IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.1270 of 2021

Arising Out of PS. Case No.-160 Year-2021 Thana- BUDDHACOLONY District- Patna

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Sachidanand Sah @ Sachchidanand Sah S/O Jaynarayan Sah R/O Village-Singhara, P.S.- Mahua, District- Vaishali ... ... Petitioner

Versus

1. The State of Bihar through the Chief Secretary Government of Bihar, Patna
2. Senior Superintendent of Police, Patna
3. Investigating Officer of Buddha Colony P.S. Case No. 160/2021 (Sri Durgesh Kumar Gahlot P.S.I., Buddha Colony, P.S.- Patna)
4. Officer-In-Charge, Buddha Colony P.S., Patna
5. Ambuj Srivastav S/o Suresh Prasad Resident of Krishi Market, Narkatiyaganj, P.S.- Sikarepur, District- West Champaran

... ... Respondents

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Appearance :

For the Petitioner/s : Mr. Sanjay Kumar, Advocate
For the Respondent/s : Mr. Prabhu Narain Sharma, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 29-11-2021

Heard Mr. Sanjay Kumar, learned counsel for the petitioner and Mr. Prabhu Narain Sharma, learned counsel for the State.

2. This application under Article 226 of the Constitution of India has been filed by the petitioner for issuance of a writ in the nature of *habeas corpus* for directing the respondent authorities to recover the daughter of the petitioner and produce her before the Court.

3. The contention of the petitioner is that his daughter Priyanka Kumari was residing in a girls' hostel situated at Boring Canal Road, Patna. She was doing a private job after completion of her MBA course. On 11.04.2021, he tried to contact her mobile number but her

number could not be connected. Ultimately, he went to her hostel but she was found absent. On inquiry, he came to know that she was absent from the hostel since last 15 days. The lock of the door of her room was broken with the consent of the caretaker of the girls' hostel and during search of her room, a marriage certificate was found. A perusal of the marriage certificate disclosed that his daughter had married one Ambuj Kumar Srivastava (respondent no. 5). When he called respondent no. 5 on his mobile number and tried to know the whereabout of his daughter, he did not give any satisfactory reply. He suspected that his daughter might have been taken to Himachal Pradesh and killed by the respondent no. 5.

4. Mr. Sanjay Kumar, learned counsel appearing for the petitioner submitted that on 13.05.2021 the petitioner submitted a written report to the Officer Incharge of Buddha Colony Police Station making allegations against respondent no. 5 and his parents. On the basis of the said written report, Buddha Colony P.S. Case No. 160 of 2021 dated 13.03.2021 was registered under Sections 363, 365, 420 and 406 read with 34 of the Indian Penal Code against respondent no. 5 (Ambuj Kumar Srivastava), his mother (Sunita Devi) and his father (Suresh Prasad). He submitted that since the date of institution of the FIR, the petitioner is running from pillar to post for the recovery of his daughter but all his efforts have gone in vain. He contended that the police have mechanically submitted chargesheet against the respondent no. 5 for the offences under which the First Information Report (for

short ‘FIR’) was registered and the learned Jurisdictional Magistrate has taken cognizance of the offences under Sections 363, 365, 420, 406 and 34 of the Indian Penal Code vide order dated 15.07.2021. However, the daughter of the petitioner has not been recovered till date. He submitted that under the circumstances, the petitioner has no option but to approach this Court for the redressal of his grievance.

5. On the other hand, Mr. Prabhu Narain Sharma, learned counsel appearing for the State submitted that the report of the police submitted under Sections 173(2) Cr.P.C. is only against the respondent no. 5. The investigation is still continuing. He contended that a perusal of the police report as contained in Annexure ‘3’ to the writ petition would suggest that the chargesheet against respondent no. 5 was submitted as the period of 60 days from the date of his arrest was going to be completed and the non-submission of the report would have resulted in grant of compulsive bail under Section 167 Clause (2) of the Code of Criminal Procedure. He contended that in the present case, the police have not arrived at any final conclusion as to whether the victim (daughter of the petitioner) is in illegal confinement of the respondent no. 5 or not. He further contended that the writ of *habeas corpus* would not be maintainable in such cases as it is not a case of illegal detention rather it is a case of law and order problem and the police are making sincere efforts to investigate the case from all angles.

6. We have heard learned counsel for the parties and carefully perused the records. At the outset, it is to be noted that for an

incident which is said to have taken place on 11.04.2021, the matter has been belatedly reported to the police on 13.05.2021. The allegations made in the FIR do not constitute a cognizable offence. In case, a cognizable offence is reported to the Officer-in-Charge of a police station, he is duty bound to register FIR and carry on investigation. It is not the case of the petitioner that the police have not instituted the case or the investigation is not being conducted. The allegations made in the FIR indicate that a suspicion has been raised against the respondent no. 5 and his parents that they may have abducted and killed the daughter of the petitioner.

7. Since the matter is under investigation before the police, it would not be proper for this Court to make any observation on the merit of the allegations made in the FIR. At least, from the FIR, this much is clear that the informant is not in a position to tell the Court as to whether the victim is in the captivity of any particular person including respondent no. 5.

8. The police report submitted under Section 173(2) of the Code of Criminal Procedure shows that the investigation has been conducted partially. Moreover, from the report submitted under Section 173(2) of the Cr.P.C., we do infer that the same has been submitted by the police on the basis of a half baked investigation in order to frustrate the right of release of the respondent no. 5 on bail under Section 167(2) of the Cr.P.C.

