

Sebastian M. Hongray vs Union Of India And Others on 24 November, 1983

Equivalent citations: 1984 AIR 571, 1984 SCR (1) 904, AIR 1984 SUPREME COURT 571, 1984 (1) SCC 339, 1984 SCC(CRI) 87, (1984) SC CR R 107, (1984) 1 CRIMES 341

Author: D.A. Desai

Bench: D.A. Desai, O. Chinnappa Reddy

PETITIONER:
SEBASTIAN M. HONGRAY

Vs.

RESPONDENT:
UNION OF INDIA AND OTHERS

DATE OF JUDGMENT 24/11/1983

BENCH:
DESAI, D.A.
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REDDY, O. CHINNAPPA (J)

CITATION:
1984 AIR 571 1984 SCR (1) 904
1984 SCC (1) 339 1983 SCALE (2) 775

ACT:

Constitution of India-Art. 32-Scope of-When Court may issue writ of habeas corpus ex parte. If on notice, facts controverted by respondent, Court must investigate facts to satisfy itself before issuing writ of habeas corpus. On writ being issued respondent obliged to file return. A writ can be issued and return insisted upon even if person alleged to be in custody of respondent has long since left the custody.

HEADNOTE:

The petitioner asked for a writ of habeas corpus under Art. 32 of the Constitution to be issued to the respondents to produce the two persons, C. Daniel and C. Paul in the Court, who, according to the petitioner, were whisked away by the army jawans from Huining village to Phungrei Camp and

unauthorisedly detained by the Officer incharge of 21st Sikh Regiment and were held incommunicado and whose whereabouts were not made known. The petitioner averred that some jawans attached to 21st Sikh Regiment visited village Huining on March 5, 1982 and rounded up some villagers. These villagers were released on March 6, 1982. On March 7 the Deputy Commissioner accompanied by the Additional District Magistrate of that area visited Huining village to enquire about the incidents of the previous day. Some of the army jawans who had obtained, under duress, certificates from some villagers exonerating them of the allegation of ill-treatment and praising the conduct of the jawans, showed these certificates to these officers. On March 10, 1982 C. Daniel C. Paul were arrested by the army jawans and were taken away from Huining village. At the same time some jawans had obtained signatures on blank papers from Machihan, village headman and from one Shangnam, a member of the village authority. On the next day Machihan reported this fact to the Deputy Commissioner. As C. Daniel and C. Paul did not return, their wives went to the Phungrei Camp in search of their respective husband and while waiting there they saw C. Daniel and C. Paul being led away by four army jawans towards the West. The village headman and others made a written complaint to the Deputy Commissioner. They also complained that they had not issued any certificate showing that C. Daniel and C. Paul were released in their presence on March 11, 1982. The Deputy Commissioner had an enquiry made into the complaint by the Superintendent of Police and reported to the Chief Secretary of the State that the village headman and other members of the village authority had given in writing that it was not correct that C. Daniel and C. Paul were released in their presence and that both of them were still missing. In response to the notice the respondents stated that both C. Daniel and C. Paul were called to the army camp 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 in

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the company of Machihan and Shangnam, their friends, and since then the security force had no knowledge about their whereabouts. The respondents denied that the respective wives of C. Daniel and C. Paul ever visited the army camp on March 15, 1982. They further denied having obtained signatures on blank papers from the village headman and others. In response to the rule the respondents reiterated their earlier stand. The respondents contended that once they had adopted the position the C. Daniel and C. Paul had come to the army camp at the request of the army authority and they left that place on their request 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.

Allowing the petition,

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HELD: A writ of habeas corpus be issued to the respondents 1, 2 and 4 commanding them to produce C. Daniel and C. Paul before this court and file the return. [626 B]

When a petition for a writ of habeas corpus under Art. 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 facts 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. If on investigation of facts, the court rejects the contention of the respondents 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.

[923 A-D]

Halsbury's Laws of England, 4th Edn., Vol. 11, para. 1482 referred to.

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. [923 E]

Thomas John Barnardo v. Mary Ford [1892] A.C. 326 and Reg. v. Barnardo Tye, 23 Q.B.D. 305 referred to.

In the instant case, when the petition was moved before this Court, rule nisi was issued calling upon the respondents to submit their version about the detention of C. Daniel and C. Paul. The respondents 1, 2 and 4 in their various affidavits adopted a positive stand that C. Daniel and C. Paul were taken by the army jawans on March 10, 1982, though not under arrest, to the army

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camp for the purpose of identifying Rashing and that they spent the night at the army camp and that they left the army camp on March 11, 1982 in company of H.L. Machihan and C. Shangnam, The petitioner and those filing affidavits in support including H.L. Machihan, C. Shangnam and Smt. Thingkhul wife of C. Daniel and Smt. Vangamla wife of C. Paul denied that C. Daniel and C. Paul left army camp on

March 11, 1982 and returned to the village, therefore, an issue squarely arose to ascertain whether the positive stand of respondents was borne out by the facts alleged and proof offered. The burden obviously was on the respondents to make good the defence. In view of the direct evidence furnished by the affidavit of H.L. Machihan and C. Shangnam, coupled with the suspicious circumstances discussed in the judgment and effort made to bolster up the stand by entries of dubious character in the register kept at the gate of Phungrei Camp as also the eloquent silence maintained by the respondents in the earlier stage of the proceedings about existence of any record leave the Court with no alternative but to hold that the respondents have failed to prove that C. Daniel and C. Paul left the army camp on March 11, 1982 around 10.00 A.M. Now that the facts are clearly established which led to the rejection of the contention of the respondents that C. Daniel and C. Paul ever left the army camp on March 11, 1982 around 10.00 A.M., the necessary corollary being that they were last seen alive under the surveillance, control and command of the army authority at Phungrei Camp, it would be necessary not only to issue a writ of habeas corpus thereby calling upon the respondents 1, 2, and 4 but to file the return.

