

Court No. - 67

Case :- HABEAS CORPUS WRIT PETITION No. - 402 of 2022

Petitioner :- Poonam Kushwaha

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Manish Dwivedi

Counsel for Respondent :- G.A.

Hon'ble Rahul Chaturvedi, J.

[1] Heard Sri Manish Dwivedi, learned counsel for the petitioner as well as Sri Ghanshyam Kumar and Sri Mohd. Afzal, learned counsels appearing for the State and perused the records of the case.

[2] At the outset, learned A.G.A. has raised strong preliminary objection with regard to the maintainability of the present Habeas Corpus petition and floated certain arguments against this petition, which would be considered in the later part of the judgment.

[3] From the petition, Sri Dwivedi, learned counsel for the petitioner has sought following prayer mentioned hereinbelow viz:-

“a) Issue a writ, order or direction in the nature of Habeas Corpus direction the respondent no.2 to produce the corpus-Km. Poonam from the custody of respondent no.4(Manish Kumar Sharma) before this Hon'ble Court to ensure his safety and happy life

b) Issue any other suitable writ, order or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

c) Award cost of this petition in favour of the petitioner.”

In this petition, Ms. Poonam Kushwaha(25 years) is

(2)

the daughter of Kailash Chandra Kushwaha who in fact, is the “petitioner no.2” has arrayed (i) State of U.P. Principal Secretary, Homes, Lucknow, Uttar Pradesh; (ii) Superintendent of Police, Banda ; (iii) S.H.O. Police Station-Kalinger, Banda ;(iv) Manish Kumar Sharma aged 29 years s/o Rajesh Sharma, r/o village-Talahati, police station-Kalinger, District-Banda, as respondents from whom he has sought aforementioned prayer.

[4] The bare skeleton fact which has given rise to the present Habeas Corpus petition are formulated hereinbelow :-

(A) Submission advanced by learned counsel for the petitioner no.2 is that Kailash Chandra Kushwaha, has lodged the FIR on 24.01.2022 for the alleged act of enticement of his daughter Poonam Kushwaha on 22.01.2022 from Kalinger. This FIR was got registered as case crime no.25 of 2022 under section 366 IPC at Police Station-Kalinger, District-Banda.

(B) On account of certain misconceptions and mis-information received to the informant, initially the FIR was registered against one Biru Prajapati, but later on, it was revealed to the informant that a person Rohit Bhatt@Manish Kumar Sharma, after hatching the conspiracy with one Afsar, Chand Khan and two others, has forcibly taken away Km. Poonam Kushwaha(24 years) from the custody of her father/petitioner no.2. Consequently, an application was moved on the same day i.e 24.01.2022 itself to the concerned Investigating Officer giving the correct information about the real offenders.

(C) During the pendency of the investigation, petitioner no.2 came to know that Rohit Bhatt@Manish Kumar Sharma carried her daughter to the Bench of this Hon'ble Court seeking civil protection, projecting that both of them are major and now are married couple and thus, their future may be secured by giving certain civil protection to them, accordingly, a Civil Writ Petition No.3002 of 2022 was filed by them and on 17.02.2022, co-ordinate Bench of this Court while relying upon the judgments of Lata

Singh Vs. State of U.P. 2006 Cr.L.J. 3312 and *Bhagwan Das Vs. NCT, New Delhi,(2011) 6 SCC 396* disposed of the aforesaid petition protecting the interest of the couple with certain conditions.

(D) The father of the corpus Mr. Kailash Chandra Kushwaha also came to know that his daughter Poonam Kushwaha got married with respondent no.4.

(E) In the present petition, father has levelled all sorts of severe allegations about the nature and character of respondent no.4 that after laying love trap, Rohit Bhatt@Manish Kumar Sharma spoiled the life of many other young girls, were trapped in his love and thereafter, utilized them for women trafficking and thrown them into flesh market etc.

