HABEAS CORPUS

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1. Constitution of India Art 226 – Habeas Corpus petition – as per the inquiry report brother of the petitioner was arrested by the BSF personnel while on his way to his place of duty as a teacher and has disappeared since then –

prayer to release the detenu and constitute magisterial inquiry and to prosecute the respondents under Sec 302 read with Sec 149 RPC and direct them to pay a compensation of Rs. one crore to the family of the detenu – investigations are already in progress – detenu has not been released – as held by various decisions of the SC State is under a legal obligation to compensate the family of the deceased for the pain and sufferings occasioned by custodial death of the deceased – relying on various decisions and totality of facts and circumstances amount of Rs. one lakh is awarded as just and proper compensation to be paid by the respondents to the family of the deceased. Petition is allowed.

Habeas Corpus Petition. On the basis of material, and inquiry conducted by the CJM the brother of the petitioner was arrested by the BSF personnel while on his way to his place of duty as a teacher in a higher secondary school and from then on he had disappeared. The petitioner prayed for constituting Magisterial inquiry and prosecuting the respondents under Sec 302 read with Sec 149 RPC and also to direct the respondents to pay a compensation of Rs. one crore to the family of the detenu. Case of disappearance has been registered and investigations are already in progress. It being a case of arrest and custodial disappearance, the respondents, Union of India and the BSF personnel are under legal obligation to compensate the family for the pain and sufferings occasioned by loss of liberty and disappearance of their bread earner. Under public law, the Union and its instrumentality are under legal duty to safeguard the life and liberty of the individuals and protect its citizens from its wrong doings which may occasionally result in death of the citizen. There are a no. of decisions of the SC which go in favour of awarding compensation to the family of the deceased who has become a victim of custodial violence. With regard to quantum of compensation details about family strength and other relevant facts having a bearing on the question of award of compensation are quite sketchy. Taking into consideration the various decisions and totality of facts and circumstances the amount of Rs. one lakh is awarded as just and proper compensation to be paid by the Union of India and BSF, to the family of the deceased. Petition allowed.

[Mohammad Sultan Mir vs. State Of J. & K.; 2001-(107)-CRLJ -0301 -J&K]

2. The 21st Sikh Regiment had set up a camp at Phungrei, Assam in 1982. Some jawans attached to this Regiment visited Huining village on March 5, 1982 rounded-up villagers and detained them in the playground and the women folk and children were confined. Most of the

villagers were released the next day, except three students studying in a College were arrested and taken away. The jawans resorted to firing which resulted in the death of one person. On March 10, 1982, C. Daniel, a former Naik-Subedar attached to Manipur Rifles and at the relevant time Head Master of Junior High School, Huining, Ukhrul East, District Manipur State and Shri C. Paul, Assistant Pastor, attached to the Baptist Church in Huining village were whisked away from Huining village to Phungrei Camp and detained by the Officer-in-charge of 21st Sikh Regiment and were held incommunicado and their whereabouts were not made known. As C. Daniel and C. Paul did not return to the village till March 15, 1982, their wives went to Phungrei Camp in search of their respective husbands and when they were waiting there, they saw C. Daniel and C. Paul being led away by 4 army jawans towards the west. In the meantime, on a complaint, the Deputy Commissioner directed Superintendent of Police to ascertain the whereabouts of C. Daniel and C. Paul, all of Huining village. Accordingly, the Superintendent of Police submitted his report on March 27, 1982 stating that three persons of Phungcham village have been released by Assam Rifles on March 19, 1982.

On a Petition of Habeas Corpus being filed in the Guwahati High Court concerning the production of C. Daniel and C. Paul, it was reiterated by the State of Assam that both of them were called for the purpose of identification of certain suspects on March 10, 1982 and after spending the night at the army camp they were allowed to go on March 11, 1982 and since then the security forces have no knowledge about their whereabouts.

It was established that C. Daniel and C. Paul for whose production the petition was filed were respectable citizens, the former being the Headmaster of the Junior High School at Huining village and the latter being Assistant Pastor, residing at Huining village. The fact which indisputably emerges is that C. Daniel and C. Paul were brought from Huining village by the army jawans and were taken to Phungrei Camp. It is admitted by the respondents that C. Daniel and C. Paul were at Phungrei Camp at the instance of army officers on March 10, 1982 and spent the night at the camp between March 10 and March 11, 1982.