[924 D-H; 918 H; 919 A; 925 A]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (Criminal) No. 148 of 1983.

(Under article 32 of the Constitution of India) C.S. Vaidyanathan and Ms. Nandita Haksar for the Petitioner.

K.G. Bhagat, Addl. Solicitor General, P.P. Singh and Ms. A. Subhashini for the Respondent.

V.C. Mahajan, Balbir Singh Shant, S.K. Mehta and Mrs. Urmila Kapur for the State of Manipur.

The Judgment of the Court was delivered by DESAI, J. Petitioner is a student of Political Science studying in Jawaharlal Nehru University at Delhi. He belongs to Naga community and hails from Manipur. He has moved this petition under Art. 32 of the Constitution praying for a writ of habeas corpus calling upon the respondents-Union of India, State of Manipur and Commandant, 21st Sikh Regiment to produce before this Court Shri 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 who according to the petitioner were whisked away on March 10, 1982 from Huining village to Phungrei Camp and detained by the officer incharge of 21st Sikh Regiment and are held incommunicado, not released till today nor their whereabouts are made known.

Petitioner averred that 21st Sikh Regiment has set up a camp at Phungrei. 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 in the S.D.A. Church Building. Most of villagers were released on March 6, 1982 around 10.30 a.m. Three students K. Nelson, H.R. Aaron and K. Paul studying in Petigrew College were arrested and taken away. The jawans resorted to firing which resulted in the death of one Luinam. It was only at about 11.00 p.m. on March 6, 1982 when the Major and Captain of the 21st Sikh Regiment were presented with some shawls that the captives were released. On March 7, 1982 one Mr. Joshi, Deputy Commissioner, East Ukhrul accompanied by Additional District Magistrate visited Huining village to enquire about the incidents of the previous day. The army, jawans, who were present in the village, produced before the aforementioned officers certificates of villagers exonerating them of allegation of ill treatment and praising the conduct of jawans, which according to the petitioner were obtained under duress from the local residents. On March 7, 1982, the Sunday service by Sri C. Paul, Assistant Pastor and C. Daniel, Head Master in the Church was disturbed by one Subedar and 4 jawans who proceeded to collect some signatures under duress from those who had assembled to participate in the Church service. The certificates were ostensibly obtained to show that the army officers and jawans had not treated the villagers with force or cruelty and nothing untoward had happened on the previous two days. On March 10, 1982, C. Daniel and C. Paul were arrested by the army jawans and were taken away from the village. At the same time, some signatures were obtained by the jawans on blank papers from Machihan, village headman, and from one Shangnam a member of the village authority. On the next day, Machihan village headman, reported the fact of arrest of C. Daniel and C. Paul to the Deputy Commissioner, East Ukhrul Shri Joshi. As C. Daniel and C. Paul did not return to the village till March 15, 1982, Mrs. C. Thingkhula, wife of Shri C. Daniel and Mrs. Vangamla, wife of Shri C. Paul went to Phungrei camp in search of their respective husband 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 made by Machihan, Shri Joshi, Deputy Commissioner directed Superintendent of Police to make enquiries about the absence of C. Daniel and C. Paul from March 10, 1982. A radiogram message was sent on March 15, 1982 to the Superintendent of Police (East) Ukhrul requesting him to enquire about and ascertain the whereabouts of (1) Roshing (2) C. Daniel and (3) C. Paul, all of Huining village and four others. The direction given to the Superintendent of Police was to find out the whereabouts of the persons named in the radiogram and to submit his report at an early date. Accordingly, the Superintendent of Police submitted his report on March 27, 1982 stating therein that three persons of Phungcham village mentioned in the radiogram have been released by Assam Rifles on March 19, 1982. The report further recites as under:

"As regards persons belonging to Huining village it is learnt that K. Roshing is still under interrogation with Army and whereabouts of other persons are not known. They were released one day after arrest by Army as reported."

On March 29, 1982, 5 residents of Huining village including Machihan, village headman, submitted a written complaint to the Deputy Commissioner, Manipur East District, Ukhrul setting out therein the circumstances in which on March 10, 1982 C. Daniel and C. Paul were taken away by the army jawans. They also complained how the village people were forced to put their signatures on blank paper. They further complained that they have not issued any certificate showing that C. Daniel and

C. Paul were released in their presence on March 11, 1982. On March 30, 1982, the Deputy Commissioner in response to the query from the Chief Secretary, Manipur State, reported that the village headman and other village authority members of Huining have given a report in writing that it is not correct that C. Daniel and C. Paul were released in presence of village authority members and that both of them were still missing. It is further stated that the village headman and other members of the village authority have reported that they had not issued any certificate as claimed by the army authority that C. Daniel and C. Paul were released by the army authority on March 11, 1982 in their presence. The report further recites that a complaint has been made that the security forces personnel had obtained signature on blank papers from village people during their combing operation in Huining village on March 10, 1982. Petitioner further averred that after C. Daniel and C. Paul were taken away by army jawans of 21st Sikh Regiment on March 10, 1982 around 3.00 p.m. from Huining village, they have not been released by the officers and jawans incharge of 21st Sikh Regiment and they are illegally and unauthorisedly detained and they are held incommunicado. It is alleged that this continuous detention by the officers and jawans of the army is illegal, invalid and contrary to Art. 21 and that all attempts to secure the knowledge as to how the officers and jawans of 21st Sikh Regiment have dealt with the aforementioned two persons have not met with success and he has no other option but to file this petition for a writ of habeas corpus.