(F) Raising all his suspicion, father of the girl moved an application on 04.04.2022, raising his grievance regarding his daughter before the Superintendent of Police, Banda but it seems that no heed was paid on the said letter. In addition to this in paragraph no.12 of the petition, it is also alleged that informant's wife Ram Janki(mother of Poonam Kushwaha) has received phone calls allegedly from Manish Bhatt@Manish Kumar Sharma demanding Rs.5 lacs for the safety and security of the kidnaped Ms. Poonam Kushwaha. Perturbed by this, Ram Janki too made an application to the concerned S.H.O., Kalinger on 09.05.2022 but that application too gone into deaf ear of concerned S.H.O.

In paragraph no.14 of the petition, on 24.01.2022, Manish Kumar Sharma and Poonam Kushwaha got married but this marriage was never accepted by her parent. The marriage certificate is from Ram Janki Mandir, Prayagraj dated 24.01.2022 certified by one Acharya Vijay Shashtri annexed as Annexure-8 to the petition.

[5] The petitioner/father was anxious to know about the well-being of his daughter and it is the petitioner who also received unconfirmed information that her daughter may be carried away

(4)

outside the country and on this ground, it is prayed that S.P. Banda(respondent no.2) was directed to produce the corpus of Poonam Kushwaha from the custody of respondent no.4-Manish Kumar Sharma to ensure the safety and security of her life so that justice could be done during the pendency of the present petition.

Interestingly, in the entire writ petition, there is not even a whisper, that his daughter was in the illegal confinement of respondent no.4 or she has been kept forcibly against her wish with respondent no.4.

[6] After hearing these factual submissions advanced by learned counsel for the petitioner, learned A.G.A. relying upon the instructions received from the S.H.O. Kalinger, Banda have pointed out that pursuant to the FIR as case crime no.25 of 2022 under section 366 IPC, police station-Kalinger dated 24.01.2022, the investigation is still going on with full swing. It is the informant who has initially lodged the FIR against one Biru Prajapati and later on, gave an application, have replaced him by inserting Manish Kumar Sharma. During investigation, it has come to the knowledge of the Investigating Agency that the aforesaid couple have solemnized marriage in some temple at Prayagraj and appeared before the Court for having a civil protection by means of Writ-C No.3002 of 2022 and vide order dated 17.02.2022, the single Bench of this Court has protected the interest of the couple with certain conditions.

[7] Besides this, petitioner no.1-Poonam Kushwaha on 27.02.2022 has given an application to the S.P. Banda annexing the certified copy of the aforesaid order levelling specific allegations against her own father, that petitioner no.2 Kailash Chandra Kushwaha was planning to get her married with a person double of her age. Meanwhile, she, on her own, contacted Manish Kumar Sharma, respondent no.4 and both of them got married on 24.01.2022 at Prayagraj. This marriage was performed by them as

per their own sweet will without any coercion or duress from any quarter and now, they are leading happy marital life.

However, as per the wild allegations levelled in paragraph 12, 13, 15, 16 and 17 of the writ petition, that ransom of Rs. five lacs were demanded on telephone of Ram Janki, mother of Poonam Kushwaha is concerned, the police is examining all these allegations in a thorough professional way and yet to file their report under section 173(2) Cr.P.C.

Learned A.G.A. has accused the petitioner with regard to the maintainability that by filing the present Habeas Corpus petition, the father Kailash Chandra Kushwaha wants to exploit its extra-ordinary power just to exert extra pressure on the police who are in the midst of the investigation. It is further contended by learned A.G.A. that this Habeas Corpus petition is nothing but a device of arm twisting by involving the High Court in this ongoing investigation thus, it is not only purposive but also misconceived.

[8] It has been further contended that writ of Habeas Corpus can only be issued when there is specific assertion in the writ petition that the corpus is in the illegal captivity or wrongful confinement of an individual against his/her wish and desire. In the instant case, when the girl, major girl of 24 years, no doubt, without any information to her parent, fled away with respondent no.4 and she has allegedly solemnized marriage and happily residing with him, it is a million dollar question as to whether she could be considered in the illegal confinement of respondent no.4 ?