9. We express our concern about the manner in which the investigation is being conducted. The duty of the police is not to keep someone in jail but to bring the investigation of the case to a logical end. The report under Section 173(2) should not be filed only with a purpose to ensure that a person against whom a case has been instituted should not be released on compulsive bail. We are of the opinion that in every case reported to the police, the police are required to do a sensitive and committed investigation in order to instill confidence in the minds of the people.

10. However, while saying so, we are also of the opinion that in such cases where there is no surety of someone being in illegal confinement of a particular person, an issuance of a writ of *habeas corpus* would not serve the purpose. In case, the petitioner has got any grievance with respect to the inefficiency in investigation, a writ of mandamus may be sought and the remedy would not be a writ of *habeas corpus.*

11. The prerogative writ of *habeas corpus* ad subjiciendum is the most renowned contribution of English common law to the protection of human member.

12. Habeas corpus ad subjiciendum means “that you have the body to submit or answer.”

13. The meaning of the term *habeas corpus* is “you must have the body”.

14. 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 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."*

15. The Constitution Bench of the Supreme Court in the case of ***Kanu Sanyal vs. District Magistrate, Darjeeling & Ors., [(1973) 2 SCC 674]***, dealing with the nature and scope of the writ of habeas corpus observed as under:-

> *"4. It will be seen from this brief history of the writ of habeas corpus 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. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the*

Court, but the production of the body of the person detained is directed in order that the circumstances of his detention may be inquired into, or to put it differently, "in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint". The form of the writ employed is "We command you that you have in the King's Bench Division of our High Court of Justice — immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody — together with the day and cause of his being taken and detained — to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf". The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint. The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C., in Cox v. Hakes "the essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom" and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end. The production of the body of the person alleged to be wrongfully detained is ancillary to this main purpose of the writ. It is merely a means for achieving the end which is to secure the liberty of the subject illegally detained. In the early days of development of the writ, as pointed out above, the production of the body of the person alleged to be wrongfully detained was

essential, because that was the only way in which the Courts of common law could assert their jurisdiction by removing parties from the control of the rival courts and thereby impairing the power of the rival courts to deal with the causes and persons before them. The common law courts could not effectively order release of the person unlawfully imprisoned by order of rival courts without securing the presence of such persons before them and taking them under custody and control. But the circumstances have changed long since and it is no longer necessary to have the body of the person alleged to be wrongfully detained before the Court in order to be able to inquire into the legality of his detention and set him free, if it is found that he is unlawfully detained. The question is whether in these circumstances it can be said that the production of the body of the person alleged to be unlawfully detained is essential in an application for a writ of habeas corpus. We do not think so. There is no reason in principle why that which was merely a step in the procedure for determining the legality of detention and securing the release of a subject unlawfully restrained should be elevated to the status of a basic or essential feature of the writ. That step was essential to the accomplishment of the purpose of the writ at one time, but it is no longer necessary. The inquiry into the legality of the detention can be made and the person illegally detained can be effectively set free without requiring him to be produced before the Court. Why then should it be necessary that the body of the person alleged to be wrongfully detained must be produced before the Court before an application for a writ of habeas corpus can be decided by the Court? Would it not mean blind adherence to form at the expense

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of substance? Why should we hold ourselves in fetters by practice which originated in England about three hundred years ago on account of certain historical circumstances which have ceased to be valid even in that country and which have certainly no relevance in ours? But we may point out that even in England it is no longer regarded as necessary to order production of the body of the person alleged to be wrongfully detained, in an application for a writ of habeas corpus."

16. On 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.****" (emphasis supplied)*

17. Illegal confinement is the pre-condition to issue a writ of *habeas corpus*.

18. 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 abducting or confining the daughter of the petitioner and who is wrongfully confining her are the subject matter of investigation and definite opinion in this regard is lacking in the present case.

19. In ***Madhav Das Agrawal & Anr. Vs. State of U.P. 2007 (59) All.Cr.Cases 202***, the Allahabad High Court held that in every case of kidnapping or abduction, the proper remedy is to lodge an FIR and get it investigated and not to issue a writ of *habeas corpus*. It has also been held when a writ of *habeas corpus* is to be issued against a private party, *prima-facie* proof that detenue is alive or is in illegal custody of private person is necessary.

20. In a criminal investigation, what action should have been taken by the police cannot be a matter of *habeas corpus* because it is not the case of the petitioner that his daughter has wrongfully been confined by police. Moreover, it is a settled position in law that

investigation of a cognizable case is the sole domain of the police. At this stage, the Court has no role to play.

21. In the instant case, the writ of *habeas corpus* cannot be issued because the writ of *habeas corpus* is festinum remedium and the power can only be exercised in a clear case.

22. In view of the facts of the instant case, developments during investigation and the law as discussed above, we are of the opinion that the writ petition in the present form is not maintainable. Accordingly, it is dismissed.

23. Before parting with the case, however, this Court would observe that dismissal of the instant case is not to be viewed by the police authorities as a license to in any way decrease the thrust of the investigation. The same is expected to continue in accordance with law with due sensitivity and sincerity.

(Ashwani Kumar Singh, J)

(Rajeev Ranjan Prasad, J)

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