Photostat copies of the affidavits of Mrs. C. Thingkhula, wife of Shri C. Daniel, Mrs. C. Vangamla, wife of Shri C. Paul and C. Shangnam, originals of which were produced in earlier writ petitions were annexed to the present writ petition. The petitioner also annexed original affidavit of Shri H. L. Machihan, village headman and Shri C. Sangnam, village authority member to the petition.

The petitioner impleaded four respondents being (1) Union of India through the Secretary, Ministry of Defence, (2) Union of India through the Secretary, Ministry of Home Affairs, (3) State of Manipur through the Chief Secretary and (4) Commandant, 21st Sikh Regiment, Phungrei Camp, Ukhrul.

On February 9, 1983, the Court directed notice to be served upon the respondents.

In response to the notice, one J. C. Sachdeva, Under Secretary, Ministry of Defence, Govt. of India, New Delhi filed the first return. He claimed his source of knowledge about the facts stated in the affidavit as being personal, being conversant with the facts but remained conspicuously silent about his access to any record on the strength of which he filed his affidavit save making a vague statement in the last para of his affidavit, "that the factual statements made above, are based on the reports and information received which I believe to be correct." In his affidavit, he referred to three other writ petitions being W.P. No. 550 of 1982, W.Ps. Nos. 9229-30 of 1982 and W.P. No. 5328 of 1980 in which constitutional validity of Assam Disturbed Areas (Special Power of Armed Forces) Ordinance, 1947 and Armed Forces (Special Powers) Regulations, 1958 was questioned. He proceeded to reproduce some of the paragraphs from the counter-affidavit filed in earlier petitions. Dealing with the petition for habeas corpus, it was admitted that on March 6, 1982 jawans of 21st Sikh Regiment carried out the search in Huining village lasting for a period of 3 to 4 hours and admitted that certain certificates were obtained by the army personnel from village authorities, Pastors etc. contradicting the allegations made in the writ petition. Copies of those certificates were annexed to the return filed in W.P. No. 550 of 1982. Concerning C. Daniel and C. Paul, it was

reiterated 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. Proceeding further it was admitted that a Deputy Commissioner of Ukhul (presumably Mr. J.P. Joshi) did visit village Huining on March 7, 1982. It was denied that Mrs. Thingkhula and Mrs. Vangamla ever visited the army post on March 15, 1982. It was admitted that in response to an appeal made to the Chief Minister regarding C. Daniel and C. Paul not having returned to their village, the Security Forces alongwith a police constable (presumably Yangya Anei Thangkul also known as Maluganai Tankhul) did visit village Huining on May 8, 1982 in order to inform the wives of C. Daniel and C. Paul that they had left the Army Camp on March 11, 1982. It was denied that at the time of this visit signatures from the village headman or members of the village authority or from other inhabitants of the village were obtained on blank papers There was a perfunctory denial about the affidavits annexed to the present writ petition. A request was made that either the writ petition may be disposed of relying upon the statements made in the affidavit of Shri Sachdeva or that the present writ petition be tagged on with the earlier writ petitions.

The petitioner filed a rejoinder affidavit in which inter alia it was stated that the earlier writ petitions were not specifically concerned with the mysterious disappearance of Shri C. Daniel and Shri C. Paul after they were taken away by the army personnel but they were primarily concerned with the constitutional validity of the aforementioned Armed Forces (Special Powers) Act, 1958. It was further stated that the Court should direct the respondents to produce the report of enquiry made by the Superintendent of Police, Ukhul to the Deputy Commissioner and the connected documents.

After hearing both the parties, rule nisi was issued. In response to the rule, again Shri J.C. Sachdeva filed a return maintaining an eloquent silence with the regard to the source of knowledge about the various factual statement made by him in the affidavit save and except repeating the same vague statement with slight modification that "the statements made above are correct to the best of my knowledge as from the records of the case." The change in the tune is deliberate as will be presently mentioned. This return is almost a carbon copy of the earlier return omitting the extracted statements from the still earlier affidavit. It was specifically stated that C. Daniel and C. Paul were respectable persons who were asked to go to the Army Camp on March 10, 1982 to identify some suspects (names not mentioned) and that after the identification they were permitted to leave. It was stated that after they work of identification was over C. Daniel and C. Paul were permitted to leave the Army Camp but as it was evening time and it was dangerous to travel at night on account of fear of the insurgents, both of them preferred to spend the night at the Army Camp which the Camp Commandant permitted and they left in the morning of March 11, 1982. It was further stated that since the suspects belonging to the insurgents group are mixed up with the local population, it is not easy to identify them or apprehend them unless there is information or identification through loyal and respectable citizens of the country. It was further stated that C. Daniel and C. Paul were not suspects or accused in any of the cases initiated by the Security Forces and that they were never arrested or apprehended by the Security Forces. With regard to the request for production of the reports of the Superintendent of Police and Deputy Commissioner, it was stated that they were produced on an earlier occasion in another Writ Petition in the Court. But a privilege was claimed by

the Government of Manipur on the ground that the nature of the contents of the said document did not permit the production of the same being against public interest.