[9] After hearing the rival parties, the father is asserting that his daughter is being enticed away by respondent no.4 in the dead hours of the night of 21/22.01.2022 whereas the other documents especially Annexure-4 order in the writ petition Smt. Poonam Kushwaha and ors. Vs. State of U.P., indicates that both of them got married and leading a happy marital life. This is a precise question of investigation. However, in this backdrop, the custody of

the victim being disputed, now it is the police who has to investigate this factual issue that the corpus is residing with respondent no.4 on her sweet will OR Manish Kumar Sharma respondent no.4 is keeping her in his illegal captivity, against her desire. This comes within exclusive domain of police to investigate into the matter.

After hearing the rival submission, the Court has formulated following proposition of law for the judicial scrutiny, viz :-

WHEN THE POLICE IS PURSUING ITS INVESTIGATION AFTER LODGING OF THE FIR, AND, IS IN THE MIDST OF INVESTIGATION, WHETHER HABEAS CORPUS PETITION IS MAINTAINABLE OR NOT ?? OR IN OTHER WORDS, THE HABEAS CORPUS PETITION AND INVESTIGATION WITH REGARD TO THE SAME ISSUE CAN GO PARALLELLY OR NOT ?

Let us examine this instant preliminary objection raised by the learned A.G.A.

[10] So far as this pertinent question regarding maintainability of the present Habeas Corpus petition is concerned, it is imperative to examine the meaning and scope of Habeas Corpus petition from its historical background.

[11] The Latin phrase habeas corpus means literally that "you", that is, the person with custody over the prisoner, must "have the body" of the prisoner produced in court at the place and time ordered by a judge. The writ of habeas corpus provides individuals with protection against arbitrary and wrongful imprisonment.

[12] The meaning of the term habeas corpus is "you must have the body". In *Halsbury Laws of England, 4th Edition, Vol.11, p.1452, p.768*, it is observed:

"The writ of habeas corpus ad subjiciendum" which is

commonly known as the writ of habeas corpus, is a prerogative High Court 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 causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on habeas corpus is not, however, an acquittal, nor may the writ be used as a means of appeal.

[13] Habeas corpus ad subjiciendum means "that you have the body to submit or answer."

May in his Constitutional History of England (1912), Vol.II, p.130, described writ of habeas corpus as "the first security of civil liberty". Blackstone called the writ of habeas corpus as "the great and efficacious writ in all manner of illegal confinement."

[14] Julius Stone in Social Dimensions of Law and Justice, (1966), p.203 described the writ of habeas corpus as a picturesque writ with an extraordinary scope and flexibility High Court of an application.

[15] According to Dicey (A.C. Dicey), Introduction to the Study of Law of the Constitution, Macmillan and Co., Ltd., p.215(1915): "*if, in short, any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the court and if he is suffering restraint without lawful cause, set him free.*"

[16] In Greene vs. Home Secretary, (1941) 3 All ER 388, it has been observed:

"Habeas corpus is a writ in the nature of an order calling upon the person who has detained another to produce the later before the court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction of imprisonment."

[17] The prerogative writ of habeas corpus ad subjiciendum

is the most renowned contribution of English common law to the protection of human member.

In India, the jurisdiction to issue prerogative writs came with the establishment of the Supreme Court by regulating Act of 1773. The charter of 1774 gave power to each High Court of the justices of the Supreme Court of Calcutta to issue a writ of habeas corpus. The three Supreme Courts in Calcutta, Bombay and Madras by the Act of Parliament in 1861 were abolished and High Courts were established and the power to issue writs of habeas corpus was inherited by them. This power to issue writ of habeas corpus was taken away from 1875 and new power of the High Court arose under [Section 491](#) of the Code of Criminal Procedure, 1898 to issue statutory directions in the nature of habeas corpus. By Articles 32 and 226, the Supreme Court and all the High Court got jurisdiction to issue writ of habeas corpus throughout their respective territorial jurisdiction when the Constitution came into force.

[18] Considering the decision of the Constitution Bench, recently the Apex Court in ***State Vs. H. Nilofer Nisha, since reported in (2020) 14 SCC 161*** has considered the expanding scope of the writ of habeas corpus and has held as under :-

"16. A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is "to produce the body", over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded, there are certain limitations to this writ and the most basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenu

is under detention without any authority of law.”