Once unerringly reaching the conclusion that C. Daniel and C. Paul were taken to Phungrei Camp by officers and jawans of 21st Sikh Regiment on March 10, 1982 and they never left the army camp as canvassed on behalf of the respondents on March 11, 1982, it was held obligatory upon the respondents to produce C. Daneil and C. Paul and to explain their whereabouts

The counsel for the respondents contended that once the respondents have adopted a position that C. Daniel and C. Paul had come to the army camp at the request of the army authority, but they left that place on their own in company of their friends, a writ of habeas corpus cannot be issued, and the respondents cannot be called upon to file a return to the writ. When a petition for a writ of habeas corpus under Article 32 of the Constitution is moved before the Court, ordinarily the Court would not issue ex parte a writ of habeas corpus unless the urgency of the situation so demands or issuing of a notice of motion was likely to result in defeat of justice. Further the Court will be reluctant to issue a writ of habeas corpus ex parte where the fact of detention may be controverted and it may become necessary to investigate the facts. The normal practice is that when a petition for a writ of habeas corpus is moved, the Court would direct a notice to be served upon the respondents with a view to affording the respondents to file evidence in reply. If the facts alleged in the petition are controverted by the respondents appearing in response to the notice by

filing its evidence, the Court would proceed to investigate the facts to determine whether there is substance in the petition for a writ of habeas corpus. (See Halsbury's Laws of England, Fourth Edition, Vol. 11, paragraph 1482). If on investigation of facts, the Court rejects the contention of the respondent and is satisfied that the respondent was responsible for unauthorised and illegal detention of the person or persons in respect of whom the writ is sought, the Court would issue a writ of habeas corpus which would make it obligatory for the respondents to file a return. It is in this sense that in Thomas John Barnardo v. Mary Ford, 1892 AC 326, the House of Lords held that even if upon a notice of motion, it is contended by the person against whom the writ is sought that the person alleged to be in the custody of the respondents has long since left the custody, a writ can be issued and return insisted upon. A few facts of that case will render some assistance in ascertaining the ratio of the case. One Harry Gossage was put at the instance of a clergyman in an institute comprising homes for destitute children and of which appellant Thomas John Barnardo was the founder and director. Mother of Harry Gossage desired that hers on Harry Gossage be transferred to St. Vincent's Home, Harrow Road, a Catholic home and a request to that effect was made to the appellant. After some correspondence was exchanged between the parties, a petition was moved in the Queen's Bench Division, whereupon a summons was served upon the appellant to attend the Court to show cause, why a writ of habeas corpus commanding him to produce the body of the said Harry Gossage should not be issued. The appellant filed several affidavits inter alia contending that the boy Harry Gossage, was adopted by one Mr. Norton of Canada on November 16, 1888 long before the respondent mother conveyed a desire to transfer the boy to the Catholic home. It was further contended on behalf of the appellant that Harry Gossage was not with him since November 16, 1888 when he transferred him into the care of Mr. Norton and at the time of the service of the summons, he was not in his custody or power. In a proceeding before Methew, J. after cross-examination of the appellant the learned Judge refused to order the writ to be issued. In the meantime, the case in Reg. v. Barnardo Tye's case (1889) 23 QBD 305 was decided by the Court of Appeal in which it was laid down that it was not an excuse for non-compliance with a writ that the defendant had parted with the custody of the child to another person if he had done so wrongfully, and accordingly a fresh application was made for a writ of habeas corpus. After hearing the arguments, the Judges of the Queens Bench Division made absolute the order for the issue of the writ. The appellant approached the House of Lords. It is in this context that the Court held that the respondent was entitled to a return of the writ.

Accordingly, the petition was allowed and the Court directed that a writ of habeas corpus be issued to the respondents commanding them to produce C. Daniel and C. Paul.The notice was served on respondents 1, 2 and 4. In compliance with the mandatory direction contained in the writ of habeas corpus, the person to whom it is directed is under a legal obligation to produce the body of the person alleged to be unlawfully detained before the Court on the day specified and to make a formal return to the writ. (Halsbury's Laws of England, Fourth Edition, Vol. 11, para 1492 at page 791). Such a writ has been issued and there has been failure to produce the missing persons in respect of whom writ is issued and to file the return as mandated by law.

The next question therefore, is : what is the appropriate mode of enforcing obedience to a writ of habeas corpus ?