The matter was then set down for hearing on May 5, 1983. Mr. P.P. Singh appeared for the Union of India. The first enquiry the Court made was about the source of knowledge of Mr. Sachdeva with special reference to reports and information received at Delhi and the record of the case. Mr. Singh was called upon to disclose the records if any, on the basis of which factual averments were made in the affidavit. It was pointed out to him that Mr. Sachdeva is a Delhi based officer and either he must explain his source of knowledge or if he has relied on any record the same may be produced before the Court, on the pain of both the returns being rejected as utterly unreliable. In response to the query of this Court surprisingly, Mr. P.P. Singh, learned counsel for the Union of India stated that the Union of India is not in possession of any record which may shed light about how C. Daniel and C. Paul were dealt with after admittedly they were taken to the Army Camp on March 10, 1982 and spent the night between 10th and 11th March, 1982 at the Army Camp. The credibility and authenticity of documents produced at a later stage have to be adjudged and evaluated in the back-drop of the earlier statements in the affidavit of Mr. Sachdeva and the statement of Mr. P.P. Singh. At the request of Mr. Singh, the matter was then again adjourned.

Things moved faster thereafter. The stand earlier taken became very inconvenient when presumably the position adopted by the Court forced the respondents to disclose some documents and therefore Sachdeva had to be replaced and another officer was selected to file one more affidavit. On behalf of Union of India, Shri H.S. Pruthi, another Under Secretary in the Ministry of Defence filed an affidavit disclosing the source of his knowledge the records of the case and copies of original documents with the Union of India. This is a complete summersault. To this affidavit were annexed telex communications between 59 Mountain Brigade and 21st Sikh Regiment, Annexures A/1 & A/2 dated August 25, 1982 and August 26, 1982 respectively; Annexure A/3 being a communication from 59th Mountain Brigade to 8 Mountain Division dated August 28, 1982; Annexures B/1 and B/2 being extracts from the registers maintained by the 21st Sikh Regiment at Phungrei Camp; Annexure C/1 being an affidavit of Shri Lt. Col. N.D. Garg, Commanding Officer of 21st Battalion, Sikh Regiment; Annexure C/2 being an affidavit of Major Joginder Singh Lamba attached at 21st Battalion of the Sikh Regiment; Annexure C/3 being an affidavit of Subedar Joginder Singh also attached to the same battalion, Annexure C/4 being an affidavit of Naik Gurdip Singh; Annexure C/5 being affidavit of Naik Gurcharan Singh; Annexure C/6 being an affidavit of Naik Bachan Singh who was on Sunday duty at the entrance gate of the 21st Battalion between 12.00 hours to 18.00 hours on March 10, 1982; Annexure C/7 being an affidavit of Subedar Sucha Singh who was Subedar Adjutant of 21st Battalion at the relevant time; and Annexure C/8 being an affidavit of Havildar Kultar Singh who stated amongst others that on March 11, 1982, two persons Shri Machihan Shri Shangham came to the gate where he was on duty and they enquired about C. Daniel and C. Paul whereupon after obtaining permission from Adjutant he and Shri Subedar Sucha Singh brought C. Daniel and C. Paul at the gate and they left in company of Shri Machihan and Shri Shangham.

At a later date, Mr. V.C. Mahajan, learned counsel appeared for the State of Manipur and filed a return on behalf of the State of Manipur. One Shri E. Kunjeswar Singh, Secretary (Home), Govt. of Manipur swore the affidavit on behalf of the State of Manipur. The affidavit was limited in character

being a response to the request made by the learned counsel for the petitioner to produce: (i) Report of the Superintendent of Police; (ii) Report of the Deputy Commissioner; and (iii) Statement of Yangya Anei Tankhul @ Malugnai Tangkhul. It was stated that with regard to the events of March 10, 1982, the Deputy Commissioner (East) Ukhrul on receipt of the information (not in writing) on March 11, 1982 sent a wireless message to the Superintendent of Police (East) Ukhrul on March 15, 1982, a copy of which was annexed as R-3/A. It was further stated that on receipt of the wireless message, the Superintendent of Police conducted an enquiry and sent his report to the Deputy Commissioner on March 27, 1982 (Annexure R-3/B). The Deputy Commissioner in turn sent a report on March 30, 1982 to the Government (Annexure R-3/C). It was further stated that with regard to the incident on March 10, 1982, the Deputy Commissioner received a written complaint for the first time on March 29, 1982 (Annexure R-3/D). With regard to the reports dated April 28, 1982 and May 31, 1982, privilege was claimed under Sec. 123 of the Evidence Act on the ground that the production of the report in Court and being made available to the petitioner will be against public interest. It was further stated that in the records with the State Government there is no statement of Police Constable Vangya Anei Tangkhul @ Maluganai Tangkhul of a date prior to the filing of the present writ petition and a notice was ordered to be issued. As a clarificatory effort, after receipt of notice, an attempt was made by the State to ascertain the fact from the concerned constable by recording his statement, a copy of which was produced at R-3/F-1. An affidavit of the constable Annexure R-3/E-2 was also produced.

In a writ petition under Art. 32 rarely, if ever pleadings are meticulously extracted and reproduced in the judgment. It however become a compelling necessity in this case for the obvious reason that certain inferences were drawn and submitted for the consideration of this Court by both sides after referring to facts admitted and/or not controverted. We would, therefore, be justified in deducing the indisputable fact situation that emerges from the rival affidavits and then proceed to draw necessary permissible inferences that flow from them.