[19] Illegal confinement is the pre-condition to issue a writ of habeas corpus. Though a writ of right, it is not a writ of course. It is an extra ordinary remedy and cannot be granted on mere asking. It cannot be resorted to in a casual and routine manner. Who is responsible for kidnapping the son of the petitioner and who is wrongfully confining him are matters of investigation and definite opinion in this regard is lacking in the present case.

[20] In a criminal investigation, what action should have been taken by the police that cannot be a matter of habeas corpus because there is no application whatsoever that there has been wrongful confinement by the police.

In Union of India vs. Yumnam Anand M. @ Bocha @ Kora @ Suraj, (2007) 10 SCC 190 while explaining the nature of writ of habeas corpus, **the Supreme Court held that it is writ of right, it is not a writ of course.** The application must show a prima facie case of his unlawful detention. Relevant para-7 of the judgment reads 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."

[21] **In Kanu Sanyal vs. Distt. Magistrate, (1973) 2 SCC 674**, the Supreme Court held that while dealing with a writ of habeas corpus, the Supreme Court held that it 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.

[22] **In Swapan Das vs. the State of West Bengal & Ors.** 2013 SCC Online Cal 11681, the High Court Calcutta held as under:

"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 High Court asking this court to direct the police to track down his missing son. For these reasons, we dismiss the writ petition."

[23] Similarly, in **Sulochana Bai vs. State of M.P. & Ors**, 2008 (2) MPHT 233, the High Court of Madhya Pradesh observed as under:

"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."

[24] In **Selvaraj vs. the State, Rep. by the Superintendent of Police, Nagapattinam District, in 2018(3) MLJ (Cri) 712**, a Division Bench of the Madras High Court observed as under:

The constitutional Courts across the country predominantly held in catena of judgments 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 and the Constitutional Courts shall be restrained in entertaining such Habeas Corpus petition, where there is no allegation of "illegal detention" or suspicion about any such "illegal detention". Man/Women missing cases cannot be brought under the provision of the Habeas Corpus petition. Man/Women missing cases are to be registered under the

regular provisions [of the Indian Penal Code](#) and the Police officials concerned are bound to investigate the same in the manner prescribed under [the Code](#) of Criminal Procedure. Such cases are to be dealt as regular cases by the competent Court of Law and the extraordinary jurisdiction of the Constitutional Courts cannot be invoked for the purpose of dealing with such Man/Women Missing cases.

To hold investigation in a cognizable offence is the statutory right of the police. It is well settled that at the stage of investigation the Court has no role to play. However, the investigating agency is required to take all necessary steps to conclude the investigation and submit its report to the Magistrate concerned. If the police fail to perform their statutory duty in accordance with law, the Court has a bounden statutory obligation to ensure that the investigation is conducted in accordance with law.

[25] In **Amar Nath Chaubey Vs. Union of India (SLP (Cr.) no.6951 of 2018)** by order dated 14 th December, 2020, a three-Judge Bench of the Supreme Court observed as under :-

"8. The police has a statutory duty to investigate into any crime in accordance with law as provided in [the Code](#) of Criminal Procedure. Investigation is the exclusive privilege and prerogative of the police which cannot be interfered with. But if the police does not perform its statutory duty in accordance with law or is remiss in the performance of its duty, the court cannot abdicate its duties on the precocious plea that investigation is the exclusive prerogative of the police. Once the conscience of the court is satisfied, from the materials on record, that the police has not investigated properly or apparently is remiss in the investigation, the court has a bounden constitutional obligation to ensure that the investigation is conducted in accordance with law. If the court gives any directions for that purpose within the contours of the law, it cannot amount to interference with investigation. A fair investigation is, but a necessary concomitant of Articles 14 and 21 of the Constitution of India and this Court has the bounden obligation to ensure adherence by the police."