The Contempt of Courts Act, 1971 defines 'Contempt of Court' in S. 2(a) to mean 'civil contempt'

or ‘criminal contempt’. ‘Civil contempt’ is defined in S. 2(b) to mean ‘wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court’. Wilful disobedience to a writ issued by the Court constitutes civil contempt. The question is : whether this disobedience is wilful ? Mere failure to obey the writ may not constitute civil contempt depending upon the facts and circumstances of the case. But wilful disobedience to a writ issued by a Court constitutes civil contempt. Again it is well settled that ‘the appropriate mode of enforcing obedience to a writ of habeas corpus is by committal for contempt. A committal order may be made against a person who intentionally makes a false return to a writ of habeas corpus, but an unintentional misrepresentation on a return is not a ground for committal’. On the facts of the case, one can say that there was a wilful disobedience to the writ of habeas corpus by misleading the Court by presenting a distorted version of facts not borne out by the record. It is thus established that the respondents 1, 2 and 4 have committed civil contempt by their wilful disobedience to the Writ.

Civil contempt is punishable with imprisonment as well as fine. In a given case, the Court may also penalise the party in contempt by ordering him to pay the costs of the application. (Halsbury’s Laws of England, Fourth Edition, Vol. 9, para 100 at p. 61). A fine can also be imposed upon the contemnor.

Now in the facts and circumstances of the case, the Court did not propose to impose imprisonment nor any amount as and by way of fine but keeping in view the torture, the agony and the mental oppression through which Mrs. C. Thingkhuila, wife of Shri C. Daniel and Mrs. C. Vangamla, wife of Shri C. Paul had to pass and they being the proper applicants, the formal application being by Sebastian M. Hongray, the Court directed that as a measure of exemplary costs as is permissible in such cases, the State of Assam and Assam Rifles shall pay Rs. 1 lac to each of the aforementioned two women.

A query was posed to the learned Attorney General about the further step to be taken. It was made clear that further adjourning the matter to enable the respondents to trace or locate the two missing persons is to shut the eyes to the reality and to pursue a mirage. As we are inclined to direct registration of an offence and an investigation, the court declined to express any opinion as to what fate has befallen to Shri C. Daniel and Shri C. Paul, the missing two persons in respect of whom the writ of habeas corpus was issued save and except saying that they have not met their tragic end in an encounter as is usually claimed and the only possible inference that can be drawn from circumstance already discussed is that both of them must have met an unnatural death. Prima facie, it would be an offence of murder. Who is individually or collectively the perpetrator of the crime or is responsible for their disappearance will have to be determined by a proper, thorough and responsible police investigation. It is not necessary to start casting a doubt on anyone or any particular person. But prima facie there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death. And the Union of India cannot disown the responsibility in this behalf. If this inference is permissible which the Court considered reasonable in the facts and circumstances of the case, it directed that the Registrar shall forward all the papers of the case accompanied by a writ of mandamus to the Superintendent of Police, Ukhrul, Manipur State to be treated as information of a cognizable offence and to commence investigation as prescribed by the relevant provisions of the Code of

Criminal Procedure.
[Sebastian M. Hongray vs. Union Of India; 1984-(090)-CRLJ -0289 –SC]
2. A petition of habeas corpus was registered on a telegram by a lawyer, received by the Chief Justice inter alia stating that Vaiyapuri, son of Govindaswamy of Canalpuram Palavakkam, Madras was forcibly taken by the Inspector of Police. Thuraipakkam and his men and was illegally detained for the past five days. It is stated that the life of the petitioner is in stake and relatives are not allowed to feed him.
The Public Prosecutor represented that nowadays it has become a fashion to send telegram of this kind and then file writ petitions making allegations that no action has been taken. It is submitted by him that advocates should not be permitted to send telegrams like this. It is also submitted that the Registry should not register every telegram as a H.C.P. Court held that in it's view, it was right.
The Court had come across a number of cases in which this practice of registering telegrams as writ petitions under Art. 226 of the Constitution of India is being not only misused but also grossly abused. In one case, a petition under Art. 226 of the Constitution was pending as H.C.P. No. 1239 of 1993 from 2-8-1993. In that case, the detenu's wife sent a telegram to the Chief Justice on 4-9-1993 requesting him to treat it as a writ petition and making a complaint against the District Judge, Salem that he was illegally remanding her husband into custody beyond the period specified by law. There was no reference to the pending H.C.P. in the telegram. The Chief Justice had to direct an administrative enquiry. It was found that the District Judge had acted within the parameters laid down by law and the papers had to be filed. But, lot of time had to be spent unnecessarily on it which could have been avoided if a reference to the pending H.C.P. had been made in the telegram.
In another case, viz., H.C.P. No. 1860 of 1993, the telegram was sent by one Krishnaveni stating that her husband Balaraman was illegally detained by E-3 Crime Inspector. The address of the sender of the telegram or any other particulars of the sender were not found in the telegram. The same was registered as H.C.P. and the Public Prosecutor had made enquiries with the concerned Police Inspector. It was reported by him that the person mentioned in the telegram viz., Balaraman was not in police custody and he was not required in connection with any offence. Learned counsel appearing for the petitioner at the instance of the Legal Aid Centre could not contact the sender of the telegram as there was no address. We adjourned the matter from 7-10-1993 to 14-10-1993. It came yesterday. Learned counsel reported that she had written to the Chief Superintendent, Department of Telecommunications and there was no reply. We dismissed the petition observing that it was not the duty of the Court or counsel to find out the address of the sender of the telegram when the latter had not chosen to give it in the telegram itself.
In H.C.P. No. 1901 of 1993, which was also a petition registered on a telegram, there was no address of the person who issued the telegram. The Public Prosecutor got the information from the concerned Inspector of Police that the person mentioned in the telegram was no under custody and that she had to be questioned in connection with suicide committed by one Ethiraj as her name was found in the suicide-note. It was also reported by the Public Prosecutor that the person had already been sent back. Recording the statement of the Public Prosecutor, we had dismissed the petition.
In H.C.P. No. 1903 of 1993, a telegram was sent by the wife of the detenu in the night on