It is established that C. Daniel and C. Paul for whose production before this Court this petition is filed are admittedly 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. It is equally well established that the 21st Sikh Regiment is stationed at Ukhrul, Manipur East District and has set up a camp known as Phungrei Camp, and that Huining village falls within the operational area of this Regiment. The jawans of this Regiment admittedly visited Huining village on March 6, 1982 and carried out extensive combing operation for couple of hours. They arrested at some point of time one R. Rashing of Huining village. It is admitted that Mr. Joshi, Commissioner (East) Ukhrul visited Huining village on March 7, 1982 which would show that something untoward had occurred as complained by the petitioner, on March 6, 1982 at Huining village. And this inference is reinforced by the fact that certain certificates purporting to vouchsafe good conduct of the personnel of security forces which carried out combing operation were obtained by the army jawans from the village inhabitants which have been produced in the earlier petitions. C. Daniel and C. Paul were at Phungrei Camp the allegation of the petitioner being that they were arrested and taken away while the contention of the respondents is that they were called at the camp for identification of R. Rashing. 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. According to the respondents' Shri Machihan and Shri Shangam arrived at Phungrei Camp on March 11, 1982 between 9.45 a.m. and 10.00 a.m. and they left in company with C. Daniel and C. Paul who were brought to the camp gate by Subedar Sucha Singh. It therefore unquestionably transpires that from March 10, 1982 somewhere in the noon or afternoon till March 11, 1982 around 10.00 a.m. C. Daniel and C. Paul were, if not in the custody under the surveillance and at the request and behest of the 4th respondent in the camp and they left Paungrei Camp around 10.00 a.m. on March 11, 1982 in company of Mr. Machihan and Mr. Shangnam, a fact disputed and seriously controverted by the petitioner. Since March 10, 1982 C. Daniel and C. Paul have not returned to their village and their whereabouts are not known. They were last seen alive in Phungrei Army Camp.

Therefore, the first question which on preponderance of probabilities this Court must examine is whether C. Daniel and C. Paul left Phungrei Camp on March 11, 1982 around 10.00 a.m. or somewhere thereabout because it could not be seriously questioned that since then no one has seen them, except as stated by the two ladies that they were seen being led away by army jawans on March 15, 1982.

Affidavit of Mrs. Thingkhulia, wife of C. Daniel even if it is one of a vitally interested witness would permit us to hold that since the jawans and officers of the 4th respondent took away C. Daniel on March 10, 1982, he has not been seen by anyone including her except on March 15, 1982 again in custody of army jawans. That averment is disputed and for the present it may be kept out of consideration. That would be equally true of C. Paul in respect of whom his wife Mrs. Vangamla has filed an affidavit. Mr. K.G. Bhagat, Additional Solicitor General while reiterating that once these two persons left the army camp on March 11, 1982 by about 10.00 a.m. the 4th respondent and its subordinate will have no knowledge about their where abouts and they cannot be called upon to explain why they are not traceable, and he proceeded to explore various possibilities as to what, might have happened. It is not necessary to speculate in that behalf because the real question is whether on the material placed on record, is it possible to affirmately arrive at a conclusion that C. Daniel and C. Paul left the Phungrei Camp latest by 10.00 a.m. or thereabout on March 11, 1982. Obviously, the burden would be on the respondents 1, 2 and 4 to substantiate their contention once having admitted that C. Daniel and C. Paul were in the camp, at their request and behest even if not actually arrested from the afternoon of March 10, 1982.

The stand taken in the first affidavit of Shri J.C. Sachdeva, which merely reproduces extracts from the affidavits in earlier writ petitions, is that C. Daniel and C. Paul were called for the purpose identification of certain suspects on March 10, 1982 and were allowed to go on March 11, 1982 and the security forces have no information about them after they "were released". Mark the words 'called at the army camp and were released'. The word 'released' would indicate that they were once held captive and were subsequently permitted to go. But the more important lacuna or omission in the first affidavit is about the name of Mr. Mr. Shangnam as having come to the army camp and C. Daniel and C. Paul accompanied him and Machihan. Name of Shangnam is conspicuous by its silence. This omission is glaring because at that stage it was not clear whether Shangnam would be disclosing some facts. H.L. Machihan's name is referred to because he had already made a complaint

to the Deputy Commissioner on March 29, 1982.