[26] In **Manohar Lal Sharma Vs. Principal Secretary & Ors., since reported in (2014) 2 SCC 532**, the Supreme Court observed as under :-

"24. In the criminal justice system the investigation of an offence is the domain of the police. The power to investigate into the cognizable offences by the police officer is ordinarily not impinged by any fetters. However, such power has to be exercised consistent with the statutory

provisions and for legitimate purpose. The courts ordinarily do not interfere in the matters of investigation by police, particularly, when the facts and circumstances do not indicate that the investigating officer is not functioning bona fide. In very exceptional cases, however, where the court finds that the police officer has exercised his investigatory powers in breach of the statutory provision putting the personal liberty and/or the property of the citizen in jeopardy by illegal and improper use of the power or there is abuse of the investigatory power and process by the police officer or the investigation by the police is found to be not bona fide or the investigation is tainted with animosity, the court may intervene to protect the personal and/or property rights of the citizens.”

[27] Now, in this backdrop of settled tenets of law with regard to Habeas Corpus petition from its very inception, its historical background and thereafter its gradual evolution by various court of law in India, one of the basic and essential convenient that, an individual must be detained or confined without any authority of law. Confinement means, “the state of being forced to stay in prison or another place which one cannot leave”. Thus the basic ingredient of illegal confinement or detention is forced stay and against one's wish or desire. If a person is residing on his own sweet free will or on his own volition, cannot be fall within realm of illegal confinement, under these circumstances, Habeas Corpus Petition is simply a futile exercise.

In the instant case, when both the victim(girl) and respondent no.4 themselves reached to the Bench of this Court by filing a Writ C No.3002 of 2022 and entertaining that writ, on 17.02.2022, Bench has protected their interest that by no stretch of imagination, the girl is said to be in illegal confinement or detention of respondent no.4. Not only this, after obtaining the order from this Court, she has submitted the same by giving a covering letter in her own writing to the concerned police station, accusing her own father, that she was compelled to marry of a person double of her age, an elderly person and thus, she on her own, decided to fled away with the boy(respondent no.4) with whom she has got an early acquaintance/friendship and a tender relationship and both of them have decided to marry. Since, both of them were major, they decided to marry with each other and now they are married couple. It seems that the parent are against this marriage and that's why after concocting the facts of the

case, wants to involve the High Court to exert pressure upon the police, to hold a futile exercise.

[28] From above, this Court is of the strong opinion, that petitioner no.2 invoking this extra-ordinary powers by way of Habeas Corpus petition, when he has already lodged an FIR and the police is seized with the matter. It is expected from the S.S.P. and S.H.O. Concern district and police station to look into the matter with all their professional skills and competence at the earliest, else the petitioner may explore other alternative avenues from their redressal of grievance, but certainly not, the Habeas Corpus Petition. In the instant Habeas Corpus Petition, there is not even a whisper that the corpus has been kept forcibly by respondent no.4 against her wish. In the absence of the basic pleadings in the petition, it lacks merits and liable to be dismissed on this score alone.

[29] In my view, filing of the present Habeas Corpus Petition is nothing but an arm twisting of the local police officials who are already engaged, after lodging of the FIR. This Court feels that after the girl is fled away from the guardianship of her parent, it is their personal perception that their son or daughter has been kept in the illegal captivity of the offence. But, in majority of the cases, when these couples are brought before the Court, after the notices, these couples ruthlessly blasts the perception of their parent, resultantly, the Habeas Corpus Petition would end into big zero and an exercise in vanity.

[30] Rightly so, the Court too is of the considered opinion that where the FIR with regard to alleged act of kidnapping, abduction or illegal confinement or for ransom has already been filed and police personnels are pursuing the matter at their end, the lodging of parallel Habeas Corpus Petition is motivated and purposive one. By filing such type of petitions, the impatient petitioner wants to involve the Courts to exert their pressure upon the police to speed up their investigation. The Habeas Corpus Petitions should not to be used as whip over the police to

officials, just to serve out the petition's vanity over the police.

[31] Thus, after marshalling of facts and circumstances of the instant case and the law in this regard, the preliminary objection raised by learned A.G.A., finds force and accordingly instant Habeas Corpus Petition is **dismissed** at the admission stage itself.

[32] It is made clear that the ratio adopted in the present case shall not apply in the case of minors because any amount of their consent or willingness is not a valid consent in the eye of law and therefore, the police report shall not be precluded in the matter of minors.

Order Date :-01.08.2022
Sumit S