

Neutral Citation No. - 2023:AHC-LKO:74307

Court No. - 13

Case :- HABEAS CORPUS WRIT PETITION No. - 337 of 2023

Petitioner :- Mahesh (Minor) Thru. Her Mother Smt. Meena @ Kiran

Respondent :- State Of U.P. Thru. Prin. Secy. Home Deptt. Lko And 3 Others

Counsel for Petitioner :- Dadu Ram Shukla (D.R. Shukla),Manoj Kumar Singh

Counsel for Respondent :- G.A.

Hon'ble Karunesh Singh Pawar,J.

1. Supplementary Affidavit filed by learned counsel for the petitioner is taken on record.

2. This petition has been filed by the detenue through her next friend Smt. Meena @ Kiran (mother of the detenue) praying for issuance of a writ in the nature of Habeas Corpus directing the respondents to produce the corpus of the child/detenue forthwith.

3. Heard learned counsel for the petitioner as well as Shri Alok Tewari, learned A.G.A. for respondent nos. 1 to 3.

4. Notices to respondent no.4 is dispensed with in view of the proposed order.

5. Learned counsel for the petitioner has submitted that the detenue is missing since 25.6.2022 at 4.00 pm to 6.00 pm from Mohalla Shakti Nagar, Police Station Gazipur, Lucknow. He submits that some scuffle took place between the child and respondent no.4 and on the very next day the child became missing, hence, an application was moved at

Police station Gazipur. Thus it is apprehended by the petitioner that the detenu has been kidnapped by respondent no.4.

6. It has been further submits that an F.I.R. under Section 363 Indian Penal Code regarding missing of the detenu was registered as F.I.R. No.326 of 2022 under Section 363 I.P.C., Police Station Gazipur, District Lucknow. It is alleged in the F.I.R. by the complainant Ramtej, who is the husband of the deponent of this petition, that his son Mahesh, aged about 9 years went missing from yesterday between 4.00 pm to 6.00 pm. He used to drink shikanji for the last two months and he had developed some relationship with shikanji seller and he was last seen on the shikanji shop. No allegation in the F.I.R. whatsoever has been made against the respondent no.4 regarding illegal detention. Pamphlet regarding the missing of the detenu have been pasted in the local area of the Police Station Gazipur one of which pamphlet is also on record. Nothing except missing of the detenu has been mentioned in the F.I.R. as well as in the pamphlet. The F.I.R. was lodged on 27.6.2022. Now the writ petition is filed after more than one year i.e. on 17.10.2023 by the mother on behalf of the detenu by making improvement in the prosecution case alleging that Mahesh appears to have been kidnapped by unknown miscreants at the behest of respondent no.4. Still no clear statement has been made by the deponent in this petition that the detenu has been illegally detained by respondent no.4. The facts pleaded in the writ petition are definite improvement from a story of the prosecution in the

F.I.R. which has been alleged by none other than father of the detenu.

7. Learned counsel for the petitioner has relied on a judgement of the Hon'ble Supreme Court in the case of *Home Secretary (Prison) and others vs. H.Nilofer Nisha* reported in 2020(14) SCC 161.

8. Learned A.G.A. for the respondent State, on the basis of instructions received, which is taken on record, has submitted that the investigation was started immediately after lodging of the F.I.R. for search of the missing child/detenu. DCRB has been informed and posters have been pasted at the public places. The investigation is going on. Search operations are also going on. Information regarding missing has been given in various newspapers and broadcast in All India Radio and Doordarshan still the missing persons has not been recovered. During investigation one dead body has been received and his clothes and the DNA samples have been sent for Forensic Science Laboratory for the testing.

9. It is further submitted by learned A.G.A. that it is clear from perusal of the F.I.R. that it is a case of missing and F.I.R. was rightly lodged by the father of the detenu. After more than one year since the deponent of this petition being the mother is not satisfied with the investigation by making improvement in the prosecution story has alleged that at the behest of respondent no.4 some unknown miscreants have kidnapped the detenu. He submits that where missing report has been lodged the petition of Habeas Corpus will not lie. In

support of his contention learned A.G.A. has placed reliance on a judgment of *High Court of Orissa at Cuttack* passed in WPCRL No.124 of 2023 Nimananda Biswal versus State of Odisha & others.

10. Perused the record.

11. It is not disputed that earlier an F.I.R. was lodged by the father of the detenu which was registered as Case Crime No.326 of 2022 under Section 363 Indian Penal Code Police Station Gazipur, District Lucknow against unknown persons on 27.6.2022. While lodging the F.I.R. no allegation against respondent no.4 has been leveled by the complainant that he has kidnapped the detenu rather a simple missing F.I.R. was lodged and consequently the investigation started which is still pending. The information regarding missing of the detenu has been given to various new channels newspapers and pamphlets have been pasted across the city. However, no success has been gained by the police. It appears that in utter frustration and being annoyed by the investigation the petition has been filed by changing the prosecution story for the first time after more than one year by the deponent.

12. The law for issuance of Habeas Corpus is settled. The petitioner has to show as the condition precedent *prima facie* that the detenu is in unlawful detention before it prays the court for issuing the prerogative writ.

13. In the case of *Union of India Vs. Yumnam Anand M. alias Bocha alias Kora alias Suraj and another* reported in

(2007) 10 Supreme Court Cases 190, Hon'ble 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 judgement is reproduced 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."

14. This Court has taken notice of the fact that in the F.I.R., which was lodged by none other than the father of the detenu, no allegation of illegal detention of the detenu by respondent no.4 has been made. Now after more than one year, while filing writ petition through the mother of the detenu, for the first time, it has been alleged that the detenu has been kidnapped at the behest of respondent no.4. This is a clear case of improvement and changing the prosecution story so that the case of Habeas Corpus may be made.

15. So far as case of Home Secretary (Prison) and others (surpa) relied upon by learned counsel for the petitioner is concerned in support of his arguments, a perusal of the said judgement shows that the writ petition was filed by the detenu seeking release from the prison at the strength of

some government order issued by the State government for premature release of convicted persons. The facts of this case are quite peculiar and do not apply to this case at all. Rather it has been held in this case by Hon'ble Supreme Court that before issuing any writ of Habeas Corpus this Court must come to the conclusion that the detenu is under detention without any authority of law.

16. The Writ in the nature of Habeas Corpus cannot be issued in a routine and casual manner. The writ of Habeas Corpus is *festinum remedium* and unless there is a clear case established by the petitioner *prima facie* to show that the detenu is in illegal confinement no writ of Habeas Corpus can be issued. 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 in the F.I.R. for the illegal detention of the person for whose production a writ is to be issued. The petitioner has failed to establish *prima facie* case of unlawful detention of her daughter. A Writ of Habeas Corpus cannot be issued by this Court for tracing out a missing person particularly when the F.I.R. of missing has already been lodged more than one year back by the father of the detenu where there is no allegation of illegal detention.

17. On due consideration of the law laid down by Hon'ble Supreme Court in the case of Nimananda Biswal (supra), Union of India Vs. Yumnam Anand M. alias Bocha alias Kora alias Suraj(supra) as well as Home Secretary (Prisons) and others Vs. H. Nilofer Nisha reported in (2020) 14 Supreme

Court Cases 161, I am of the view that writ of Habeas Corpus cannot be issued in respect of missing person more so when no named person is alleged to be responsible in the F.I.R. for the illegal detention of the person for whose production a writ is sought to be issued.

18. Accordingly, a writ in the nature of Habeas Corpus fails and is accordingly dismissed.

Order Date :- 7.11.2023

Madhu