The stand now taken is that C. Daniel and C. Paul were brought to the army camp as army authority wanted them to indentify R. Rashing, who was arrested as a suspect and that C. Daniel and C. Paul were not arrested or were not held as suspects. It is not made clear whether C. Daniel and C. Paul were brought in an army vehicle. It is equally not made clear why soon after identifying R. Rashing which would hardly require a couple of minutes, they were not sent back in army vehicle. It is asserted on behalf of the 4th respondent that C. Daniel and C. Paul were reluctant to leave the army camp at night and at their request they were allowed to stay at the army camp. This is far from convincing. If what the petitioner asserts is true that C. Daniel and C. Paul were arrested and treated in an unbecoming manner, they would be least inclined to spend a night, if they were free agents to leave the place, at the Army camp, hardly a cosy place in an insurgently infested area. Assuming that the respondents are right in saying that on account of fear of moving out at night in a jungle area infested with insurgents, according to them, they left the army camp on March 11, 1982 around 10.00 a.m. The respondents assert that H. L. Machihan, a village Headman and C. Shangnam, village Authority Member came to army camp on March 11, 1982 to enquire about C. Daniel and C. Paul and further to enquire why they had not returned and at that time Subedar Sucha Singh on being informed by Guard Commander Havaladar Kultar Singh that two persons from Huining village had come and wanted to meet someone from the battalion whereupon Subedar Sucha Singh went to the gate and met the two persons. It is further averred that at that time H. L. Machihan and C. Shangnam introduced themselves as such and enquired from Subedar Sucha Singh about C. Daniel and C. Paul, whereupon Subedar Sucha Singh told them that they had spent the night at the army camp. Subedar Sucha Singh thereupon informed Maj. Joginder Singh Lamba, Adjutant that two persons have come to enquire about C. Daniel and C. Paul whereupon Joginder Singh Lamba told Subedar Sucha Singh that C. Daniel and C. Paul should return to their village with Shri H. L. Machihan and Shri C. Shangnam. The respondents further averred that thereupon Havaladar Kultar Singh and Subedar Sucha Singh accompanied C. Daniel and C. Paul to the gate and permitted them to accompany H. L. Machihan and Shangnam. There are affidavits to that effect of Major Joginder Singh Lamba, Adjutant, Subedar Sucha Singh and Havaladar Kultar Singh. They have also produced extracts from the register maintained at the camp gate showing the entry and exist in and out of the army camp. The relevant extracts were produced at Annexures B/1 and B/2. The original registers were submitted to the Court in sealed envelope with a request that the other entries except the relevant entries may not be exposed as the same may endanger the safety of some innocent persons. We have glanced through the registers. As copies of the relevant entries from the registers were annexed to the affidavit of Mr. Pruthi, it was unnecessary to give inspection of the whole of the registers to the petitioner in the facts and circumstances of this petition.

The evidence furnished by entries in the registers leaves us cold and unconvinced. It appears to be an attempt at supporting affidavits by some so-called contemporaneous documents which apart from being unworthy of credit, the circumstances in which they came to light add to our apprehension about its genuineness. We may recall here the wavering position about existence or otherwise of any record taken in the affidavit of Mr. Sachdeva and the statement made by Mr. P. P. Singh before the Court denying the existence of any record as late as May 5, 1983. And the affidavits of various members of security forces personnel bear the date between May 24, 1983 and first week

of June 1983 that is subsequent to the order dated May 5, 1983.

To begin with, both H. D. Machihan and C. Shangam in their affidavits filed long time back stated that they had not gone to Phungrei Camp on March 11, 1982 either in the morning or at any time of the day. H. L. Machihan denied that C. Daniel and C. Paul were released in his presence on March 11, 1982. There is an affidavit to the same effect of Shri Shangnam. These are two persons in whose company according to respondents C. Daniel and C. Paul left army camp on March 11, 1983.

Turning to the affidavits filed on behalf of the respondents to substantiate the stand of the respondents, Havaldar Kultar Singh says in his affidavit that at about 9.45 A.M. on March 11, 1982, two persons from Huining village arrived at the gate of the army camp and introduced themselves as Shri Machihan and Shri Shangnam. He further says that they told him that they had come to enquire about C. Daniel and C. Paul as they had not returned to the village on the previous day. He does not say that H.D. Machihan and Shri C. Shangnam individually or collectively was or were permitted to enter the camp. In fact, his affidavit read with the affidavit of Subedar Sucha Singh clearly shows that Havaldar Kultar Singh went to Subedar Sucha Singh and informed him about the arrival of Machihan and Shangnam and inquired about C. Daniel and C. Paul whereupon Subedar Sucha Singh came to the gate, talked to H.L. Machihan and Shri Shangnam and then returned inside the camp and came out with C. Daniel and C. Paul and they were brought to the gate and they both left in company of H.L. Machihan and Shangnam. This would unmistakably show that H.L. Machihan and Shangnam never entered the army camp, and surprisingly yet in the two extracts Annexures B/1 and B/2, Machihan and Shangnam are shown to have entered the army camp one after the other between 9.45 A.M. and 10.00 A.M. and left at 10.05 A.M. If Machihan and Shangnam came upto army gate, never entered the same and according to the respondents C. Daniel and C. Paul were brought to the gate of the army camp, there was absolutely no justification for making an entry in the register evidencing that they had both entered the army camp.

There is a further infirmity in that the entry in the name of Shri C. Daniel appearing in the Register on March 10, 1982 appears to be overwritten over another entry which was already there. Therefore in view of the direct evidence furnished by the affidavits of H.L. Machihan and C. Shangnam, coupled with the suspicious circumstances herein discussed and effort made to bolster up the stand by entries of dubious character as also the eloquent silence in the earlier stage of the proceedings about existence of any record leave us with no alternative but to hold that the respondents have failed to prove that C. Daniel and C. Paul left the army camp on March 11, 1982 around 10.00 A.M. This inference is further buttressed by the fact that all these documents along with the affidavits were placed on record after this Court made an order on May 5, 1983 clearly pointing out that the affidavit of Shri Sachdeva lacks credibility as the source of information is not traced therein and after Mr. P.P. Singh, learned counsel for the Union of India stated that the first respondent is not in possession of any record in respect of C. Daniel and C. Paul.