11-10-1993. It was received by the High Court on 12-10-1993. On that day itself the very same person engaged advocates and filed a regular writ petition which was registered as H.C.P. No. 1923 of 1993. Referring to the said fact, we dismissed the petition as unnecessary.
In H.C.P. 1890 of 1993, the telegram was sent by an advocate who failed to appear before Court though his name was printed in the cause list as petitioner. According to the telegram, his client was taken to the police station and forced to sign a blank paper. There was no allegation of illegal detention. Yet, the Registry registered it as a H.C.P. and posted before us. We dismissed it yesterday as there was no case.
In H.C.P. 1923 of 1993, the telegram which was registered as H.C.P. was sent on 12-10-1993 with the allegation that some persons were illegally detained from 22 hrs. on 11-10-1993 and tortured by the police. Neither the address nor the relationship of the sender was disclosed. The Public Prosecutor could get the relevant information from the police station mentioned in the telegram on the basis of which we dismissed the H.C.P.
On a study of the above cases, the Courtfound that people are taking undue advantage of the fact that the High Court is acting on telegrams being sent even when such telegrams do not contain relevant particulars. It is seen that the telegrams are treated as Public Interest Litigations by the P.I.L. Cell of the High Court and registered as writ petitioners by the Registry of the High Court. On such registration, the Legal Aid Centre is requested to nominate a lawyer for conducting the case on behalf of the petitioner if the telegrams have been sent by persons other than lawyers. If the senders of the telegrams are advocates, they are themselves treated as counsel in the case and their names are printed in the cause list. If the Legal Aid Centre nominates a lawyer, he is paid a minimum fee of Rs. 250/- for the case. If the case is contested and involves some argument, the lawyer is paid at least Rs. 500/-. Thus, the total expenditure in each case ranges from Rs. 400/- to Rs. 750/- at least. We are unable to appreciate how public funds can be spent on matters of this type when most of the telegrams turn out to be false alarms setting this Court on a wild goose chase. These cases will not fall either under the category of PIL or under Legal Aid Cases. The characteristics of a public interest litigation are by now well defined. Recently, in Janata Dal v. H. S. Chowdhary (AIR 1993 SC 892), the Supreme Court warned against frivolous litigations in the garb of public interest litigation and said :-
“It is thus clear that only a person acting bona fide and having sufficient interest in the proceedings of PIL will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the Court for vindicating any personal grievance, deserves rejection at the threshold.
It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumberable days are wasted which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we are second to none in fostering and developing the newly invented concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties

worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from the undue delay in service matters, Government or private persons awaiting the disposal of tax cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detenus expecting their release from the detention orders etc. etc. – are all standing in a long serpentine queue for years with the found hope of getting into the Courts and having their grievances redressed, the busy bodies, meddlesome interlopes, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy or others or for any other extraneous motivation or for glare of publicity break the queue muffling their faces by wearing the mask of public interest litigation, and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Court never moves which piquent situation creates a frustation in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.

In the words of Bhagwati, J. (as he then was) “the Courts must be careful in entertaining public interest litigations” or in the words of Sarkaria, J. “the applications of the busy bodies should be rejected at the threshold itself” and as Krishna Iyer, J. has pointed out, the doors of the Courts should not be a jar for such vexatious litigants.”

