to secure release from any form of unlawful detention. As has been observed in Halsbury's Laws of England, Third Edition, Volume 11 (page 26):

The writ of habeas corpus ad subjiciendum, unlike the other writs of habeas corpus, is a prerogative writ, that is to say, it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. It is also a writ of right, and is grantable ex debito justitiae. Though it is a writ of right it is not a writ of course, and therefore may be refused where there is an alternative remedy available by which the validity of the detention can be questioned. Both at common law and by statute, the writ of

habeas corpus is grantable only upon reasonable ground for its issue being shown. A writ, however, which issues on a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course.

The writ of habeas corpus is remedial and not punitive:

It is a writ of remedial nature, and is not to be used as an instrument of punishment. It is inapplicable if the illegal detention has ceased before the application for the writ is made. When it is clear that the person charged with unlawfully detaining another, whether a child or an adult, has de facto ceased to have any custody or control, the writ ought not to issue. Where, however, a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a Court may, and ought to, examine into the facts, because the detention is in fact being continued by someone who is really the agent of the original wrongdoer.

26. In *Barnardo v. Ford Gossage*'s case 1892 AC 326, the appellant was the founder and director of institutions in the East End of London and elsewhere, known as Dr. Barnardo's Homes for Destitute Children. The respondent, Mary Ford, was the wife of John W. Ford, of Wolverhampton, a labourer, and the mother of Harry Gossage by her former husband, Edward Gossage, who died in Nov., 1882, intestate, and without having appointed any guardian for the infant children. The child Harry Gossage was born in January, 1880, and was baptised in 1883 in a Roman Catholic church at Southam in Warwickshire. It appeared that the mother, in the autumn of 1888, being in destitute circumstances, accepted the offer of an organ grinder at Lamington, whom she had known for some time and whose character she believed to be good, to take the child for a time, and further exacted a promise from him that he would communicate with her should he at any time wish to part with the boy. According to Dr. Barnardo's statement, he received, in Sept., 1888, a letter from a clergyman at Folkestone, saying that a policeman had found a little boy there who said he had no home, and that he had come to Folkestone with two organ-grinders, who had treated him badly and turned him off. The writer having expressed a wish that Dr. Barnardo should receive the boy, he was shortly afterwards admitted to one of the homes. The mother was communicated with, and she wrote a letter to Dr. Barnardo, saying she was pleased that he was going to take care of her son, as she could not keep him herself, and added that his two brothers had already been sent to Canada. Shortly afterwards a Mr. Norton, from Quebec, offered to adopt a boy from the homes, and Dr. Barnardo, after making inquiries about this gentleman, accepted his offer, and the boy he selected from several whom Dr. Barnardo put forward was Harry Gossage. On November 16 the boy was handed over to Mr. Norton. According to Dr. Barnardo this was done solely for the welfare and benefit of the boy, and not, as alleged by the respondent, in order to get him out of his custody so that the boy's relations should be unable to interfere and have him placed in a home where he would be brought up in the Roman Catholic faith. The appellant admitted that he received a letter posted on Nov. 11, written

at the request of the mother by Mr. Alferd Newdigate, a Roman Catholic gentleman, asking that the boy might be given up to him. Since Dr. Barnardo handed over the boy to Mr. Norton, he said that he had never heard from the boy or from Mr. Norton, and, further, that he did not know where either of them were, nor their address, nor had he any means of communicating with either of them. The respondent applied for a rule nisi for a writ of habeas corpus, which was made absolute by the Queen's Bench Division, a decision which was affirmed by the Court of Appeal. From that decision Dr. Barnardo appealed. It was observed that the terms of the writ of habeas corpus require the recipient to have the body of the person detained. The every basis of the writ is the allegation that the person to whom the writ is directed is unlawfully detaining another in custody. As Lord Herschell observed, "Where an application for a writ of habeas corpus comes before the Court and the Court is satisfied that the illegal detention alleged ceased before the application for the writ was made or the person to whom it was directed had notice of the application, so that at those times the person to whom the writ relates was no longer in the custody, power, or control of the respondent to the writ, that is a good return to the writ, which, therefore, should not be ordered to issue. The remedy of habeas corpus is intended to facilitate the release of persons detained in unlawful custody and not to afford the means of inflicting penalties on those persons by whom they were at some time or other illegally detained. If, however, the Court entertains a doubt whether it be a fact that at the material time the person alleged to be detained was not in the control of the respondent to the writ, the Court may issue the writ, and the matter can be decided on the return to the writ when the respondent can be cross-examined."

27. Lord Halsbury did not agree to the view that if a Court is satisfied that illegal detention has ceased before the application for writ has been made, nevertheless the writ might issue in order to vindicate the authority of the Court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody. His Lordship observed:

This is a view that I cannot agree to, I think, under such circumstances, the writ ought not to issue at all, as it is not the appropriate procedure for punishing such conduct. Of course where a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a Court may, and ought to, examine into the facts by the writ of habeas corpus, because the detention is, in fact, being continued by someone who is really the agent of the original wrongdoer to continue and persist in the unlawful detention. But, assuming that the detention has ceased, then the writ of habeas corpus is, in my judgment, inapplicable.