There is one curious feature of the whole case which cannot be overlooked. Petitioner averred and it is supported by the affidavits of H.L. Machihan and C. Shangnam that the army jawans ransacked the houses and tortured the inhabitants in the course of the search on March 6, 1982. They further averred that in order to save their skin, army jawans obtained false certificates as also signatures on

blank papers. Now if the army authorities had acted within the bounds of legitimate combating operation to trace insurgents, it was not necessary for them to obtain certificates from the inhabitants of village Huining. In the first affidavit of Mr. Sachdeva, it is stated that in the counter-affidavit in Writ Petition No. 550 of 1982 certificates from village authorities and Pastor were obtained by the army authorities contradicting the allegations made in the statements and averments set out in the petition. There is further evidence that after the authorities of the Manipur State such as Deputy Commissioner and Superintendent of Police started making enquiries, the army jawans again went to Huining village on May 8 1982 and obtained some more certificates as well as signatures on blank papers. One Yangya Anei Tanghul @ Maluganai Tangkhul, a Police Constable attached to Manipur Police Department was asked to accompany the army jawans when they visited Huining village on May 8, 1982. It is admitted that this Police Constable accompanied the army jawans on May 8, 1982. In his affidavit, the Police Constable states that security forces personnel obtained the signatures from the Village Authority Members as proof of their having furnished the information to the village people regarding release of C. Daniel and C. Paul and even he was asked to put his signature as a witness which he duly complied. Why were army jawans so keen to obtain certificates from village people both on March 6, 1982 and on May 8, 1982 and certificates appear to have been obtained with a view to either white-washing their activities or exonerating the army jawans from their improper actions which were questioned by the village people.

We may here briefly refer to the various certificates Appendix 'O', annexures to the counter-affidavit by Mr. J.C. Sachdeva in Writ Petition No. 550 of 1982 to show that the very language used in the certificates obtained by the personnel of the security forces would be a give away showing how the army people were trying to cover their illegitimate actions. These certificates provide tell-tale evidence of how a very spurious attempt was made to white- wash some of the actions of the jawans of the army. We may specifically refer to certificates produced at Appendix 'L' in which it is stated that the Deputy Commissioner of Ukhrul Mr. J.P. Joshi visited village Huining on March 7, 1982 from 7 A.M. to 11 A.M. and instigated the villagers against the security forces. The village residents of Huining were so co-operative with the security forces that they refused to be instigated by him and on other hand they praised the security forces for the good treatment meted out to the villagers by the security forces. The attempt to blemish the good name of Mr. Joshi when the village headman and others had approached to ventilate their grievance against the army personnel, we refrain from using strong term, is crude, if not counter-productive. On the contrary, it would be legitimate to infer that there was something very despicable in the conduct of the army jawans and therefore to forestall any action they procured certificates which inevitably must be under threat, duress or coercion. Therefore, these certificates leave us cold.

In the meantime, certain events occurred of which notice should be taken. The first search was carried out by the army jawans on March 6, 1982. Soon after presumably upon a complaint of the local inhabitants, Mr. Joshi, Deputy Commissioner visited Huining village on March 7, 1982. This is admitted by Mr. Sachdeva in his first affidavit. Obviously, the village people must have complained to the Deputy Commissioner about the misbehavior of the members of the security forces. Presumably, acting upon the complaint, Deputy Commissioner Mr. Joshi directed Superintendent of Police (East) Ukhrul to enquire about various persons detained by the army officers and missing

since then. Amongst the names of 7 persons, the Deputy Commissioner has set out the names of C. Daniel and C. Paul. The Superintendent of Police was called upon to furnish the report about the whereabouts of the persons whose names were set out in the direction given to him. In response to this enquiry by the Deputy Commissioner, the Superintendent of Police submitted his report on March 27, 1982 part of which may be extracted:

"Following persons were released by Assam Rifles on 19/3/82:-

- 1) Rr. Nganaopam ()
- 2) Pr. Pheireisang () All of Phungcham village
- 3) Hr. Wungnaokan ()

As regards persons belonging to Huining village it is learnt that K. Rashing is still under interrogation with Army & whereabouts of other persons are not known. They were released one day after arrest by army as reported."

It appears from this report that with regard to C. Daniel and C. Paul, the Superintendent of Police could not ascertain their whereabouts but he noted the fact that according to the army authority, they were released one day after the arrest by army authorities. It again appears that the assertion by Respondents 1, 2 and 4 that C. Daniel and C. Paul were invited to identify R. Rashing, is not borne out by this report because the Superintendent of Police states that they were released after their arrest. Pursuant to this report, the Deputy Commissioner submitted a report to the Chief Secretary, Manipur State that C. Daniel and C. Paul are missing and that the certificates are not correct and that the village headman had stated that they were made to sign blank papers. Before this report was submitted, the Deputy Commissioner had received an application signed by five persons including village headmen Machihan setting out the details about the events that occurred on March 10, 1982 and the fact that their signatures were obtained by the army authorities on blank papers and that they had not signed the certificates and it was not true that C. Daniel and C. Paul were released in their presence on March 11, 1982.

From the evidence herein collated, it unquestionably follows that not only C. Daniel and C. Paul after admittedly they were taken presumably under arrest to Phungrei Camp on March 10, 1982 in the afternoon, they never left the Phungrei Camp on March 11, 1982 as claimed on the respondents in company of H.L. Machihan and Shangnam, but a very crude attempt was made to concoct evidence in the form of certificates with a view to disowning the responsibility to explain what happened to C. Daniel and C. Paul after they were taken to army camp on March 10, 1982. The affidavit of gateman Kultar Singh and Adjutant Subedar Sucha Singh and the Registers do not carry conviction, more so in the light of the fact that if what is claimed is genuine this subsequent attempt to doctor facts would not have been undertaken. We are therefore constrained to reject the contention that C. Daniel and C. Paul left the army camp on March 11, 1982 either on their own or in company of Machihan and Shangnam.