Nor do the cases require legal aid which is intended only for the poor who cannot afford to engage lawyers and avail of the normal process of law. In fact we found that the parties in some of these cases are very rich and they can well afford to engage renowned and senior lawyers whose usual charges are heavy.

Apart from that as pointed out rightly by the Public Prosecutor, these telegrams are often intended to put a spoke in the wheel of ‘law enforcement’ and hamper the progress of investigation. There is a good chance of relevant and crucial evidence being removed or destroyed while the investigating officer is summoned to this court to answer the H.C.P. The Public Prosecutor points out that for example in cases of dacoity, when the concerned police officer who is in charge of investigation is in the process of instructing the Public Prosecutor with the facts to be placed before the Court the interested persons will destroy the relevant evidence.

Further, valuable time of the Judges and other officials of this Court will be wasted on such matters while genuine cases of persons who have approached this Court through the regular roads have to wait continuously unattended for years together. A look at the statistics will disclose how in the recent past the number of H.C.Ps. has shot up beyond anyone’s expectation increasing the workload beyond measure. There is no presumption that every police officer indulges in illegal detention.

If the time of the Police Officials is to be consumed by their attending to these H.C.Ps. how will they carry out their normal duties in the matter of enforcement of law ? Already there is a complaint from all quarters that police officials are used only for the bandobust duties of V.I.Ps. and V.V.I.Ps. and sufficient number of them is not available to attend to either the increasing traffic problems or prevention or detection of heinous crimes. There is also likelihood of the police officials getting demoralised if they are summoned to this Court even when they function in accordance with law.

Besides, the police officers have to be paid by the State their travelling expenses, and daily battas, etc. That will also be a big drain on the State Exchequer.
More than anything else, we are pained to note that advocates have started issuing telegrams to the Chief Justice thus misusing the procedure. In our opinion, when an advocate receives instruction from the party with regard to the facts, it is his duty to adopt the appropriate procedure prescribed by law. It is not as if there is no provision in the law with regard to these matters. For example, there is a provision in S. 97 of the Code of Criminal Procedure which enables a person to approach the District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class in cases where a person is stated to be wrongfully confined. The advocates can always avail themselves of such provisions of law and file appropriate proceedings. In fact, it is not necessary in every case to approach this Court and invoke its extraordinary jurisdiction under Art. 226 of the Constitution with a petition for issue of writ of habeas corpus. Even without a writ petition, the relief which may be needed by the party can easily be obtained by resorting to other remedies. Hence, we are of the opinion that in no case an advocate who receives instructions from the parties with regard to the facts should send a telegram to this Court or the Judges with an expectation that it would be treated as a writ petition.
It appears that people send telegrams as soon as any person is arrested by the police or taken to the police station for enquiry. In the circumstances, we are firmly of the view that the Registry of this Court should stop this practice of indiscriminate registering of the telegrams as H.C.Ps. Otherwise, in course of time, people will stop adopting the normal procedure prescribed by law and the normal safeguards provided by the Legislature will have to be thrown into the dustbin. In the larger interests of the country, the Legislative wisdom cannot be ignored and Courts should not evolve a new procedure unless there is an extraordinary situation warranting it.
Hence, the Court laid down the following guidelines to be followed by the High Court Legal Aid Centre, Madras and the Registry of this Court :-
(1) A telegram should not be registered as H.C.P. unless it contains the following particulars :-
(a) the connection or relationship between the sender of the telegram and the persons who are said to have been taken into custody and illegally detained;
(b) full particulars of the sender.
(2) A telegram sent by an advocate on behalf of a party should not be registered as H.C.P. In all cases where the advocate have received instructions from the parties with regard to the facts should get affidavits from the parties and file the same in Court with appropriate petitions. No advocate should indulge in sending a telegram to the Chief Justice and requesting the latter to treat it as a writ petition. It is the duty of an advocate to advise the party appropriately and file a proper petition before the Court. The procedure of sending telegram and registering it as writ petition is intended only for poor people who cannot afford to engage advocates.
(3) All telegrams received by the High Court must be forwarded to the Tamil Nadu State Legal Aid and Advisory Board for the purpose of their investigation and taking action only when necessary. It is noticed that the Legal Aid and Advisory Board is having machinery for making such investigations and they are having their branches in every district. It will be convenient for them to ascertain the facts before any action is taken in Court.
[M. G. Shivaraj vs Inspector Of Police, Thuraipakkam Police Station; 1994-(100)-CRLJ -1770

–MAD]