28. The above principle applies to the facts of the present case as the two detenus were released before these writ applications were made. The release cannot be doubted to be a counterfeited one as it was reported months ahead of the petitions.

29. The above principle was followed in AIR 1944 24 (Federal Court) where an appeal against an order dismissing an application for a writ of habeas corpus was filed to the Federal Court and the detenu was released on the same day on which the appeal was filed, it was held, while dismissing the appeal, that as the accused was no longer in custody no order could be made on the habeas corpus application" and the Federal Court would not pronounce an opinion on the correctness of the order appealed against.

30. While applying the above principle of writ of habeas corpus in England, we have to remember what was stated in Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, , and in T.C. Basappa Vs. T. Nagappa and Another, regarding the scope of Article 226 of the Constitution. In India the High Court can issue writs in the nature of prerogative writs as understood in England. The scopes of those writs have been widened by the use of the expression "nature". That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. "The High Courts are enabled to mould the reliefs to meet the peculiar and complicated requirements of this country. To equate the scope of the power of the High Court under Article 226 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 would defeat the purpose of the article itself. But this does not mean that the High Courts can function arbitrarily under this article. There are some limitations implicit in the article and others may be evolved to direct the article through defined channels."

31. It was Dicey's opinion that the writ of habeas corpus invested the judges "in truth, though not in name, with the means of hampering or supervising the whole administrative action of the Government, and of at once putting a veto upon any proceeding not authorised by the law". It was observed in Secretary of Home Affairs v. O'Brien, 1923 AC 603 that it is perhaps the most important writ known to the Constitutional Law of England "affording, as it does, swift, and imperative remedy in all cases of illegal restraint or confinement" and a "check upon the illegal usurpation of power by the executive, at the cost of the liege".

32. The ineffectiveness of the writ after detention has ceased is due to the very nature of the writ commanding the production of the body of the detenu. The basis and purpose of the writ of habeas corpus in India do not differ materially from those in England. English law may, therefore, still guide its issue. American Ferris also observes, the purpose of the writ is not to punish for the wrongful act of restraining petitioner, or to afford him redress for his illegal detention. Such is not its design, nor can judgment thereunder be entered against anybody therefor. In this respect Indian law is not much different.

33. In Kanu Sanyal Vs. District Magistrate, Darjeeling and Others, it has been held that in petition for habeas corpus writ the earliest date with reference to which the legality of the detention is to be considered is the date of filing the

petition for such writ. Therefore any defect in the legality of the detention of the petitioner prior to the date of filing the petition cannot affect the detention if it is legal on the date of petition. A writ of habeas corpus cannot be granted when a person is committed to jail custody by a competent Court by order which prima facie does not appear to be without jurisdiction or wholly illegal.

34. In cases of counterfeited release, pretended ignorance, or concealment through agencies or instrumentalities not disclosed to Court, the writ may issue if the Court is satisfied about continuing detention. In *T.V. Eachara Varier Vs. Secretary to the Ministry of Home Affairs and Others*, it has been observed that the High Court has the power under Article 226 for issue of a writ in the nature of habeas corpus, to undertake an enquiry into disputed fact of detention by taking evidence, if necessary. In that case the petitioner alleged that his son had been taken into custody by the police from the Regional Engineering College Hostel, Calicut and in spite of his various representations to various authorities he was unable to know the whereabouts of his son. The respondents had totally denied that the petitioner's son had been taken into custody by filing false affidavits and thus disabled themselves from pleading or showing that he was no longer in such custody by reason of his having been released or he having absconded or he having died in police custody. The High Court on the materials on record having come to the conclusion that the petitioner's son was in police custody, took this unique circumstance into account in moulding the relief, and issued a writ of habeas corpus for ordering the respondents to produce the detenu before the Court on a particular date or to inform before that date by memo submitted to the Registrar of the High Court of their inability to do so and on the date posted for hearing the respondents might furnish detailed information as to the steps taken by them to comply with the order of the Court and particularly to locate the detenu.

35. The facts in *Rajan's* case are somewhat distinguishable. In the instant case the army authorities have been constantly maintaining that the three boys were released on 25-9-1980. The families were so informed on 30-9-1980 when no writ petition was pending. In reply to the notices of motion as also to the Rules, the authorities have been stating that the boys were released. The records produced Wore the Court clearly show that they were released. Under such circumstances there is no room for believing that the two boys are still in army custody. Whether they ought to have been handed over to the nearest police station and whether the army authorities have or have not acted according to law is entirely a different matter not within the scope of writ of habeas corpus. In *Rajan's* case also it has been observed that a writ of habeas corpus is purely remedial and carries no punitive or deterrent "force" save in so far as the authorities may be embarrassed by adverse publicity.

36. To avoid such consequences in future it will be desirable that the army authorises invariably hand over persons arrested by them to the nearest police station as provided in Section 5 of the Act,

37. It may also, in this case, be desirable for the army authorities to inform the families of the two boys whenever any male suspect of their (of the two boys) age group is arrested, captured or killed by army so that they may be identified. Let the civil police authorities also follow the same practice until the, two boys are identified.

38. For the reasons stated above these petitions are rejected. The Rules stand discharged. No costs.