In reaching the conclusion that the respondents have failed to discharge the burden heavily lying on them to affirmatively establish, once having admitted taking them to army camp on March 10, 1982 that C. Daniel and C. Paul left Phungrei Camp on March 11, 1982 around 10.00 A.M., we have

completely overlooked and not take into consideration the affidavits of Mrs. Thingkhuala, wife of Shri C. Daniel and Mrs. Vangamala, wife of Shri C. Paul that they had seen C. Daniel and C. Paul being led away by army personnel on March 15, 1982, as contended by Mr. Bhagat.

Once we unerringly reach the conclusion that C. Daniel and C. Paul were taken to Pungrei 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 is obligatory upon the respondents to produce C. Daniel and C. Paul and to explain their whereabouts, more so because respondents claim the power to arrest and question anyone under the provisions of Armed Forces (Special Powers) Act, 1958.

We may now examine some technical contentions raised on behalf of the respondents.

Mr. Bhagat 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 Art. 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 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 Holsbury'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*(1), 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 her son 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*(1) case 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. To some extent, the position before us is identical, if not wholly similar. When the petition in the present case was moved before this Court, rule nisi was issued calling upon the respondents to submit their version about the detention of C. Daniel and C. Paul. The respondents 1, 2 and 4 in their various affidavits adopted a positive stand that C. Daniel and C. Paul were taken by the army jawans on March 10, 1982, though not under arrest, to the army camp for the purpose of identifying Rashing and that they spent the night at the army camp and that they left the army camp on March 11, 1982 in company of H.L. Machihan and C. Shangnam. The petitioner and those filing affidavits in support including H.L. Machihan, C. Shangnam and Smt. Thingkhula, wife of C. Daniel and Smt. Vangamla, wife of Shri C. Paul denied that C. Daniel and C. Paul left army camp on March 11, 1982 and returned to the village, therefore an issue squarely arose to ascertain whether the positive stand of the respondents was borne out by the facts alleged and proof offered. The burden obviously was on the respondents to make good the defence. Now that the facts are clearly established which led to the rejection of the contention of the respondents that C. Daniel and C. Paul ever left the army camp on March 11, 1982 around 10.00 A.M., the necessary corollary being that they were last seen alive under the surveillance, control and command of the army authority at Phugrei Camp, it would be necessary not only to issue a writ of habeas corpus thereby calling upon the respondents 1,2 and 4 to file the return. In this context, it may be pointed out that the petitioner has prayed for issuing of a writ of habeas corpus directing the respondents to produce C. Daniel, retired Naib Subedar of Manipur Rifles and Headmaster of the Junior High School of Huining village and C. Paul, Assistant Pastor of Huining Baptist Church, the writ must be issued and the petition must succeed to that extent.

It may be mentioned that the Manipur State Authorities Respondent 3 had received numerous complaints about the behaviour of the army personnel. The search in village Huining was taken by the jawans of 21st Sikh Regiment on March 6, 1982. On March 7, 1982, Mr. Joshi had to visit the village when he received complaints of torture and ill- treatment of village inhabitants at the hands of the personnel of the security forces. Thereafter certain enquiries were made by the Chief Secretary, Manipur State which we have already deal with. In the course of hearing, a request was made by Mr. Vaidyanathan, learned counsel for the petitioner and at a later date by Miss Haskar that the Manipur State Government be called upon to produce; (1) Report of the Superintendent of Police (ii) Report of the Deputy Commissioner and (iii) Statement of Yangya Anei Tangkhul alias Malugnai Tangkhul. A copy of the third document is already produced. As far as reports mentioned

at

(i) and (ii), privilege was claimed on behalf of the E. Kunjeshwar Singh, Secretary (Home), Manipur. In the affidavit claiming privilege, it is stated that the aforementioned two reports dated April 28, 1982 and 31st may, 1982 were with regard to the incident that occurred on March 10, 1982. Before adjudicating upon the claim of privilege, we called upon Mr. V. C. Mahajan, learned counsel for the State of Manipur to produce the reports for our perusal. We read the reports. We are not inclined to examine the question of privilege for the obvious reason that these reports are hardly helpful in any manner in the disposal of this petition, and further the three relevant documents, namely, the telex message sent by the Deputy Commissioner to Superintendent of Police, the report made by the Superintendent of Police to the Deputy Commissioner and the short report submitted by the Deputy Commissioner to the Chief Secretary, Manipur State have been disclosed in the proceedings. Therefore, we do not propose merely to add to the length of the judgment by examining the question of the privilege claimed in respect of the two reports first dated April 28, 1982 by the Superintendent of Police and another dated May 31, 1982 by the Deputy Commissioner.

Accordingly, this petition is allowed and we direct that a writ of habeas corpus be issued to the respondents 1, 2 and 4 commanding them to produce C. Daniel, retired Naik Subedar of Manipur Rifles and Headmaster of the Junior High School of Huining Village and C. Paul, Assistant Paster of Huining Baptist Church, who were taken to Phungrei Camp by the jawans of 21st Sikh Regiment on March 10, 1982 before this Court on Dec. 12, 1983 and file the return.

H. S. K.

Petition allowed.